



## **ADA Live! Special Episode: Gil v. Winn-Dixie, 11th Circuit Decision on Web Access and the ADA**

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**Speakers:** Mark Riccobono, National Federation of the Blind; Howard Rosenblum, National Association of the Deaf; Bruce Sexton, Disability Advocate

**Host:** Peter Blanck, Chairman Burton Blatt Institute Syracuse University

**Disclaimer Note:** The personal opinions expressed by guest speakers in this episode should not be understood as an endorsement by the ADA National Network, the Southeast ADA Center, or Syracuse University.

**Mark Riccobono:** Hi, I'm Mark Riccobono.

**Howard Rosenblum:** Hi, I'm Howard Rosenblum from the National Association of the Deaf.

**Bruce Sexton:** Hi, I'm Bruce Sexton and you're listening to ADA Live.

**4 Wheel City:** (rapping)

**Barry Whaley:** Hi, everybody. On behalf of the Southeast ADA Center, the Burton Blatt Institute at Syracuse University, and the ADA National Network, I want to welcome you to this special episode of ADA Live. I'm Barry Whaley, I'm the director at the Southeast ADA Center and as a reminder listening audience, if you have questions about the Americans with Disabilities Act, you can use our online forum anytime at [adalive.org](http://adalive.org).

On APR 7, 2021, after two years of deliberation, the Eleventh Circuit Court of Appeals reversed a Florida federal district court ruling in Gil v. Winn Dixie. The Eleventh Circuit found that Winn Dixie's website was not a place of public accommodation as they interpret Title III of the ADA. The court also found the website did not pose a tangible barrier to the plaintiff, Juan Carlos Gil, in order to have access to goods, services, privileges, or advantages of Winn Dixie's physical stores.

In their decision the Eleventh Circuit ruled that although inaccessibility online can be a significant inconvenience, the supermarket chain, Winn Dixie, cannot be found liable under Title III of the ADA for having a website that is inaccessible to people with disabilities who use screen reading software. This decision has implications not only for blind people or people with low vision, but it also impacts people who are deaf or hard of hearing, as well as barriers in digital access for all people with disabilities.

Here to discuss the impact of that decision, we're pleased to have Mark Riccobono, the President of the National Federation of the Blind, Howard Rosenblum, CEO of the National Association of the Deaf, and Bruce Sexton, who is the lead plaintiff in National Federation for the Blind v. Target. Joining us today, Dr. Peter Blanck, chairman of the Burton Blatt Institute at Syracuse University. Again, welcome to ADA Live and Peter, I'll turn it over to you.

**Peter Blanck:** Thank you, Barry. It really is a pleasure to be here with these panelists. I would say it's a family reunion, but in this case it's perhaps a little bit more of a wake. We are dealing with a recent court decision as you have discussed, Barry, and my journey in this area goes back 30 years when I knew Howard with hair when he was working with Newton Minnow and myself at the Annenberg Foundation on this issue. I knew Mark in NFB when I was testifying before Congress on this very issue, at the same time that Henry Heighs Committee was trying to impeach or did impeach President Bill Clinton.

Soon after, I met a young student at Berkeley, Bruce Sexton, and was honored to be co-counsel and play a small role in the seminal case representing the National Federation of the Blind v. Target stores. The lead counsel in that case was a dear friend of all of ours who has passed away, named Larry Paradis, who was a stellar disability rights lawyer at

Disability Rights Advocates. I subsequently wrote a book called Equality, as a professor, talking about these issues and after the year 2000, 2014. Evidently, I published but perished in this case because besides my mother, probably very few people would buy a book by Cambridge University Press on web access for people with disabilities written by a professor.

Today, we're here to react to and discuss the impact of this Gill case, but taking it also in the broader context in which much progress has happened, in which I also acted for with Larry Paradis, I should have mentioned, the Greater Los Angeles Association for the Deaf v. CNN on a similar sort of case. Again, co-counsel with brilliant lawyers fighting for the right to web access for individuals with disabilities. I want to get right into it and I was going to start with Mark Riccobono and simply put Mark, and I will ask all the panelists about this as well, where are we at? What do you think of this decision? In my view, it's not the death knell of course for this issue, but we have a lot of work to do, where are you and NFB at today on this issue?

**Mark Riccobono:** Thank you, Peter. I'll make it really simple. It's outrageous. It's outrageous and the National Federation of the Blind, we often say that we lose battles but we don't lose the war. You've already alluded to the fact that we as the Organized Blind Movement have been involved in this for decades now. This particular ruling is outrageous, recognizing that this is 2021, not 1921 and we're in the middle of a worldwide pandemic. The idea that the website, which permits you to stay at home, in the safety of your own home, that not being able to access the website is merely an inconvenience is completely, completely out of touch with reality. Obviously, besides disagreeing with the legal facts, we think just in terms of being in touch with the real authentic experience of people with disabilities and our role in society in 2021, it's outrageous.

The Federation, we're going to put our energy, imagination, time into helping to get a different ruling in this regard. More than that, we also recognize that Winn Dixie itself as a major corporation has spent more money on this litigation and fighting accessibility than they would have needed to in making their website fully accessible to people with disabilities. We encourage everybody to recognize that they have placed their money

where their values are, we would encourage people to boycott Winn Dixie on that basis. In addition, more than the courts, we need the United States Congress to act, we need Congress to affirmatively adopt into law the idea that the internet, websites are places of public accommodation and that reflects the era that we're in and we need accessibility to be the standard for the internet and websites and commerce and education, just as we have done in this nation for physical places.

**Peter Blanck:** Thank you, Mark. Howard, for as long as I've known you, which is a pretty long time now, you've been at the forefront of this issue, leading the charge. I would ask you the same question that I put to Mark from the perspective of yourself and your organization, and your community.

**Howard Rosenblum:** Certainly. Thank you for allowing me to participate in this vital discussion with respect to the very recent decision on the part of the Eleventh Circuit, which has devastated any progress that we have gained in terms of the electronic age for access to the web. Now, if I may go back a little bit I agree with you, Mark, outrageous is the word I would use to describe this decision. It is a very narrow and isolated opinion and with selective use of the terminology. Not only that, it ignores the rest of the ADA, it ignores the spirit and intention of the law itself. Thinking that Congress has to create an amendment or change an existing law if they want to have a remediation, it's outrageous.

You're correct. We're in a pandemic, people are housebound, they can't access physical environments, they're isolated. This approach to life is a complete disconnect to the current world in which we live. This opinion, two years back, that we've discussed, after the pandemic ... It's like they're making a decision for a world in which there is no pandemic, which is just unthinkable. The NFB is correct. This is a place of public accommodation, this is a law that is standing in statute, they don't need to amend or change anything. It doesn't make a lick of sense. The expectation that they would do so is a grievous error.

In saying so, Mark has indicated, we cannot continue to petition Congress every time we get a decision that we don't agree with to change the law that would bar our accessibility. I think that President George Bush said when we signed the Americans with Disabilities

Act, "Let the shameful wall of isolation and the barrier, let that barrier come down." This opinion is a new shameful wall that has been constructed in an electronic format.

**Peter Blanck:** Thank you, Howard. We'll come back to that. Very important remarks from two leaders of major national disability organizations. Let's take a different tack. Bruce Sexton, you were a young man getting through Berkeley, fine university, as a young man who was blind and stood up against Target stores for your right 25 years ago, to access the web. Why did you do that, Bruce, then and what do you think of what's going on today?

**Bruce Sexton:** Thank you, Peter. Back then I filled out a survey about accessible websites or on whether the websites were accessible and I was ultimately from that survey asked whether I wanted to participate in the Target case with the National Federation of the Blind. For me, it was an easy decision because I wanted to not just help me to gain access to the web but also to help many people gain access. It was explained to me by Larry Paradis and other great lawyers like him that by taking on a giant store like Target, it would encourage other stores, not only stores, but universities and the web in and of itself, to take notice. I was very excited to be a part of a movement to create a more accessible world for disabled people and the blind because accessibility to the web has now become more than just accessibility to the blind, but to all kinds of disabled folks who can't use keyboards or mice and that sort of thing.

People are now, because of the Target lawsuit which was seminal at the time, it was never done before successfully, we were able to propel that sentiment of accessibility and now people like my brother and sisters and lots of folks are in jobs of web accessibility, getting paid good salaries to make sure that companies reduce their risk to other lawsuits. They're also saying that it's just the right thing to do. Banks and Google and Amazons of the world did take note of the Target suit. Now that this decision is coming down, it's appalling because that accessibility can be set back. Of course, we do hope that Congress acts, we hope that perhaps the Supreme Court would take and agree with other decisions that are more favorable, but at the same time, right now what we need is to

have a solid idea in the law that says that web accessibility is as important as we know it is.

When I was part of the Target suit, also, I was asked by the lawyers to try using the telephone to make an order on Target. It takes a lot longer to be on a telephone conversation, to ask detailed information. The representative was not able to spend as much time as I needed to, to discover the products, to understand what they look like, whether it was pants or shirts, whether they fit, whether it was a right color and all of that sort of thing. I've noticed recently too, when you're on the phone it says, for a faster, easier experience go to the web.

It's a way to experience life in a much more positive way, including the ability to ... I have two kids and if I'm on the web and I'm doing some shopping, I can leave my computer for a couple of minutes, attend to my kids and then come back at any time, continue to add things to my cart, to link the information that I need while I'm at the convenience of my home during this pandemic, but also at any time. It's just a more convenient, stable 24-hour. The web is very patient, it doesn't have to count how much time I am using it and that sort of thing. It's a very permanent thing.

**Peter Blanck:** That's excellent, Bruce, thank you. You're going to have more time to speak but I want to make another rotation here. Obviously, Mark, we're embedded now in a complicated legal strategy as well for your members, NAD's members. Essentially, the Eleventh Circuit has held that the web in and of itself is not covered by the ADA Title III in this case, the Target case, Ninth Circuit, there must be a nexus to a physical place, the First Circuit and arguably the Seventh Circuit, no nexus. What's your strategy, Mark, going forward? What are you hearing from your members? What are your short term and longer term efforts going to be to rectify this?

**Mark Riccobono:** Well, it's a great question. I'm not going to take it from the legal point of view obviously. We in the National Federation of the Blind have continued to press for rulings wherever we can get them that in fact websites, nexus or no nexus should be accessible and I agree with Howard that Americans with Disabilities Act, in our mind, this issue is covered based on the role that websites and eCommerce play in today's society.

For us, it's a multi-pronged strategy and I want to take a second to call out Target because we've called out the lawsuit, but we actually need to take a step back and acknowledge that Target has flipped the script. They have made accessibility a core part of what they're doing online and in their stores.

A perfect evidence is my wife, who is blind, she's a Target fanatic so too much of my yearly income goes to Target. That's true for a lot of people and that's because they have made people with disabilities ... they've recognized and made that a target audience for them. Kudos to Target for taking what was a tenuous situation and a real battle and they've made it positive. That is part of our strategy. We're going to continue to work with corporations, schools, other organizations that really recognize that people with disabilities are part of their constituency and that having accessible websites, that's a priority for them.

We're going to continue to promote the best practices in how to make sure that the internet is accessible to people with disabilities, continuing to pursue those avenues in the courts as well, continuing to help university training programs that are training people to go into the technology field to realize that accessibility is about good design, it's not about fixing something later. Just like we do in buildings, you build a website with accessibility the first time, it's going to be accessible. The final thing is, although we do believe that the Americans with Disabilities Act covers this space, we do feel it's important for Congress to take affirmative action to pass a law that says, websites, mobile apps, other online applications do have to be accessible to people with disabilities and to help promote the WCAG standards, which have done a great job of giving people guidance, and to use that as a baseline for really making it clear from all aspects of our democracy that people with disabilities need to be included in the online commerce of our nation.

**Peter Blanck:** Thank you, Mark. Howard, I think I know we share a common mentor, Newton Minnow, who has always said to me what a lot of people say, "You can do well by doing right." Here, your community has a totally vested stake in this. You can talk about, of course, the CNN and other cases, but where are you going now with your members in partnership with NFB on this issue?

**Howard Rosenblum:** Excellent. Firstly, I would like to ask Mark, if he is able to maybe earn a commission from his wife's shopping. Maybe that would go toward their accessibility budget, if you could pay that back. Anyway, all deaf, blind shoppers that should go ... a commission of that should go toward accessibility. I share many, of course of these sentiments. As far as NAD goes, we have the Netflix seminal case in our back pocket for web streaming and captions. Certainly, there are many deaf people who enjoy those services and feel very vested in them because of the necessary captions. Streaming movies, unlike physical DVDs, are not always captioned and the NAD asked that that be accommodated, that all streaming content would be captioned and they indicated that they did not have to do that.

Secondly, that it was just too hard. Analog captions would not port to a digital conversion and so it was too expensive and nigh unto impossible. We brought evidence, we brought technology, we brought solutions on ways that this could happen but they remained staunch in their position. The law firm that we used was with DREDF, D-R-E-D-F, and the law firm ... Ultimately, a lot of those lawyers moved on to CRE. Among the three legal counsels, we were able to bring a suit against Netflix, realizing that of course, we couldn't do it in a given ... they didn't have a physical operation, we couldn't do it in a jurisdictional way but the First Circuit was where we decided to go ahead and file, and we were one of the first to argue and to win.

The fact that there is no physical nexus whatsoever, they're entirely web-based and if you take a look at Winn Dixie, the implication there is that there is a physical place which would provide goods and services, benefits to customers, that are tangible and that should be accessible, but tangible and physical are not necessarily the same thing. In our Netflix case, they provided a suite of services, goods, services, sales entirely web-based and that's the future, if I may. After we won Netflix, every other web streaming organization, or we'll call them business, were on notice and agreed 100% that captions were the order of the day. That was 10 years ago, well, nine years ago.

At this stage, were it not for Netflix, all the deaf people who have been housebound now during COVID, would not have been able to avail of any of the streamed content. That

Netflix case set the stage and impacted the world and deaf people in other countries as well have indicated that now they can use Netflix in their own respective countries that hadn't provided captioned content. Again, this is a seminal case, I think the strategy going forward is to rely on the First Circuit. We encourage everyone, everyone, if you're talking about web accessibility First or maybe as a backup Second Circuit, focusing entirely on building a record of cases. If you think about it, winning in the Second Circuit would cover that because honestly the web is international.

It would cover the whole of the country because it's ... regardless of First, Second, Ninth or what have you, it's an advantage to us and it should be our collective strategy to focus on the most favorable outcomes. That should be our focus. Harvard and MIT are in the First Circuit, that should be a strategy to pursue those kinds of universities also providing accessibility in their own respective web content.

**Peter Blanck:** Thank you, Howard. Bruce, one of my proudest days was when you asked me to hug you and hand you your diploma, your law diploma, on your graduation. Little did we know 20 years later, when you were the named plaintiff. It's, of course, a very distressing decision. In your daily life today, are you still experiencing barriers to the web?

**Bruce Sexton:** Absolutely. Unfortunately, there are so many websites that are not accessible or documents on websites that are not accessible, or information that could be on the internet but it's still paper based that would be a lot better if it were on the web. For example, forms from the school district for my kids, I can download them from the web but then I can't actually fill them out. If they were web-based with accessibility in mind, I would be able to fill them out. In many, many areas of life a lot of people are more open to changing things on their websites, but I still do find barriers that prevent me from fully participating in the world.

I don't want to harp on it too much but filling in forms is a huge ... whether it's doctor's offices, or schools, or filling out credit cards, or getting medication like in the Winn Dixie case, or even trying to get tested for COVID or the vaccine, the web experience is horrendous in some of those instances.

**Peter Blanck:** Well, thank you, Bruce. It's really important to emphasize the day-to-day grassroots difficulties that are going on. Mark, this is the lightning round, the last three questions. I'm thinking in listening to you amazing advocates, scratching my head, why in this day and age is corporate America across the board not on board with this? You mentioned also a more universal right to the web, which I believe Canada and some other countries have as well as embedded in the UN Convention on the Rights of Persons with Disabilities, why in this day and age, with the consumer power of the NFB, and the NAD, and a host of other organizations that are not here today, we're still having these battles?

**Mark Riccobono:** The progress we have made is significant across the board, but the fundamental reason that we're having this conversation is the same one that the National Federation of the Blind, National Association of the Deaf, other disability advocates have been working for now for ... against, have been working against now for decades, which are really the low expectations that exist and really the low standard that is set in terms of how people with disabilities are expected to participate in all aspects of this nation. The fact of the matter is that people with disabilities are in too many places, even today, an afterthought. Howard mentioned Harvard and MIT and it brought me back to the fact that 10 years ago, we got a report, a federal commission through the Department of Education, to recommend that there be a standard that tells universities how to make all of their information technologies accessible to people with disabilities.

That was 10 years ago, we got that federal commission to issue that as their number one priority for Accessible Instructional Materials. Imagine if that would have actually happened. What would have happened during the pandemic? So many schools would have been ready for that digital conversion, frankly, for all students but certainly for students with disabilities who disproportionately got shut out of online learning for all sorts of reasons. It comes down to the fact that at the end of the day, corporations, schools, people with disabilities are an afterthought and we need to continue to fight, continue to push forward to get people with disabilities to be thought of as part of the group from day one.

What we know and especially is true with digital technology but across the board, when people with disabilities are included from the beginning, the solutions are better, they're more innovative and they work better for everyone. That's truly the fight that we've all been in from the beginning, is getting the public to understand disability in the authentic way we do and getting that to be baked into the programs we do. That's the commitment that we continue to have in the National Federation of the Blind. I'm glad we have so many allies and advocates in the disability rights community pushing on this together.

**Peter Blanck:** Thank you, Mark. I would ask you, Howard the same question but I'm also struck of the intersectional nature of this issue as well, in terms of people of color, people living in poverty, all disenfranchised and oppressed groups, immigrants in our society, many of whom have disabilities and how this hurtful approach cuts across all these dynamics. Perhaps you can react to that and also my earlier comment as well, the depth of this community.

**Howard Rosenblum:** Absolutely, Peter. It remains a challenge to be sure. I think that part of the issue in this country right now is ... Well, there's the fact that the web is not accessible and there's also the fact that access to the internet in general is not available to many marginalized groups, regardless of their disability status or not. This should be part of a systemic movement in the United States just like utilities, electricity, water, housing itself. There should be a basic human right understood, of access to the internet for purposes of education, medical care. As we see, so much is happening through the internet. Not able to access them, it's just not an equitable situation. The mindset, the system itself, should be completely accessible.

There now exists, with COVID another burden for people who are deaf and hard of hearing. As you see this platform here, it doesn't have the greatest of embedded auto captions. Many platforms don't have a built-in way to have an interpreter docked on the screen, which is what many deaf students in particular are going through in high schools and post secondary education just to have visibility on everyone on screen. In terms of corporations, I do agree with Mark, that there are several strategies at hand here. We have to bring attention into the public mind that Winn Dixie has invested a fortune in

fighting web access when all they had to do was fix a website so that their customers could use it.

Why would any corporation resist such a thing? It makes no sense whatsoever. As far as the NFB and the NAD is concerned and all the other disability advocacy organizations, we can identify actions to be taken against these strident postures that people have, and work in tandem with each other so that we can not only fix this, but fix other matters as well. There's social injustice, political correctness and all the other things that really get down to respect and the money and the power of people with disabilities. Hopefully, we can work together to highlight the bad actors and encourage the community across the board to certainly give attention to this shameful matter that has degraded these communities' access. Congress, the police process, the litigation process, all of these things should come to be brought to bear against this kind of oppression.

**Peter Blanck:** Thank you, Howard. Bruce, I'm happy to give you the brief last closing of your choice, and then we shall take a few questions very briefly and have some closing remarks by Barry and his team. Incredibly stimulating discussion by leaders in this community that I hope will be thought about very deeply. Bruce?

**Bruce Sexton:** Thank you, Peter. What I want to say is that disabled folks need to continue to demand the right to accessibility on the web because that's a way of life. It's a way to gain access to the outside world, a way to gain access to our medical care, to education, to religion, or whatever it may be that we have. We cannot stand for the Winn Dixie cases of the world because we cannot be barred from living our lives. It's 2021, it is time for us to have equal access.

**Peter Blanck:** Thank you, Bruce. I know I'm here in Syracuse, New York today and I'm heading to Wegmans for my grocery shopping next. It's been a very important and stimulating discussion. It's not every day that I have the great honor to really engage with leaders such as Mark, Howard and Bruce. We very much look forward to continuing this dialogue across disability, across individual, from an intersectional and deep perspective and I want to thank you very much today, the three of you, for participating at this

beginning salvo. I turn it now to my colleague, Barry Whaley, who may have some closing remarks and/or questions from our listeners. Barry?

**Barry Whaley:** Thank you, Peter, for being our host today. Thank you to Howard, Mark and Bruce for being our guests. Thank you very much for being so generous with your time to be on ADA Live. Howard Rosenblum is the CEO of the National Association of the Deaf, Mark Riccobono, President of the National Federation of the Blind, and then Bruce Sexton, who was the plaintiff in NFB v. Target. Thank you again for being with us. If you want to learn more about the National Federation of the Blind, please visit their website at [nfb.org](http://nfb.org). If you want to learn more about the National Association of the Deaf, their website is [nad.org](http://nad.org). I also want to thank our listeners for joining us for this special episode and to remind them that to get access to all ADA Live episodes on our website, at [adalive.org](http://adalive.org). All those episodes are archived with streamed audio, accessible transcripts and resources.

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**4 Wheel City:** (rapping)

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