

CIVIL PROCEDURE
PROFESSOR OGDEN
FALL 2016
CASE BRIEFING CLASS II

QUESTIONS TO DISCUSS BASED ON THE ACCESS NOW V.
SOUTHWEST AIRLINES CO COURT DECISION.

1. Who are the plaintiffs in this lawsuit?
2. What type of claim are they bringing?
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Access Now, Inc. v. Southwest Airlines, Co.
227 F.Supp.2d 1312, 13 A.D. Cases 1186, 24 NDLR P 243, 15 Fla. L.
Weekly Fed. D 591

United States District Court, S.D. Florida.
ACCESS NOW, INC., a Florida non-profit corporation, and Robert
Gumson, individually, Plaintiffs,
v.
SOUTHWEST AIRLINES, CO., a Texas corporation, Defendant.
No. 02-21734-CIV.

Oct. 18, 2002.

Blind individual and non-profit advocacy organization for blind individuals brought action for injunctive and declaratory relief against airline, alleging that airline's website excluded blind persons, in violation of the Americans with Disabilities Act (ADA), as good and services offered on website were inaccessible to blind persons. Airline moved to dismiss. The District Court, [Seitz](#), J., held that: (1) airline internet website was not place of public accommodation within meaning of Title III of the ADA, and (2) plaintiffs failed to establish a nexus between the website, and a physical, concrete place of public accommodation.

Motion granted.

[Steven R. Reininger](#), Esq., [Howard R. Behar](#), Esq., Rasco Reininger Perez & Esquenazi, P.L., Coral Gables, FL, for Plaintiffs.
[K. Renee Schimkat](#), Esq., [Garth T. Yearick](#), Esq., Carlton Fields, P.A., Miami, FL, for Defendant Southwest Airlines, Co.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

[SEITZ](#), District Judge.

THIS MATTER is before the Court on Defendant Southwest Airlines, Co.'s (Southwest) Motion to Dismiss Plaintiffs' Complaint [DE-11]. Plaintiffs, Access Now, Inc. (Access NOW), a non-profit, access advocacy organization for disabled individuals, and Robert Gumson (Gumson), a blind individual, filed this four-count Complaint for injunctive and declaratory relief under the Americans with Disabilities Act (ADA), [42 U.S.C. §§ 12101](#), *et seq.* Plaintiffs contend that Southwest's Internet website, southwest.com, excludes Plaintiffs in violation of the ADA, as the goods and

services Southwest offers at its virtual ticket counters are inaccessible to blind persons. Southwest has moved to dismiss Plaintiffs' Complaint on the grounds that southwest.com is not a place of public accommodation and, therefore, does not fall within the scope of Title III of the ADA. The Court has considered the parties' thorough papers, the extremely informative argument of counsel, and the exhibits presented during oral argument. For the reasons stated below, the Court will grant Southwest's motion to dismiss.

Background

Having found that nearly forty-three million Americans have one or more mental or physical disabilities, that such individuals continually encounter various forms of discrimination, and that the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, a Congress enacted the ADA in 1990. [Pub.L. No. 101-336, § 2\(a\), 104 Stat. 327, 328.](#) Congress' stated purposes in enacting the ADA were, among other things, to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities, a and clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities. a *Id.* Among the statutorily created rights embodied within the ADA, is Title III's prohibition against discrimination in places of public accommodation. [42 U.S.C. § 12182\(a\).](#)

Since President George Bush signed the ADA into law on July 26, 1990, this Nation, as well as the rest of the world, has experienced an era of rapidly changing technology and explosive growth in the use of the Internet. Today, millions of people across the globe utilize the Internet on a regular basis for communication, news gathering, and commerce. Although this increasingly widespread and swiftly developing technology provides great benefits for the vast majority of Internet users, individuals who suffer from various physical disabilities may be unable to access the goods and services offered on many Internet websites. According to Plaintiffs, of the nearly ten million visually impaired persons in the United States, approximately 1.5 million of these individuals use the Internet.

In an effort to accommodate the needs of the visually impaired, a number of companies within the computer software industry have developed assistive technologies, such as voice-dictation software, voice-navigation software,

and magnification software to assist visually impaired persons in navigating through varying degrees of text and graphics found on different websites. However, not only do each of the different assistive software programs vary in their abilities to successfully interpret text and graphics, but various websites also differ in their abilities to allow different assistive technologies to effectively convert text and graphics into meaningful audio signals for visually impaired users. This lack of coordination between website programmers and assistive technology manufacturers has created a situation where the ability of a visually impaired individual to access a website depends upon the particular assistive software program being used and the particular website being visited.^{[FN1](#)}

^{[FN1](#)}. Although it appears that no well-defined, generally accepted standards exist for programming assistive software and websites so as to make them uniformly compatible, Plaintiffs provided the Court with a copy of the Web Content Accessibility Guidelines 1.0, W3C Recommendation 5-May-1999, produced by the Web Accessibility Initiative. *See* Web Content Accessibility Guidelines 1.0, at <http://www.w3.org/TR/WCAG10/> (Last visited Oct. 16, 2002). While these guidelines explain how to make Web content accessible to people with disabilities, a the guidelines further note that they do not provide specific information about browser support for different technologies as that information changes rapidly. a *Id.* Moreover, not only are these guidelines over three-years old, but there is no indication that the Web Accessibility Initiative, which pursues accessibility of the Web through five primary areas of work: technology, guidelines, tools, education and outreach, and research and development, a is a generally accepted authority on accessibility guidelines. *See* About WAI, at <http://www.w3.org/WAI/about.html> (Last visited Oct. 16, 2002).

In light of this rapidly developing technology, and the accessibility problems faced by numerous visually impaired Internet users, the question remains whether Title III of the ADA mandates that Internet website operators modify their sites so as to provide complete access to visually impaired individuals.^{[FN2](#)} Because no court within this Circuit has squarely addressed this issue, the Court is faced with a question of first impression, namely, whether Southwest's Internet website, southwest.com, is a place of public accommodation as defined by the ADA, and if so, whether Title III of the

ADA requires Southwest to make the goods and services available at its virtual ticket counters accessible to visually impaired persons.

FN2. Some commentators, while recognizing the paucity of case law in this area, have suggested that Internet websites fall within the scope of the ADA. *See, e.g.,* Jeffrey Scott Ranen, Note, *Was [Blind But Now I See: The Argument for ADA Applicability to the Internet](#), 22 B.C. Third World L.J. 389 (2002)*; Adam M. Schloss, *[Web-Sight for Visually-Disabled People: Does Title III of the Americans with Disabilities Act Apply to Internet Websites?](#), 35 Colum. J.L. & Soc. Probs, 35 (2001)*; Matthew A. Stowe, Note, *[Interpreting the Place of Public Accommodation Under Title III of the ADA: A Technical Determination with Potentially Broad Civil Rights Implications](#), 50 Duke L.J. 297 (2000)*; Jonathan Bick, *[Americans with Disabilities Act and the Internet](#), 10 Alb. L.J. Sci. & Tech. 205 (2000)*.

Southwest, the fourth largest U.S. airline (in terms of domestic customers carried), was the first airline to establish a home page on the Internet. *See* Southwest Airlines Fact Sheet, at http://www.southwest.com/about_swa/press_factsheet.html (Last visited Oct. 16, 2002). Southwest's Internet website, southwest.com, provides consumers with the means to, among other things, check airline fares and schedules, book airline, hotel, and car reservations, and stay informed of Southwest's sales and promotions. Employing more than 35,000 employees, and conducting approximately 2,800 flights per day, Southwest reports that approximately 46 percent, or over \$500 million, of its passenger revenue for first quarter 2002 was generated by online bookings via southwest.com. *Id.* According to Southwest, [m]ore than 3.5 million people subscribe to Southwest's weekly Click N Save e-mails. *a Id.* Southwest prides itself on operating an Internet website that provides the highest level of business value, design effectiveness, and innovative technology use achievable on the Web today. *a Id.*

Despite the apparent success of Southwest's website, Plaintiffs contend that Southwest's technology violates the ADA, as the goods and services offered on southwest.com are inaccessible to blind persons using a screen reader.^{FN3} (Compl.¶ 4). Plaintiffs allege that although southwest.com offers the sighted customer the promise of independence of on-line airline/hotel booking in the comfort and safety of their home...even if a blind person like

[Plaintiff] Gumson has a screen reader with a voice synthesizer on their computer, they are prevented from using the southwest.com website because of its failure to allow access. a (Compl.¶ 4). Specifically, Plaintiffs maintain that the southwest.com website fails to provide alternative text which would provide a screen reader program the ability to communicate via synthesized speech what is visually displayed on the website. a (Compl.¶ 11). Additionally, Plaintiffs assert that the southwest.com website fails to provide online forms which can be readily filled out by [Plaintiffs] and fails to provide a skip navigation link which facilitates access for these blind consumers by permitting them to bypass the navigation bars on a website and proceed to the main content. a (Compl.¶ 12).

[FN3.](#) Plaintiffs claim that although purchasing tickets at southwest.com is technically possible, plaintiffs found purchasing a ticket to be extremely difficult... (Compl. at 7). Plaintiffs do not argue that they are unable to access such goods and services via alternative means such as telephone or by visiting a particular airline ticket counter or travel agency.

Plaintiffs' four-count Complaint seeks a declaratory judgment that Southwest's website violates the communication barriers removal provision of the ADA (Count I), violates the auxiliary aids and services provision of the ADA (Count II), violates the reasonable modifications provisions of the ADA (Count III), and violates the full and equal enjoyment and participation provisions of the ADA (Count IV).[FN4](#) Plaintiffs ask this Court to enjoin Southwest from continuing to violate the ADA, to order Southwest to make its website accessible to persons who are blind, and to award Plaintiffs attorneys' fees and costs. Southwest has moved to dismiss Plaintiffs' Complaint pursuant to [Fed.R.Civ.P. 12\(b\)\(6\)](#). The Court has federal question jurisdiction over this matter pursuant to [28 U.S.C. § 1331](#).

[FN4.](#) Plaintiffs' Counsel informed the Court that Plaintiffs made no effort to resolve this dispute prior to filing their Complaint. (Tr., Oct. 16, 2002). Although the law does not require Plaintiffs to confer with Southwest prior to filing this action, in light of Plaintiffs' Counsel's discussion of the proactive measures that other companies, such as Amazon.com, have taken to modify their websites to make them more accessible to visually impaired persons, it is unfortunate that Plaintiffs made no attempt to resolve this matter before resorting to litigation.

Discussion

A. Standard of Review

[Federal Rule of Civil Procedure 12\(b\)\(6\)](#) provides that dismissal of a claim is appropriate when it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. a [Blackston v. Alabama, 30 F.3d 117, 120 \(11th Cir.1994\)](#) (quoting [Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 \(1984\)](#)). At this stage of the case, the Court must accept Plaintiffs' allegations in the Complaint as true and view those allegations in a light most favorable to Plaintiffs' to determine whether the Complaint fails to state a claim for relief. [S & Davis Int'l, Inc. v. Republic of Yemen, 218 F.3d 1292, 1298 \(11th Cir.2000\)](#).

B. Plaintiffs Have Failed to State a Claim Upon Which Relief Can be Granted

[\[1\]\[2\]\[3\]](#) The threshold issue of whether an Internet website, such as southwest.com, is a place of public accommodation as defined by the ADA, presents a question of statutory construction. As in all such disputes, the Court must begin its analysis with the plain language of the statute in question. [Rendon v. Valleycrest Prods., Ltd., 294 F.3d 1279, 1283 n. 6 \(11th Cir.2002\)](#) (citing [K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291, 108 S.Ct. 1811, 100 L.Ed.2d 313 \(1988\)](#)). The first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. a [Rendon, 294 F.3d at 1283 n. 6.](#) (quoting [Robinson v. Shell Oil Co., 519 U.S. 337, 340, 117 S.Ct. 843, 136 L.Ed.2d 808 \(1997\)](#)). A court need look no further where the statute in question provides a plain and unambiguous meaning. [Rendon, 294 F.3d at 1283 n. 6.](#)

1. Southwest.com is Not a Place of Public Accommodation as Defined by the Plain and Unambiguous Language of the ADA

Title III of the ADA sets forth the following general rule against discrimination in places of public accommodation:

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any *place of public accommodation* by

any person who owns, leases (or leases to), or operates a *place of public accommodation*.

[42 U.S.C. § 12182\(a\)](#) (emphasis added).

The statute specifically identifies twelve (12) particularized categories of places of public accommodation. a [42 U.S.C. § 12181\(7\)](#). Public accommodations include:

- (A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;
- (B) a restaurant, bar, or other establishment serving food or drink;
- (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
- (D) an auditorium, convention center, lecture hall, or other place of public gathering;
- (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
- (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
- (G) a terminal, depot, or other station used for specified public transportation;
- (H) a museum, library, gallery, or other place of public display or collection;
- (I) a park, zoo, amusement park, or other place of recreation;
- (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
- (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
- (L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

[42 U.S.C. § 12181\(7\)](#).

[4] Furthermore, pursuant to Congress' grant of authority to the Attorney General to issue regulations to carry out the ADA, the applicable federal regulations also define a place of public accommodation as a facility, operated by a private entity, whose operations affect commerce and fall

within at least one of the [twelve (12) enumerated categories set forth in [42 U.S.C. § 12181\(7\)](#).] [28 C.F.R. § 36.104](#).^{FN5} [Section 36.104](#) defines facility as all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located. a [28 C.F.R. § 36.104](#). In interpreting the plain and unambiguous language of the ADA, and its applicable federal regulations, the Eleventh Circuit has recognized Congress' clear intent that Title III of the ADA governs solely access to physical, concrete places of public accommodation. [Rendon, 294 F.3d at 1283-84](#); [Stevens v. Premier Cruises, Inc., 215 F.3d 1237, 1241 \(11th Cir.2000\)](#) (noting that [b]because Congress has provided such a comprehensive definition of public accommodation, a we think that the intent of Congress is clear enough). Where Congress has created specifically enumerated rights and expressed the intent of setting forth clear, strong, consistent, enforceable standards, a courts must follow the law as written and wait for Congress to adopt or revise legislatively-defined standards that apply to those rights. Here, to fall within the scope of the ADA as presently drafted, a public accommodation must be a physical, concrete structure. To expand the ADA to cover virtual spaces would be to create new rights without well-defined standards.

[FN5](#). The Court may consider the C.F.R. definitions, as Congress specifically directed the Attorney General to issue regulations in an accessible format to carry out the provisions of [the ADA]... that include standards applicable to facilities and vehicles covered under [section 12182](#) of [the ADA.] [42 U.S.C. § 12186\(b\)](#).

Notwithstanding the fact that the plain and unambiguous language of the statute and relevant regulations does not include Internet websites among the definitions of places of public accommodation, a Plaintiffs allege that the southwest.com website falls within the scope of Title III, in that it is a place of exhibition, display and a sales establishment. a (Compl.¶ 9). Plaintiffs' argument rests on a definition they have created by selecting language from three separate statutory subsections of [42 U.S.C. § 12181\(7\)](#). See [42 U.S.C. §§ 12181\(7\)\(C\), \(H\) & \(E\)](#).^{FN6} While Plaintiffs can, as advocates, combine general terms from three separate statutory subsections, and apply them to an unenumerated specific term, namely Internet websites, the Court must view these general terms in the specific context in which Congress placed each of them.

[FN6](#). Plaintiffs created their definition from the following italicized language in three subsections of [42 U.S.C. § 12181\(7\)](#):
a motion picture house, theater, concert hall, stadium, or other *place of exhibition* or entertainment, a [42 U.S.C. § 12181\(7\)\(C\)](#);
a museum, library, gallery, or other place of public *display* or collection, a [42 U.S.C. § 12181\(7\)\(H\)](#); and
a bakery, grocery store, clothing store, hardware store, shopping center, or other *sales* or rental *establishment*, a [42 U.S.C. § 12181\(7\)\(E\)](#).

[5] Under the rule of *ejusdem generis*, where general words follow a specific enumeration of persons or things, the general words should be limited to persons or things similar to those specifically enumerated. a [Allen v. A.G. Thomas](#), 161 F.3d 667, 671 (11th Cir.1998) (quoting [United States v. Turkette](#), 452 U.S. 576, 581-82, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981)); see also [Snapp v. Unlimited Concepts, Inc.](#), 208 F.3d 928, 934 (11th Cir.2000); [Sutton v. Providence St. Joseph Medical Ctr.](#), 192 F.3d 826, 834 (9th Cir.1999). Here, the general terms, exhibition, a display, a and sales establishment, a are limited to their corresponding specifically enumerated terms, all of which are physical, concrete structures, namely: motion picture house, theater, concert hall, stadium; museum, library, gallery; and bakery, grocery store, clothing store, hardware store, shopping center, a respectively. [42 U.S.C. §§ 12181\(7\)\(C\), \(H\) & \(E\)](#). Thus, this Court cannot properly construe a place of public accommodation to include Southwest's Internet website, southwest.com.

2. Plaintiffs Have Not Established a Nexus Between Southwest.com and a Physical, Concrete Place of Public Accommodation

Although Internet websites do not fall within the scope of the ADA's plain and unambiguous language, Plaintiffs contend that the Court is not bound by the statute's plain language, and should expand the ADA's application into cyberspace.^{[FN7](#)} As part of their argument, Plaintiffs encourage the Court to follow [Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Assoc. of New England](#), in which the First Circuit broadly held that the ADA's definition of public accommodation is not limited to actual physical structures, but includes, *inter alia*, health-benefit plans. [Carparts](#), 37 F.3d 12, 19 (1st Cir.1994).^{[FN8](#)} While application of the broad holding and dicta in [Carparts](#) to the facts in this case might arguably require this Court to include

Internet websites within the ADA's definition of public accommodations, a the Eleventh Circuit has not read Title III of the ADA nearly as broadly as the First Circuit.^{FN9} See [Rendon, 294 F.3d 1279](#).

[FN7](#). Plaintiffs concede that neither the legislative history of the ADA nor the plain language of the statute and applicable federal regulations, contain any specific reference to the Internet or cyberspace. (Tr., Oct. 16, 2002).

[FN8](#). Although *Carparts* does not explicitly address the issue of whether an Internet website falls within the definition of public accommodation, a Plaintiffs focus on the First Circuit's dicta discussing the public policy reasons for why the ADA's definition of public accommodations should be read broadly:

By including travel service among the list of services considered public accommodations, a Congress clearly contemplated that service establishments include providers of services which do not require a person to physically enter an actual physical structure. Many travel services conduct business by telephone or correspondence without requiring their customers to enter an office in order to obtain their services. Likewise, one can easily imagine the existence of other service establishments conducting business by mail and phone without providing facilities for their customers to enter in order to utilize their services. It would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result.

[Carparts, 37 F.3d at 19](#).

[FN9](#). In addition to *Carparts*, Plaintiffs encourage this Court to follow [Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557, 559 \(7th Cir.1999\)](#), in which Chief Judge Posner approvingly cited to *Carparts* and stated in dicta that:

The core meaning of [\[42 U.S.C. § 12182\(a\) \]](#), plainly enough, is that the owner or operator of a store, hotel, restaurant, dentist's office, travel agency, theater, Web site, or other facility (whether in physical space or in electronic space, [*Carparts*]), that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do.

Plaintiffs also cite to a September 9, 1996 letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Division, United States Department of Justice, to U.S. Senator Tom Harkin, advising the Senator that [c]overed entities that use the Internet for communications regarding their programs, goods, or services must be prepared to offer those communications through accessible means as well. a (Pl.'s Resp., Exh. A). Finally, Plaintiffs cite the recent unpublished opinion in [*Vincent Martin et al. v. Metro. Atlanta Rapid Transit Authority*, 225 F.Supp.2d 1362 \(N.D.Ga.2002\)](#), in which U.S. District Judge Thomas W. Thrash, Jr. held that until the Metropolitan Atlanta Rapid Transit Authority (♦MARTA♦) reformats its Internet website in such a way that it can be read by visually impaired persons using screen readers, MARTA is violating the ADA mandate of making adequate communications capacity available, through accessible formats and technology, to enable users to obtain information and schedule service. a ♦ [*Vincent Martin et al. v. Metro. Atlanta Rapid Transit Authority*, 225 F.Supp.2d 1362, 1374 \(N.D.Ga.2002\)](#) (quoting [49 C.F.R. § 37.167\(f\)](#)). That case, however, is distinguishable in one critical respect: Plaintiffs in *Vincent Martin* filed suit under both the Rehabilitation Act of 1973, as amended, [29 U.S.C. § 794 et seq.](#), and Title II of the ADA, [42 U.S.C. § 12132](#), not Title III as in the present case. Title II prohibits qualified individuals from being excluded from participation in or [being] denied the benefits of the services, programs, or activities of a public entity, or [being] subjected to discrimination by any such entity. a [42 U.S.C. § 12132](#). Title II of the ADA defines public entity as (A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and (C) the National Railroad Passenger Corporation, and any commuter authority.... [42 U.S.C. § 12131](#). Because the present case deals with Title III, not Title II of the ADA, and Plaintiffs could not allege any facts that would place Southwest within the definition of a public entity under Title II, *Vincent Martin* is inapplicable.

In *Rendon*, a recent Eleventh Circuit case addressing the scope of Title III, a group of individuals with hearing and upper-body mobility impairments sued the producers of the television game show, Who Wants To Be A Millionaire, a alleging that the use of an automated fast finger telephone selection process violated the ADA because it excluded disabled individuals

from participating. The district court dismissed the complaint on grounds that the automated telephone selection process was not conducted at a physical location, and therefore, was not a place of public accommodation as defined by the ADA. The Eleventh Circuit reversed, holding that the telephone selection process was a discriminatory screening mechanism...which deprives [the plaintiffs] of the opportunity to compete for the privilege of being a contestant on the [game show]. [Rendon, 294 F.3d at 1286](#). The Eleventh Circuit observed that [t]here is nothing in the text of the statute to suggest that discrimination via an imposition of screening or eligibility requirements must occur on site to offend the ADA. [Id. at 1283-84](#). Most significantly, the Eleventh Circuit noted that the plaintiffs stated a claim under Title III because they demonstrated a nexus between the challenged service and the premises of the public accommodation, a namely the concrete television studio. [Id. at 1284 n. 8](#).

Plaintiffs contend that the Eleventh Circuit in *Rendon* aligned itself with the First Circuit in *Carparts*, and that *Rendon* requires a broad reading of the ADA to include Internet websites within the public accommodations definition. However, these arguments, while emotionally attractive, are not legally viable for at least two reasons. First, contrary to Plaintiffs' assertion that the Eleventh Circuit aligned itself with *Carparts*, the Eleventh Circuit in *Rendon* not only did not approve of *Carparts*, it failed even to cite it.^{[FN10](#)}

^{[FN10](#)}. In fact, the Eleventh Circuit recognized those courts which declined to follow *Carparts*, noting that to the extent that a plaintiff intends to raise a claim of disability discrimination based on the kind of insurance offered, the plaintiff must demonstrate that the policy was offered to the plaintiff directly by the insurance company *and was connected with its offices*, as opposed to its being a privilege provided by the plaintiff's employer. a [Rendon, 294 F.3d at 1284 n. 8](#) (emphasis added) (citing [Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114-15 \(9th Cir.2000\)](#) (noting that some connection between the good or service complained of and an actual physical place is required); [Ford v. Schering-Plough Corp., 145 F.3d 601, 612-13 \(3d. Cir.1998\)](#) (noting that [t]he plain meaning of Title III is that a public accommodation is a place...); [Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1011-14 \(6th Cir.1997\)](#) (noting that [a]s is evident by § 12181(7), a public accommodation is a physical place...)).

[6] Second, whereas the defendants in *Rendon* conceded, and the Eleventh Circuit agreed, that the game show at issue took place at a physical, public accommodation (a concrete television studio), and that the fast finger telephone selection process used to select contestants tended to screen out disabled individuals, the Internet website at issue here is neither a physical, public accommodation itself as defined by the ADA, nor a means to accessing a concrete space such as the specific television studio in *Rendon*.^{FN11} [294 F.3d at 1284](#). Although Plaintiffs contend that this is a case seeking equal access to Southwest's virtual ticket counters' as they exist on-line, a (Pl.'s Resp. at 13), the Supreme Court and the Eleventh Circuit have both recognized that the Internet is a unique medium-known to its users as cyberspace-located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet. a [Voyeur Dorm, L.C. v. City of Tampa, 265 F.3d 1232, 1237 n. 3 \(11th Cir.2001\)](#) (quoting [Reno v. ACLU, 521 U.S. 844, 851, 117 S.Ct. 2329, 138 L.Ed.2d 874 \(1997\)](#)). Thus, because the Internet website, southwest.com, does not exist in any particular geographical location, Plaintiffs are unable to demonstrate that Southwest's website impedes their access to a specific, physical, concrete space such as a particular airline ticket counter or travel agency.^{FN12} Having failed to establish a nexus between southwest.com and a physical, concrete place of public accommodation, Plaintiffs have failed to state a claim upon which relief can be granted under Title III of the ADA.^{FN13}

^{FN11}. In recognizing the requirement that a plaintiff establish a nexus between the challenged service and the premises of the public accommodation, a the Eleventh Circuit noted that the plaintiffs in *Rendon* stated a claim under Title III of the ADA because they sought the privilege of competing in a contest held in a *concrete space*... [Rendon, 294 F.3d at 1284](#) (emphasis added); compare [Stoutenborough v. Nat'l Football League, Inc., 59 F.3d 580 \(6th Cir.1995\)](#) (holding that hearing impaired plaintiffs, who alleged that National Football League blackout rule violated Title III of ADA, failed to state a cause of action, as there was no nexus between televised broadcast of football game and physical place of public accommodation). See also [Torres v. AT & T Broadband, LLC, 158 F.Supp.2d 1035 \(N.D.Cal.2001\)](#) (dismissing Title III claim that cable service provider must make a list of available programs accessible to the visually impaired, and holding that neither the digital cable system nor its on-screen channel menu can be considered a place of public accommodation within the meaning of the ADA); [Access Now, Inc. v.](#)

[Claire's Stores, Inc., No. 00-14017-CIV-MOORE, 2002 WL 1162422, at *5 \(S.D.Fla. May 7, 2002\)](#) (noting in approving a Title III class settlement that [n]o court has held that internet websites made available to the public by retail entities must be accessible).

[FN12.](#) It is important to note that aircrafts are explicitly exempt from Title III of the ADA. [42 U.S.C. § 12181\(10\)](#). Plaintiffs do not argue that Southwest's website impedes their access to aircrafts.

[FN13.](#) Given the number of visually impaired persons who utilize the Internet for commerce, and the significant amount of business that Southwest obtains through its Internet website, it is unfortunate that the parties have not cooperated to develop a creative solution that benefits both parties and which avoids the costs and polarizing effects of litigation. It is especially surprising that Southwest, a company which prides itself on its consumer relations, has not voluntarily seized the opportunity to employ all available technologies to expand accessibility to its website for visually impaired customers who would be an added source of revenue. That being said, in light of the rapidly developing technology at issue, and the lack of well-defined standards for bringing a virtually infinite number of Internet websites into compliance with the ADA, a precondition for taking the ADA into virtual space is a meaningful input from all interested parties via the legislative process. As Congress has created the statutorily defined rights under the ADA, it is the role of Congress, and not this Court, to specifically expand the ADA's definition of public accommodation beyond physical, concrete places of public accommodation, to include virtual places of public accommodation.

Conclusion

Accordingly, based upon the foregoing reasons, it is hereby

ORDERED that Defendant Southwest's Motion to Dismiss Plaintiffs' Complaint [DE-11] is GRANTED, and this action is DISMISSED WITH PREJUDICE. All pending motions not otherwise ruled upon are denied as moot, and this case is CLOSED.

Access Now, Inc. v. Southwest Airlines Co., 385 F.3d 1324 (2004)

16 A.D. Cases 296, 29 NDLR P 22, 17 Fla. L. Weekly Fed. C 1064

 KeyCite Yellow Flag - Negative Treatment
Distinguished by [Bynum v. American Airlines, Inc.](#), 5th Cir.(Tex.),
February 6, 2006

385 F.3d 1324
United States Court of Appeals,
Eleventh Circuit.

[ACCESS NOW, INC.](#), a Florida non-profit
corporation, Robert Gumson,
Plaintiffs–Appellants,
v.
SOUTHWEST AIRLINES COMPANY, a Texas
corporation, Defendant–Appellee.

No. 02–16163.
|
Sept. 24, 2004.

Synopsis

Background: Blind individual and non-profit advocacy organization brought action alleging that airline’s website excluded blind persons, in violation of Americans with Disabilities Act (ADA). The United States District Court for the Southern District of Florida, No. 02-21734-CV-PAS, [Patricia A. Seitz, J.](#), 227 F.Supp.2d 1312, dismissed claims, and plaintiffs appealed.

[Holding:] The Court of Appeals, [Marcus](#), Circuit Judge, held that plaintiff, whose trial court claim was based on theory that airline’s website was place of public accommodation, could not raise for first time on appeal theory that airline’s travel service was place of public accommodation to which website was connection.

Appeal dismissed.

West Headnotes (4)

[1] **Federal Courts**
 Pleading

[4] **Federal Courts**
 In general; necessity

District court’s dismissal for failure to state claim is reviewed *de novo*, applying same legal standard that district court did. [Fed.Rules Civ.Proc.Rule 12\(b\)\(6\)](#), 28 U.S.C.A.

[21 Cases that cite this headnote](#)

[2] **Federal Courts**
 Failure to mention or inadequacy of treatment of error in appellate briefs

Legal claim or argument that has not been briefed before appellate court is deemed abandoned and its merits will not be addressed. [F.R.A.P.Rule 28\(a\)\(5\)](#), 28 U.S.C.A.

[238 Cases that cite this headnote](#)

[3] **Federal Courts**
 Matters of Substance

Blind person, whose unsuccessful ADA claim against airline was based on theory that airline’s website was place of public accommodation, could not raise for first time on appeal theory that airline’s travel service was place of public accommodation to which website was connection; new claim raised significant questions of fact and law, and appellate court’s refusal to address it would not give rise to miscarriage of justice. Americans with Disabilities Act of 1990, §§ 301(7), 302, [42 U.S.C.A. §§ 12181\(7\), 12182](#).

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Issue not raised in district court and raised for first time in appeal generally will not be considered by appellate court unless: (1) it involves pure question of law and refusal to consider it would result in miscarriage of justice; (2) appellant raises objection to order which he had no opportunity to raise at district court level; (3) interest of substantial justice is at stake; (4) proper resolution is beyond any doubt; or (5) issue presents significant questions of general impact or of great public concern.

[254 Cases that cite this headnote](#)

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

Before [TJOFLAT](#) and [MARCUS](#), Circuit Judges, and [MUSGRAVE*](#), Judge.

Opinion

[MARCUS](#), Circuit Judge:

The plaintiffs, Access Now, Inc. and Robert Gumson,

appeal the district court’s [Rule 12\(b\)\(6\)](#) dismissal of their claim against the defendant Southwest Airlines Company (“Southwest”) under the Americans with Disabilities Act (“ADA”). The case centers around the inaccessibility of Southwest’s web site, Southwest.com, to individuals like Mr. Gumson who are visually impaired and use the Internet through a special software program called a “screen reader.” Some features of Southwest.com make it very difficult for the visually impaired to access using a screen reader. The plaintiffs claim that this limitation places Southwest.com in violation of Title III of the ADA, which requires privately operated “places of public accommodation” to be accessible to disabled individuals. Unfortunately, we are unable to reach the merits of this case, however, because none of the issues on appeal are properly before us. Accordingly, we are constrained to dismiss the appeal.

I.

The facts and procedural history in this case, which involves the application of Title III of the Americans with Disabilities Act, [42 U.S.C. § 12181](#), to the Internet web site of Southwest Airlines, Southwest.com, are not in dispute. Southwest Airlines, the fourth-largest American domestic air carrier, first created Southwest.com in April 1996, making it the first major American airline to establish a web site. Now, Southwest.com allows individuals to check fares and schedules, make flight reservations, and learn about Southwest sales and promotions. The web site allows visitors to book reservations for hotels and car rentals. It also allows visitors to obtain transfers between the airport and the hotel, or elsewhere, travel insurance, tickets to local attractions, and other information about destinations. Southwest.com offers a “do it yourself” reservation system allowing customers to book and pay for airline flights as well as hotel rooms and rental cars. Exclusively through its web site, [*1326](#) Southwest offers “click and save Internet specials” that provide weekly discounts on plane tickets, hotel rooms, car rentals, and vacation packages. Southwest.com also offers a “rapid rewards” program that offers incentives to make purchases on the site. According to company factsheets, approximately 46 percent, or over \$500 million, of Southwest’s passenger revenue for the first quarter of 2002 was generated by online bookings via Southwest.com. However, none of these revenues apparently came from web surfers with

serious vision impairments.

Robert Gumson is one of 1.5 million Americans with vision impairments who use the Internet. Being blind, Gumson is unable to use a computer monitor or a mouse. To overcome this difficulty, Gumson has installed on his computer a “screen reader,” which is an inexpensive software program that converts graphic and textual information on his monitor into speech that an electronically synthesized voice reads out through the computer’s speakers. Using the screen reader has enabled Gumson to access web browsers, e-mail, and other computer functions. Many sites on the World Wide Web are accessible to the visually impaired by the use of screen readers. Southwest.com, however, is not among them. Its unlabeled graphics, inadequately labeled data tables, online forms inaccessible to the blind, and lack of a “skip navigation link” make it all but impossible for Gumson and other visually impaired individuals to access the features and services of Southwest.com. Because he cannot access Southwest.com, Gumson cannot take advantage of the beneficial services and information available to the site’s visitors.

Mr. Gumson and Access Now, Inc., a nonprofit advocacy organization for disabled individuals, brought suit in the United States District Court for the Southern District of Florida, seeking a declaratory judgment that Southwest.com violates (1) the ADA’s communication barriers removal provision; (2) the ADA’s auxiliary aids and services provision; (3) the ADA’s reasonable modifications provisions; and (4) the ADA’s full and equal enjoyment and participation provisions. They asked the district court to enjoin Southwest from continuing to violate the ADA, to order it to make Southwest.com accessible to the blind, and for attorneys’ fees and costs. Southwest moved to dismiss for failure to state a claim, pursuant to Fed.R.Civ.P. 12(b)(6). The district court granted the motion and dismissed the claim with prejudice, finding that Southwest.com is not a place of public accommodation and therefore not covered under Title III. *Access Now, Inc. v. Southwest Airlines, Co.*, 227 F.Supp.2d 1312, 1322 (S.D.Fla.2002). This appeal ensued.

II.

^[1] The case before us hinges entirely on a question of

statutory construction, addressing whether Southwest may have violated Title III by making Southwest.com inaccessible to the visually impaired. We review the district court’s dismissal pursuant to Rule 12(b)(6) *de novo*, applying the same legal standard that the district court did. *Hoffman–Pugh v. Ramsey*, 312 F.3d 1222, 1225 (11th Cir.2002). Dismissal under Rule 12(b)(6) is appropriate “only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations” of the complaint. *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L.Ed.2d 59 (1984).

However, we are unable to reach the merits of the plaintiffs’ claim because, simply put, they have presented this Court with a case that is wholly different from the one they brought to the district court. As we see it, the plaintiffs have abandoned *1327 the claim and argument they made before the district court, and in its place raised an entirely new theory on appeal—one never presented to or considered by the trial court.

In their complaint before the district court, the plaintiffs alleged:

The SOUTHWEST.COM website is a *public accommodation* as defined by Title III of the ADA, 42 U.S.C. § 12181(7), in that it is a *place* of exhibition, display and a sales establishment. SOUTHWEST has discriminated and continues to discriminate against Plaintiffs, and others who are similarly situated, by denying access to, and full and equal enjoyment of the goods, services, facilities, privileges, advantages and/or accommodations of their website (SOUTHWEST.COM) in derogation of the ADA.

Complaint ¶ 9 (emphasis added). The complaint then detailed the various ways in which the web site was inaccessible to the visually impaired, including, for example, by failing to provide “alternative text” to make it possible for a screen reader program to use and failing to provide accessible online forms. *See id.* ¶ 10–14.

The plaintiffs’ four claims for relief in the complaint all hinged on their inability to access the Southwest.com web

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site (purportedly a *place* of public accommodation), without any reference to any connection or “nexus” with any other goods or services (such as travel services) provided by Southwest Airlines. Specifically, Count I alleged that the “website denies access to Plaintiffs through the use of a screen reader and therefore, violates the communications barriers removal provision of the ADA, 42 U.S.C. § 12182(b)(2)(A)(iv), because it constitutes a failure to remove existing communications barriers from the website.” *Id.* ¶ 18. Count II, in turn, claimed that “Defendant’s website violates the auxiliary aids and services provision of the ADA, 42 U.S.C. § 12182(b)(2)(A)(iii), because it constitutes a failure to take steps to ensure that individuals who are blind are not denied access to the website, and does not provide an effective method of making this ‘visually delivered material available to individuals with visual impairments.’ ” *Id.* ¶ 22 (citing 42 U.S.C. § 12102(1)(b)). Count III said that “Defendant’s website denying access to the Plaintiffs to use it through a screen reader violates the reasonable modifications provisions of the ADA, 42 U.S.C. § 12182(b)(2)(A)(ii), in that it constitutes a failure to make reasonable modifications to policies, practices and procedures necessary to afford access to the website to persons who are blind.” *Id.* ¶ 25. Finally, Count IV alleged that “Defendant’s internet website violates the full and equal enjoyment and participation provisions of the ADA pertaining to access to goods and services and advantages offered by SOUTHWEST.COM (42 U.S.C. §§ 12182(a), 12182(b)(1)(A)(i), and 12182(b)(1)(A)(ii)), in that it constitutes a failure to make the website fully accessible and independently usable by individuals who are blind.” *Id.* ¶ 27. All of the counts in the complaint thus focused entirely on the inaccessibility of the web site itself as a place of public accommodation, making no connection between Southwest.com and any *other* supposed place of public accommodation.

Moreover, in their memorandum filed with the district court in response to Southwest’s motion to dismiss, the plaintiffs again reiterated that their Title III claim was based on the simple idea that Southwest.com was itself a place of public accommodation. Thus, one major section heading in the response was entitled “Southwest.com is a ‘Place of Public Accommodation.’ ” Memorandum in Response to Motion to Dismiss Complaint with Prejudice at 3. The plaintiffs began this section noting: “Central to defendant’s *1328 attack is that the Southwest.com website is not a place of ‘public accommodation.’ ” *Id.* The plaintiffs then attempted to rebut the argument, but notably did *not* say that Southwest, in arguing that

Southwest.com is not a place of public accommodation, had somehow mischaracterized their argument. Instead, they addressed head-on the website-as-public-accommodation claim, again making it abundantly clear that this was their argument.

In a comprehensive order dismissing the case, the district court also focused entirely on the plaintiffs’ argument that the web site itself was a place of public accommodation; indeed, it had no opportunity to address any other claim or argument because that was the only one the plaintiffs presented. In holding that the plaintiffs had failed to state a claim upon which relief could be granted, the district court observed, in a section heading of the opinion, that “Southwest.com is Not a ‘Place of Public Accommodation’ as Defined by the Plain and Unambiguous Language of the ADA.” *Access Now*, 227 F.Supp.2d at 1317. The court examined the relevant statutory text and case law supporting this conclusion. *See id.* at 1317–19. It said that “the plain and unambiguous language of the statute and relevant regulations does not include Internet websites among the definitions of ‘places of public accommodation.’ ” *Id.* at 1318. According to the district court, “to fall within the scope of the ADA as presently drafted, a public accommodation must be a physical, concrete structure. To expand the ADA to cover ‘virtual’ spaces would be to create new rights without well-defined standards.” *Id.* The court determined that the three categories of public accommodation purportedly covered by Title III—“exhibition,” “display,” and “sales establishment”—“are limited to their corresponding specifically enumerated terms, all of which are physical, concrete structures.” *Id.* at 1319.

The opinion’s next section was entitled “Plaintiffs Have Not Established a Nexus Between Southwest.com and a Physical, Concrete Place of Public Accommodation.” *Id.* at 1319. The court came to this conclusion not because the plaintiffs had tried and failed to establish some *connection* between the web site and a physical location, but rather because the plaintiffs never attempted to establish any such link, instead arguing that no link to a physical location was necessary for a website to be covered by Title III. *See id.* at 1319–21. The court concluded that “because the Internet website, southwest.com, does not exist in any particular geographical location, Plaintiffs are unable to demonstrate that Southwest’s website impedes their access to a specific, physical, concrete space such as a particular airline ticket counter or travel agency.” *Id.* at 1321. Accordingly, the district court dismissed the plaintiffs’

complaint with prejudice. *Id.* at 1322.

The plaintiffs have not appealed from the determination made by the district court that Southwest.com is not a place of public accommodation under Title III. Rather, the plaintiffs have presented a very different theory, one wholly distinct from the complaint and the arguments presented below. Their appellate brief, for the first time, argues that Southwest Airlines *as a whole* is a place of public accommodation because it operates a “travel service,” and that it has violated Title III precisely because of the web site’s *connection* with Southwest’s “travel service.”

Indeed, the plaintiffs’ summary of the argument in the front of their blue brief alleges, for the first time, that “*Southwest Airlines* is a ‘travel service’ and thereby one of the ADA’s covered public accommodations.” *1329 *Id.* at 9 (emphasis added). The titles of the brief’s sections also make this abundantly clear. The overall heading of the plaintiffs’ substantive argument says: “As a public accommodation, Southwest cannot discriminate against persons with disabilities in the provision of travel services offered through their Internet website.” Appellants Brief at 10. Subsection A.1. of the argument asserts that “Title III applies to privileges and services of a public accommodation, even when provided off-site through the Internet.” *Id.* at 17. Subsection A.2. says: “Although Southwest’s Internet website has a nexus with a physical facility, the ADA nevertheless prohibits discrimination in the prov[i]sion of services of a place of public accommodation.” *Id.* at 21. Subsection A.3. reads: “The absence of specific mention of services provided off-site does not restrict the ADA’s coverage.” *Id.* at 24.

None of these headings—nor, notably, any of the text that follows—give any hint that the plaintiffs have any intention of rearguing that Southwest.com is itself a place of public accommodation. Rather, they focus on the “travel service” provided by the *airline*, of which Southwest.com is merely a part, and they now claim that a Title III violation is the result of the *connection* between the inaccessible web site and the travel service provided by the airline. The plaintiffs expressly say that “the internet ... is a mechanism to take advantage of the goods and services offered by a public accommodation, in this case, a travel service.” *Id.* at 28. They also claim that “an internet website is merely one device, similar to a telephone, a ticket counter, or a facsimile machine, *that Southwest, a public accommodation, uses to place its services in the marketplace.*” *Id.* at 17 (emphasis added).

Our problem on appeal is that the new argument depends on critical facts (and a new theory) neither alleged in the complaint nor otherwise presented to the district court. Simply put, the plaintiffs now contend that “there is a sufficient nexus between [Southwest’s] physical ‘facilities’ and their off site internet use to prohibit discrimination.” *Id.* at 22. To support this claim, the plaintiffs must show that these “physical ‘facilities’ ” exist and that they bear a reasonable “nexus” or connection with Southwest.com that subjects it to the public accommodations requirements of Title III. The plaintiffs say for the first time on appeal that “Southwest is introducing self-service physical kiosks at physical airport facilities in which it operates,” *id.*, and that “Southwest maintains many physical locations throughout the United States, including its headquarters in Texas, and locations throughout airports at its destination cities,” *id.* at 21. These factual averments were never made in district court. Likewise, the complaint made no reference to the “travel service” category of places of public accommodation, 42 U.S.C. § 12181(7)(F), instead alleging that Southwest.com was a place of public accommodation because it was a “place of exhibition, display and a sales establishment,” *see id.* § 12181(7)(C), (E), (H). The district court never had the opportunity to consider the merits of the new “nexus” claim, and, indeed, the defendant never had the opportunity to respond to the new allegations.

At oral argument, the plaintiffs again focused on their new claim that Southwest Airlines operates a travel service that operates, among other ways, through Southwest.com. Thus, the claim presented to the district court—that Southwest.com is itself a place of public accommodation—appears to us to have been abandoned on appeal, and a new (and fact-specific) theory—that Southwest.com has a “nexus” to Southwest Airlines’ travel service—has been raised for the first time on appeal. For the reasons we detail at some length, *1330 we believe it is improper for us to evaluate the merits of either.

III.

[2] In the first place, the law is by now well settled in this Circuit that a legal claim or argument that has not been briefed before the court is deemed abandoned and its

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merits will not be addressed. The Federal Rules of Appellate Procedure plainly require that an appellant's brief "contain, under appropriate headings and in the order indicated ... a statement of the issues presented for review." Fed. R. App. P. 28(a)(5). See *AAL High Yield Bond Fund v. Deloitte & Touche LLP*, 361 F.3d 1305, 1308 (11th Cir.2004) ("BAS argued to the district court that it should have been included in the plaintiff class because it was a purchaser of Notes. It has declined to renew that argument on appeal, and the argument is deemed abandoned as to BAS."); *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir.2000) ("Parties must submit all issues on appeal in their initial briefs."); *United States v. Mejia*, 82 F.3d 1032, 1036 n. 4 (11th Cir.1996) (same); *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1114 n. 1 (11th Cir.1993) (same); *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1573 n. 6 (11th Cir.1989) (same); *Fed. Sav. & Loan Ins. Corp. v. Haralson*, 813 F.2d 370, 373 (11th Cir.1987) (same).

Any issue that an appellant wants the Court to address should be specifically and clearly identified in the brief. As we recently said in *United States v. Jernigan*, 341 F.3d 1273 (11th Cir.2003):

Under our caselaw, a party seeking to raise a claim or issue on appeal must plainly and prominently so indicate. Otherwise, the issue—even if properly preserved at trial—will be considered abandoned....

....

Our requirement that those claims an appellant wishes to have considered on appeal be unambiguously demarcated stems from the obvious need to avoid confusion as to the issues that are in play and those that are not.

Id. at 1283 n. 8. If an argument is not fully briefed (let alone not presented at all) to the Circuit Court, evaluating its merits would be improper both because the appellants may control the issues they raise on appeal, and because the appellee would have no opportunity to respond to it. Indeed, evaluating an issue on the merits that has not been raised in the initial brief would undermine the very adversarial nature of our appellate system. As the First Circuit has stated, "[i]n preparing briefs and arguments, an appellee is entitled to rely on the content of an appellant's brief for the scope of the issues appealed." *Pignons S.A. de Mecanique v. Polaroid Corp.*, 701 F.2d 1, 3 (1st Cir.1983).

Simply put, the plaintiffs' appellate brief and oral argument have not alleged that Southwest.com is itself a place of public accommodation. As such, we deem this argument abandoned and do not address its merits.

IV.

^[3] Rather, on appeal, as detailed above, the plaintiffs have advanced, for the first time, a very different theory and argument. Neither the complaint presented to the district court nor the response to the defendant's motion to dismiss relied upon the "travel service" provision of Title III, 42 U.S.C. § 12181(7)(F), and the plaintiffs did not argue that Southwest Airlines as a whole is or operates a travel service. Nor did the plaintiffs say anything in district court about a physical "nexus" between Southwest.com and some physical location that could qualify as a place of public accommodation. Their failure to do so requires us to address whether we may *1331 now consider their "nexus" argument on appeal.

^[4] This Court has "repeatedly held that 'an issue not raised in the district court and raised for the first time in an appeal will not be considered by this court.'" *Walker v. Jones*, 10 F.3d 1569, 1572 (11th Cir.1994) (quoting *Depree v. Thomas*, 946 F.2d 784, 793 (11th Cir.1991)); see also *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1222 n. 8 (11th Cir.2004) ("The district court was not presented with and did not resolve an equal protection argument based on Surfside's treatment of private clubs and lodges. Therefore, we will not consider this argument on appeal."); *Lovett v. Ray*, 327 F.3d 1181, 1183 (11th Cir.2003) ("Because he raises that argument for the first time in his reply brief, it is not properly before us."); *Hurley v. Moore*, 233 F.3d 1295, 1297 (11th Cir.2000) ("Arguments raised for the first time on appeal are not properly before this Court."); *Nyland v. Moore*, 216 F.3d 1264, 1265 (11th Cir.2000) (same); *Provenzano v. Singletary*, 148 F.3d 1327, 1329 n. 2 (11th Cir.1998) (same); *FDIC v. Verex Assurance, Inc.*, 3 F.3d 391, 395 (11th Cir.1993) (same); *Allen v. State of Ala.*, 728 F.2d 1384, 1387 (11th Cir.1984) (same); *Spivey v. Zant*, 661 F.2d 464, 477 (5th Cir. Unit B Nov.1981)¹ (same); *Easter v. Estelle*, 609 F.2d 756, 758–59 (5th Cir.1980)² (same). The reason for this prohibition is plain: as a court of appeals, we review claims of judicial error in the trial courts. If we were to regularly address

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questions—particularly fact-bound issues—that districts court never had a chance to examine, we would not only waste our resources, but also deviate from the essential nature, purpose, and competence of an appellate court.

In *Irving v. Mazda Motor Corp.*, 136 F.3d 764 (11th Cir.1998), we expressed our concern that “[t]oo often our colleagues on the district courts complain that the appellate cases about which they read were not the cases argued before them. We cannot allow Plaintiff to argue a different case from the case she presented to the district court.” *Id.* at 769. We share that concern. Plainly, as an appellate court with no fact finding mechanism, and, indeed, without any factual averments made in the trial court, we are naturally hesitant to consider this claim. We also observe that the plaintiffs had every opportunity to raise the new theory in district court, whether in their initial complaint or in an effort to amend their complaint.³ As best we can tell, at no time did the plaintiffs do so.

The argument that the plaintiffs have raised on appeal is not only new, but also one that is highly dependent on specific facts regarding Southwest Airlines’ physical *1332 locations and “travel service,” and their connections with the Southwest.com web site. It is undeniable that these facts were never alleged in a claim presented to the district court; were never explicated in any document or argument before that court; and no discovery was ever conducted about them. As a result, the district court never had an opportunity to make any findings as to the new allegations, and we have nothing to go on other than scattered (and unsupported) factual references in the appellants’ brief before this Court. Thus, it would be improvident for us to try to grapple with the important question whether Southwest Airlines operates a “travel service” and whether Southwest.com has a sufficient “nexus” to that travel service to subject the site to Title III.

This question is rendered still more difficult because airlines such as Southwest are largely not even covered by Title III of the ADA. See 42 U.S.C. § 12181(10) (defining the “ ‘specified public transportation’ ” covered by Title III as “transportation by bus, rail, or any other conveyance (other than by aircraft)” (emphasis added)); see also *Love v. Delta Air Lines*, 179 F.Supp.2d 1313, 1316 (M.D.Ala.2001) (saying that “aircraft are expressly excepted from the statutory definition of ‘specified public transportation’ ”), *rev’d on other grounds*, 310 F.3d 1347 (11th Cir.2002). Rather, airplanes and their accompanying terminals and depots are covered by another

disability-access statute, the pre-ADA Air Carriers Access Act, 49 U.S.C. § 41705 *et seq.* (the “ACAA”). Thus, the question whether Southwest owns and operates anything that might fall outside the air travel exemption in Title III is one that would depend on a thorough and meticulously calibrated factual analysis—an analysis that the district court was never asked to perform, and that we are unable to competently perform for the first time on appeal.

We recognize that a circuit court’s power to entertain an argument raised for the first time on appeal is not a jurisdictional one; thus we *may* choose to hear the argument under special circumstances. See *Dean Witter Reynolds, Inc. v. Fernandez*, 741 F.2d 355, 360 (11th Cir.1984) (saying that the notion that an appellate court will not consider issues not raised before the district court is “not a jurisdictional limitation but merely a rule of practice”). We have permitted issues to be raised for the first time on appeal under five circumstances:

First, an appellate court will consider an issue not raised in the district court if it involves a pure question of law, and if refusal to consider it would result in a miscarriage of justice. Second, the rule may be relaxed where the appellant raises an objection to an order which he had no opportunity to raise at the district court level. Third, the rule does not bar consideration by the appellate court in the first instance where the interest of substantial justice is at stake. Fourth, a federal appellate court is justified in resolving an issue not passed on below ... where the proper resolution is beyond any doubt. Finally, it may be appropriate to consider an issue first raised on appeal if that issue presents significant questions of general impact or of great public concern.

Wright v. Hanna Steel Corp., 270 F.3d 1336, 1342 (11th Cir.2001) (quoting *Narey v. Dean*, 32 F.3d 1521, 1526–27 (11th Cir.1994) (quoting *Dean Witter Reynolds*, 741 F.2d at 360–61 (footnotes and internal citations omitted))) (alteration in original).

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As we see it, none of these exceptional conditions is found in this case. As for the first such condition listed in *Dean Witter Reynolds*, the new theory is plainly *not* “a pure question of law,” because it raises considerable questions of fact. The plaintiffs’ *1333 argument hinges on whether there is a sufficient “nexus” between Southwest.com and a place of public accommodation to warrant a finding that the web site is covered by Title III. The questions whether and where various facilities (such as airport ticket counters, corporate headquarters, and rent-a-car offices) are owned and operated by Southwest, whether, in the aggregate, they qualify as a “travel service,” and whether they are sufficiently connected to Southwest.com to subject it to Title III, are undoubtedly mixed questions of fact and law, and cannot be deemed to be covered by this exception to the general rule against entertaining issues raised for the first time on appeal.

As for the second exception, the appellants have raised no objection to any order that they had no opportunity to raise before the district court. On the contrary, the record strongly suggests that they had every opportunity to raise the “nexus” theory before the district court. They chose not to do so, and we can divine no reason to evaluate this fact-specific theory for the first time on appeal.

As for the third exception, we do not believe that, in this case, “the interest of substantial justice is at stake.” Although this exception is theoretically broad, covering any case where a court genuinely concludes that the equities favor the party raising a new issue, as best we can tell, this Court has never once elected to evaluate a new argument on this basis. *See Wright*, 270 F.3d at 1342 (citing but declining to apply this exception); *Polo Ralph Lauren, L.P. v. Tropical Shipping & Const. Co., Ltd.*, 215 F.3d 1217, 1224 (11th Cir.2000) (same); *Blue Cross & Blue Shield of Al. v. Sanders*, 138 F.3d 1347, 1357 & n. 12 (11th Cir.1998) (same); *Narey*, 32 F.3d at 1526–27; *Baumann v. Savers Fed. Sav. & Loan Ass’n*, 934 F.2d 1506, 1512–13 (11th Cir.1991) (same); *Dean Witter Reynolds*, 741 F.2d at 361 (same); *Matter of Novack*, 639 F.2d 1274, 1276–77 & n. 5 (5th Cir. Unit B Mar.1981) (same); *Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307, 1324 (5th Cir.1976) (same).

To find an example of an application of this exception, we have to go back nearly three decades to a case before the former Fifth Circuit. In *Edwards v. Sears, Roebuck and Co.*, 512 F.2d 276 (5th Cir.1975), the defendants appealed a \$450,000 judgment for manufacturing and retailing tires whose failure allegedly caused a fatal car accident.

During closing argument at trial, counsel for the plaintiff said that a Sears representative had testified that, after the victim’s death, the manufacturer had taken off the market the manuals that mentioned the speed and inflation pressures that were safe for the tire. *Id.* at 284. This claim about the representative’s testimony was patently false; there had been no such testimony. *Id.* at 284–85. Furthermore, in closing argument, counsel for the plaintiff also made highly prejudicial and inflammatory remarks about the astronomical value his own son would have placed on his father’s life, about his personal association with the decedent, and evoked the image of decedent’s children crying at grave site. *Id.* at 285.

On appeal, plaintiff’s counsel did “not seriously urge that their remarks were fair and proper, and they could not reasonably do so.” *Id.* at 286. Rather, they argued that the issue was being raised for the first time on appeal because the statements had not been objected to at trial and thus should not be entertained on the merits on appeal. *Id.* The Fifth Circuit rejected this argument, observing that it did have the power to consider issues not objected to at trial but only “in exceptional cases where the interest of substantial justice is at stake.” *Id.* The Court believed that counsel’s behavior at the *Edwards* trial led *1334 to such an unusual circumstance, but took pains to “emphasize, however, our continued reluctance to address for the first time on review errors which the trial court was not given an opportunity to consider and correct.” *Id.*⁴

We can not discern any miscarriage of justice in this case. If the “nexus” argument was an overriding question involving substantial justice, it baffles us that the plaintiffs did not raise it in the district court. Unlike in *Edwards*, where the opposing party virtually admitted that it had done wrong, we have before us a highly contentious and important question. It is also very different to raise an issue on appeal based on statements that counsel may have failed to object to in the split-second pressure of argument in a jury trial, as opposed to fact-bound issues that the party had an opportunity to present to the district court.

As for the fourth exception, the plaintiffs’ “nexus” argument is plainly not one “where the proper resolution is beyond any doubt.” First of all, as noted, the argument depends on an evaluation of facts that were not alleged in the complaint. To resolve the question whether Southwest.com had a sufficient “nexus” to physical locations to subject it to Title III of the ADA, we would have to evaluate extensive factual records and testimony

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about Southwest Airlines' physical locations and their connection to the web site. Again, we are unable to do so because these matters were never presented to the district court. And again, this question is complicated further because many, if not all, of Southwest Airlines' physical facilities may be explicitly exempted from Title III, which does not cover the terminals or depots of aircraft. 42 U.S.C. § 12181(10). In short, this is a difficult question, and one about which there is considerable doubt.

Furthermore, even the purely legal question of the application of Title III to Internet web sites is far from "beyond any doubt." In addressing the question, we would be wading into the thicket of a circuit split on this issue. Compare *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 19–20 (1st Cir.1994), and *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir.1999) (suggesting that web sites can be considered public accommodations), with *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010–13 (6th Cir.1997), *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612–14 (3d Cir.1998), and *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir.2000) (finding otherwise). Plainly, this is not an easy question.

As for the final exception to the general rule—that an issue may be presented for the first time on appeal if it "presents significant questions of general impact or of great public concern"—we do not believe that this case is appropriate for application. The question raised before the district court—whether a web site is a place of public accommodation covered by Title III—is a question of substantial public interest, because it concerns the application of one of the landmark civil rights statutes in the country to a major new form of media that has only gained wide use in the past decade. However, the plaintiffs' argument before this Court that Southwest.com is covered by Title III because of its "nexus" with Southwest Airlines' "travel service" is narrower, and complicated by the specific exemption that Title III gives to airlines. Because of the special exemption Congress has given to the airlines, but not to other forms of public transportation (or to the numerous other forms of public accommodation listed in Title III), any ruling we would make would likely be inapplicable to any future cases other than to challenges of airline web sites. And this case would shed little light even on Title III challenges to other airline web sites, because our ruling would necessarily be based on facts specific to the physical places owned and operated by Southwest Airlines.

Accordingly, we are constrained to conclude that this case is not one of the "exceptional" ones in which we should elect to entertain a new theory and argument never raised in the district court. Indeed, to evaluate it now, without the benefit of any record or district court ruling, invites disaster for an appellate court.

In declining to evaluate the merits of this case, we are in no way unmindful that the legal questions raised are significant. The Internet is transforming our economy and culture, and the question whether it is covered by the ADA—one of the landmark civil rights laws in this country—is of substantial public importance. Title III's applicability to web sites—either because web sites are themselves places of public accommodation or because they have a sufficient nexus to such physical places of public accommodation—is a matter of first impression before this Court. Unfortunately, this case does not provide the proper vehicle for answering these questions.

Thus, as we see it, there are no substantive questions properly before us. We will not address a claim that has been abandoned on appeal or one that is being raised for the first time on appeal, without any special conditions. Accordingly, we must dismiss this appeal. See *Morehead v. Stewart*, 47 Fed.Appx. 817, 817 (9th Cir.2002) ("Because Morehead has waived the only issue properly before us, we must dismiss his appeal."); *Chevron USA Inc. v. School Bd. Vermilion Parish*, 294 F.3d 716, 718 (5th Cir.2002) ("Because we find that there is no appealable order properly before us, we dismiss the appeal."); *Smith v. Principi*, 34 Fed.Appx. 721, 724–25 (Fed.Cir.2002); *Bines v. Kulaylat*, 215 F.3d 381, 383 (3d Cir.2000) ("Because we hold that such an order is not final, and that the qualified-immunity issue is not properly before us, we will dismiss this appeal for lack of jurisdiction."); *FDIC v. Letterman Bros.*, 980 F.2d 1298, 1300 (9th Cir.1992) ("Those issues have not been briefed in this appeal and are not properly before this court. We therefore DISMISS this appeal for lack of an appealable judgment."); *Whittemore v. Farrington*, 234 F.2d 221, 227 (9th Cir.1956) ("The jurisdictional amount of \$5000 not appearing and no federal question being properly before us the motion to dismiss the appeal is granted.").

DISMISSED.

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Footnotes

- * Honorable [R. Kenton Musgrave](#), Judge, United States Court of International Trade, sitting by designation.
- 1 In [Stein v. Reynolds Secs., Inc.](#), 667 F.2d 33 (11th Cir.1982), the Eleventh Circuit adopted as binding precedent all decisions of Unit B of the former Fifth Circuit handed down after September 30, 1981.
- 2 The Eleventh Circuit has adopted as precedent the decisions of the former Fifth Circuit rendered prior to October 1, 1981. [Bonner v. City of Prichard](#), 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*).
- 3 At oral argument before this Court, counsel for the plaintiffs argued that they did not amend their complaint because, in light of the district court's dismissal of their case, doing so would have proven futile. This argument makes little chronological sense to us. The order dismissing the case came *after* the complaint and all relevant briefs; as such, the plaintiffs had no way of knowing that the district court would not agree with their Title III claims until after the dismissal order was given. Besides, the order dismissing the case said nothing about the "travel service" argument, focusing solely on whether Southwest.com itself was a public accommodation. As such, the "futility" argument is an unpersuasive one.
- 4 Other instances of the application of this exception have also tended to involve appeals based on prejudicial statements at trial that were not objected to. See, e.g., [San Antonio v. Timko](#), 368 F.2d 983, 986 (2d Cir.1966) (Friendly, J.) (allowing appeal of a verdict because plaintiff's counsel's summation at trial had engaged in inappropriate personal attacks against the defendant and his attorney, and saying that "[a]lthough defense counsel did not take exception to this, the impropriety of the argument was so flagrant as to constitute 'fundamental error' " (citation omitted)); [Klotz v. Sears, Roebuck & Co.](#), 267 F.2d 53, 55 (7th Cir.1959).

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