No. 02-16163-BB

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ACCESS NOW, INC., AND ROBERT GUMSON,

Plaintiffs - Appellants,

v.

SOUTHWEST AIRLINES CO.,

Defendant - Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF OF AIR TRANSPORT ASSOCIATION OF AMERICA, INC., AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE

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CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

Amicus Curiae, Air Transport Association of America, Inc., pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, hereby certifies that the following persons or entities may have an interest in the outcome of the litigation:

1. Access Now, Inc.

2. American Airlines, Inc.

3. American Association of People With Disabilities

4. American Council of the Blind

5. American Foundation for the Blind

6. Air Transport Association, Inc. (a non-profit corporation that offers no stock; there is no parent corporation or publicly owned corporation that owns 10% or more of this entity's stock; its members are Airborne Express, Alaska Airlines, Aloha Airlines, America West Airlines, American Airlines, ATA Airlines (formerly American Trans Air), Atlas Air, Inc., Continental Airlines, Delta Air Lines, Inc., DHL Airways, Emery Worldwide, Evergreen International Airlines, Inc., FedEx Corporation, Hawaiian Airlines, JetBlue Airways, Midwest Airlines (formerly Midwest Express), Northwest Airlines, Polar Air Cargo, Southwest Airlines Co., United Airlines, Unites Parcel Service Airlines, and US Airways; its associate members are Aeromexico, Air Canada, Air Jamaica, KLM Royal Dutch Airlines, and Mexicana).

7. Bandstra, The Honorable Ted. E.,
United States Magistrate Judge

8. Barnes, Alison C.

9. Bazelon Center for Mental Health Law

10. Behar, Howard R.

11. Behar, Howard R., P.A.

12. Berg, David

13. Boalt Hall School of Law

14. Buhr, Cindy

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17. Deitz, Matthew

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19. Disability Rights Advocates

20. Disability Rights Education and Defense Fund

21. Englert, Roy T., Jr.

22. Equal Employment Advisory Council

23. Estevez, Anne

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26. Goldstein, Demchak, Baller, Borgen & Dardarian

27. Gumson, Robert

28. Konecky, Joshua

29. Lisitzky, Sharon A.

30. Morgan, Lewis & Bockius, LLC

31. Mulligan, Deirdre

32. National Association of Protection and Advocacy Systems

33. National Association of the Deaf

34. National Federation of the Blind

35. Pappas, Gary M.

36. Rasco, Reininger, Perez & Esquenazi, P.L.

37. Reininger, Steven R.

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43. Schwartzman, Emmet J.

44. Seitz, The Honorable Patricia A.,
United States District Court Judge

45. State Street Bank & Trust

46. Southwest Airlines Co.

47. University of California at Berkeley

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STATEMENT OF *AMICUS CURIAE*'S IDENTITY, INTEREST IN THE CASE, AND AUTHORITY TO FILE ITS BRIEF

Air Transport Association of America, Inc. (ATA), is a non-profit corporation that represents the airline industry. It is the principal trade and service organization of the major U.S. air carriers, including Southwest Airlines Company (Southwest).[1] In that capacity, ATA regularly participates in litigation that affects all aspects of commercial air transportation – including air safety and air carrier business operations – on behalf of its members.

The outcome of this appeal will directly and materially affect ATA's members because a holding that Title III of the Americans with Disabilities Act (ADA) applies to airlines and their websites could create liability for air carriers under the ADA (despite an express exclusion in the statute that applies to them) and could render them subject to regulation under two overlapping but inconsistent disability discrimination statutes.

All parties to this action have consented to the filing of this brief by ATA.

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[1] ATA's other members include Airborne Express, Alaska Airlines, Aloha Airlines, America West Airlines, American Airlines, ATA Airlines (formerly American Trans Air), Atlas Air, Inc., Continental Airlines, Delta Air Lines, Inc., DHL Airways, Emery Worldwide, Evergreen International Airlines, Inc., FedEx Corporation, Hawaiian Airlines, JetBlue Airways, Midwest Airlines (formerly Midwest Express), Northwest Airlines, Polar Air Cargo, United Airlines, United Parcel Service Airlines, and US Airways. Aeromexico, Air Canada, Air Jamaica, KLM Royal Dutch Airlines, and Mexicana are associate members.

STATEMENT OF THE ISSUE

Are air carriers or their websites – neither of which exists at any identifiable physical place – "places of public accommodation" within the meaning of Title III of the ADA, 42 U.S.C. § 12181 *et seq.*?

SUMMARY OF THE ARGUMENT

Title III of the ADA prohibits discrimination in the provision of the goods, services, facilities, privileges, advantages, or accommodations of any *place* of public accommodation. According to the statute and implementing regulations, a place of public accommodation is a physical place. But neither the alleged denial of meaningful access to southwest.com, Southwest's website, nor plaintiffs' purported inability to use Southwest's travel services involves a physical place. Indeed, the ADA explicitly *excludes* air carriers from the statute's requirements. Moreover, even if plaintiffs could identify a public accommodation owned, leased, or operated by Southwest, plaintiffs' claims of discrimination lack the requisite nexus to that physical place.

Unlike the ADA, the Air Carrier Access Act (ACAA), 49 U.S.C. § 41705, covers claims of disability discrimination by a prospective or actual air traveler. The statute and its implementing regulations comprehensively address all aspects of air travel by persons with disabilities, from making reservations to assistance with

boarding and seating. Thus, Congress excluded air carriers from the ADA to avoid the redundancy and inefficiency that would result from exposing air carriers to regulation under both statutes. Because the ACAA is specifically tailored to the air transportation industry (and the ADA is not) the ACAA is the only statute under which a disabled traveler may seek redress from an airline.

ARGUMENT

I. THE DISTRICT COURT'S ORDER DISMISSING THE COMPLAINT SHOULD BE AFFIRMED BECAUSE PLAINTIFFS DO NOT ALLEGE THAT THEY WERE DEPRIVED OF THE GOODS OR SERVICES OF ANY PLACE OF PUBLIC ACCOMMODATION

Title III of the ADA, in pertinent part, provides as follows:

> 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). Thus, on its face, the statute applies only to discrimination in the receipt of the offerings "of any place of public accommodation." *Ibid.* Here, plaintiffs have alleged that they were denied the services and advantages of southwest.com and Southwest itself. But neither the airline nor its website is a "place of public accommodation." Plaintiffs therefore cannot state a claim under Title III.

A. Neither Southwest.com Nor Southwest Is A Place of Public Accommodation

In their complaint, plaintiffs allege that the website, southwest.com, is itself a place of public accommodation. That theory having been (properly) rejected by the district court (R1:24-7)[2], plaintiffs have retreated from this position and now argue that Southwest itself is subject to Title III because it operates a "travel service"– a type of public accommodation listed in the statute. PB 19 (citing 42 U.S.C. § 12181(7) (G)). Regardless of which theory plaintiffs advance, their claim fails.

1. Under the Plain Meaning of the ADA, a Public Accommodation Is a Physical Place

The starting point for the interpretation of any statute is the statutory text. If the language at issue is unambiguous, no further inquiry is required. *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 340 (1997); *Rendon* v. *Valleycrest Prod., Ltd.*, 294 F.3d 1279, 1284 n.6 (11th Cir. 2002). The plain language of the ADA defeats plaintiffs' claim.

The ADA defines "public accommodation" as one of the twelve listed types of private entities or venues, including such places as hotels, restaurants, theaters,

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[2] ATA adopts the form of citation to the record used by Southwest in its brief: "Rx:y-z", where x is the volume, y is the document number, and z is the page number. When referring to briefs filed by the parties in this appeal, ATA uses "PB" to refer to plaintiffs' initial brief and "DB" to refer to Southwest's brief.

grocery stores, laundromats, and amusement parks. See 42 U.S.C. § 12181(7).[3] Each of the twelve categories lists "physical place[s] open to public access." *Parker* v. *Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1014 (6th Cir. 1997) (en banc). In fact, the majority of the entities listed exist only at physical locations. Significantly, none of the twelve categories includes or references an internet site, see *ibid.*, as plaintiffs concede. PB 17 ("[t]he ADA does not specify a website as a place of public accommodation").[4]

Consistent with the statutory text, numerous courts have held that the term "public accommodation" in Title III means a physical place. *Weyer* v. *Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114-15 (9th Cir. 2000); *Ford* v. *Schering-Plough Corp.*, 145 F.3d 601, 613 (3d Cir. 1998); *Parker*, 121 F.3d at 1010-11; *Stoutenborough* v. *Nat'l Football League*, 59 F.3d 580 (6th Cir. 1995). As the Third Circuit has stated, "[t]he plain meaning of Title III is that a public accommodation is a place." *Ford*, 145 F.3d at 612.

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[3] A complete list of the categories set forth in Section 12181(7) is included in Southwest's brief. DB 11-12. This list of categories is exhaustive. 28 C.F.R. Pt. 36, App. B at 661.

[4] As defendants persuasively argue in their brief (DB 15-16), Section 508 of the Rehabilitation Act, 29 U.S.C. § 794d, requires federal agencies and their contractors to make their websites disabled-accessible. The absence of legislation similar to Section 508 that applies to the private sector is a strong indication that Congress has not yet required private entities to take this step.

Although this Circuit has not directly addressed the question whether a public accommodation must be a physical place, several decisions of this Court are consistent with such an interpretation of the ADA. In *Stevens* v. *Premier Cruises, Inc.*, 215 F.3d 1237, 1241 (11th Cir. 2000), this Court stated that the ADA contains a "comprehensive definition" of "public accommodation" that encompasses "physical location[s]." See also *Rendon*, 294 F.3d at 1284 (theater is a "concrete space" and therefore place of public accommodation). Indeed, interpreting public accommodation to mean only entities with physical locations is consistent with the host of examples of public accommodations provided in Section 12181(7), "all of which refer to places." *Ford*, 145 F.3d at 612.

Moreover, even if the statutory definition of public accommodation did not dispositively resolve this issue, an application of established interpretive canons mandates the same conclusion. Under the doctrine of *noscitur a sociis*, an ambiguous word or phrase should be interpreted by reference to the accompanying words of the statute "to avoid the giving of unintended breadth to the Acts of Congress." *Wash. State Dep't of Social and Health Servs.* v. *Guardianship Estate of Keffeler*, 123 S. Ct. 1017, 1025 (2003) (citing *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1967)). The doctrine of *ejusdem generis* similarly requires that, "where general words follow specific words in a statutory enumeration, the general words are

construed to embrace only objects similar in nature to those objects enumerated by the specific preceding words." *Ibid*. (quoting *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 114-15 (2001)). Thus, even if certain entities listed in the definition of public accommodation could be construed broadly enough to include non-physical locations, the doctrines of *noscitur a sociis* and *ejusdem generis* would require a more restrictive reading.[5] These principles therefore support the conclusion that only a physical place can be a public accommodation. See, *e.g.*, *Parker*, 121 F.3d at 1014 (relying on doctrine of *noscitur a sociis* to conclude that a public accommodation is a physical place).[6]

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[5] Plaintiffs criticize the district court's application of the doctrine of *ejusdem generis* on the ground that it resulted in a distortion of the "common and ordinary meaning" of the term public accommodation. PB 28-29. In response, Southwest correctly notes that the district court's holding – that a public accommodation is a physical place – reflects that meaning exactly. DB 13-15.

[6] The First and Seventh Circuits have both indicated that the term public accommodation is not necessarily limited to physical places. See *Carparts Distribution Ctr., Inc.* v. *Automotive Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994); *Morgan* v. *Joint Admin. Bd.*, 268 F.3d 456, 459 (7th Cir. 2001). These decisions are misguided in that they find ambiguity in plainly unambiguous statutory language and fail to apply the doctrines of *noscitur a sociis* and *ejusdem generis* in interpreting the statute. See *Parker*, 121 F.3d at 1014 (criticizing *Carparts* for "disregard[ing] the doctrine of statutory construction, *noscitur a sociis*"). Moreover, neither Circuit has addressed the regulation's definition of a public accommodation as a "facility," which in turn is defined to include only physical spaces. See I.A.2, *infra*.

2. The Regulations Issued Under the ADA Confirm that a "Place of Public Accommodation" Is Part or All of a Piece of Real or Personal Property

The regulations promulgated by the Department of Justice (DOJ) offer further support for the conclusion that the ADA applies only to entities that are physical locations. Congress explicitly directed DOJ to issue regulations implementing Title III. See 42 U.S.C. § 12186(b). "[T]he Department's views," therefore, "are entitled to deference." *Bragdon* v. *Abbott*, 524 U.S. 624, 646 (1998) (deferring to DOJ's definition of disability under Title III). See also *Johnson* v. *Gambrinus Co./Spoetzl Brewery*, 116 F.3d 1052, 1060-61 (5th Cir. 1997) (deferring to DOJ regulation addressing use of service animals in places of public accommodation).

In addition to adopting the statutory definition of "public accommodation," the regulations define "place of public accommodation" – a term used in Section 12182(a) but not included in the definitions set forth in Section 12181. 28 C.F.R. § 36.104 (2003).[7] According to the regulations, a place of public accommodation is

[7] The use of the terms "public accommodation" and "place of public accommodation" has generated some confusion. See, *e.g.*, *Bowers* v. *NCAA*, 9 F. Supp. 2d 460, 483-84 (D.N.J. 1998) (commenting on the confusion). The apparent source of the confusion is that the anti-discrimination provision uses the phrase "place of public accommodation" twice but does not include a definition for that term. See 42 U.S.C. § 12182(a). The statute defines only the term "public accommodation" (*id*. § 12181(7)), although the regulations define the term "place of public accommodation." 28 C.F.R. § 36.104. For purposes of this case, the distinction between the two terms – to the extent there is any – is irrelevant.

a "facility, operated by a private entity, whose operations affect commerce and fall within at least one of the * * * categories [listed in 42 U.S.C. § 12181(7)(A-L)]." 28 C.F.R. § 36.104. A facility is "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, structure, or equipment is located." *Ibid*. Thus, taken together, the regulations define "place of public accommodation" to mean part or all of a piece of real or personal property that is owned, leased, or operated by a private entity and that fits within one of the statute's twelve specified categories. Consequently, even if the Court finds that the meaning of the statute is unclear, the regulations – which are entitled to deference – leave no room to doubt that the term place of public accommodation means a place with a physical location, such as a building or other structure, that fits within one of the statute's twelve categories.

3. Southwest.com Is Not a Public Accommodation Because It Exists At No Physical Location

Plaintiffs' argument – advanced in the district court and seemingly abandoned on appeal – that southwest.com itself is a public accommodation is incorrect because southwest.com does not exist in a physical place. As the Supreme Court has

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Plaintiffs' claim fails under either definition.

recognized, websites are "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." *Reno* v. *American Civil Liberties Union*, 521 U.S. 844, 851 (1997) (emphasis added). Users of the World Wide Web "search for and retrieve information stored in remote computers* * *. In concrete terms, the Web consists of a vast number of documents stored in different computers all over the world." *Id*. at 852. Southwest.com is a part of this "unique medium" consisting of remote computers and documents that exists in no definable physical space. Therefore, it is not a public accommodation within the meaning of Title III, nor is it a place of public accommodation as defined in the regulations.

4. Southwest, a Corporate Entity, Is Not A Public Accommodation

Southwest Airlines is not a public accommodation because it, as a corporate entity, is not a physical place. As numerous federal courts have held, neither a business nor an organization is itself a public accommodation within the meaning of Section 12182(a). See *Stoutenborough*, 59 F.3d at 583 (defendants, including the National Football League, its member clubs, several broadcasting companies, and multiple television stations, are not public accommodations); *Matthews* v. *NCAA*, 79 F. Supp. 2d 1199, 1205 (E.D. Wash. 1999) (National College Athletic Association is not a public accommodation); *Bowers* v. *NCAA*, 9 F. Supp. 2d 460, 483 (D.N.J.

1998) (NCAA not a public accommodation because it is not a place); see also *Clegg* v. *Cult Awareness Network*, 18 F.3d 752, 755 (9th Cir. 1994) (organization itself cannot be a "place of public accommodation" under Title II of the Civil Rights Act of 1964). In addition, under the ADA regulations, a corporate entity is not a place of public accommodation because it is not a "facility" – *i.e.*, a building, site, complex, or other real or personal property.

Plaintiffs nonetheless argue that Southwest is "one of the ADA's covered accommodations" because it is a "travel service" – one of the entities listed as a type of public accommodation in Section 12181(7)(F). To make this argument, plaintiffs cite only the dictionary definition of "travel agency" – a different term than "travel services," the term used in the statute. PB 13. But the plain language of the statute defeats plaintiffs' argument. Subsection F, which describes one of the categories of public accommodations, lists in its entirety: "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." 42 U.S.C. § 12181(7)(F). Thus, when the term "travel services" is read with the rest of the other offices and service establishments listed in the same category, with due regard to the *noscitur* and *ejusdem* canons, it is clear that it is limited to physical establishments

that provide travel services, and does not encompass entities that provide travel services through other means.

5. Southwest's Planes and Physical Locations in Airport Terminals Are Not Public Accommodations

As an alternative theory, plaintiffs suggest that Southwest is subject to the ADA because it provides travel services at "particular physical locations at airports." PB 22. But plaintiffs concede in the next sentence that "Title III does not cover privately operated airports or the airplanes themselves." *Ibid*.[8] That concession is fatal to plaintiffs' claim.

Although Title III prohibits discrimination by "specified public transportation" providers, 42 U.S.C. § 12184, it explicitly excludes air transportation from the definition of the term "specified public transportation." 42 U.S.C. § 12181(10) ("The term 'specified public transportation' means transportation by bus, rail, or any other conveyance (*other than aircraft*) * * *.") (emphasis added).[9] Thus, air transportation

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[8] Public airports are also excluded from Title III, but are subject to Title II of the ADA, which applies to public entities. Commercial airports, with few exceptions, are owned and operated by state and local governments.

[9] As discussed in Part II, *infra*, Congress excluded air transportation carriers and facilities from Title III of the ADA because a separate, pre-existing statute – the ACAA – prohibits disability discrimination by air carriers. See 28 C.F.R. Pt. 36, App. B at 592 ("The operations of any portion of any airport that are under the control of an air carrier are covered by the Air Carrier Access Act.").

providers, unlike other public transportation providers, are not subject to Title III. So too for physical facilities used for air transportation. Only facilities "used for specified public transportation" are places of public accommodations. See 42 U.S.C. § 12181(7)(G). Because air travel is not a "specified public transportation," an airline's ticket counters cannot be facilities used for specified public transportation.

Plaintiffs' reliance on Southwest's physical presence in "airports at its destination cities" to establish that Southwest operates a place of public accommodation (PB 21) is therefore misplaced. Indeed, the regulations under the ADA explicitly state that "privately operated airports" are "excluded" from the statutory definition of "places of public accommodation because they are not terminals used for 'specified public transportation.'" 28 C.F.R. Pt. 36, App. B at 592 (1994).[10] Thus, Southwest's ownership or operation of physical locations at airports that it uses to provide air transportation services cannot give rise to a claim under the ADA because such facilities are not places of public accommodation.

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[10] The regulations clarify an additional point. Places of public accommodation located within airports, such as restaurants, shops, lounges, or conference centers, are subject to the statute. 28 C.F.R. Pt. 36, App. B at 592. This rule states only that, when a business fits the statutory definition of a public accommodation, it cannot avoid the requirements of Title III simply because it is located on the premises of an airport. It does not, as plaintiffs contend, nullify the effect of the exclusion of air transportation providers from Title III. See PB 22.

B. The Alleged Discrimination Did Not Deprive Plaintiffs of the Goods or Services *of* a Place of Public Accommodation Because There Is No Nexus Between the Alleged Discrimination And Any Physical Place.

Even if plaintiffs could satisfy the place-of-public-accommodation requirement by relying on physical premises owned, leased, or operated by Southwest, they could not demonstrate that the alleged discrimination denied them the equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations *of* that place. The District Court was therefore correct in holding that plaintiffs failed to state a claim because they "failed to establish a nexus between southwest.com and a physical, concrete place of public accommodation." R1:24-11.

This Court requires that a Title III plaintiff allege the required "nexus between the challenged service and the premises of the public accommodation." See *Rendon*, 294 F.3d at 1284 n.8. In *Rendon*, this Court considered whether the fast-finger telephone system used by would-be contestants to qualify for "Who Wants to Be a Millionaire" denied the plaintiffs an opportunity to compete. The parties agreed that the television studio was a place of public accommodation; the only question was whether there was a sufficient nexus between the telephone system – which allegedly discriminated against persons with disabilities – and participation in the game show held at the place of public accommodation. The court held that such a nexus was

present because the telephone qualifying system was the only avenue to competing in the show at the television studio. *Id.* at 1286. In this case, unlike *Rendon*, there is no physical premises like a television studio to which plaintiffs were denied access or participation.

The regulations further state that a public accommodation must not discriminate "only with respect to the operations of a place of public accommodation." 28 C.F.R. Pt. 36, App. B at 607. They also note that application of the public accommodation requirement to the operations of an entity that do *not* involve the place of public accommodation "would exceed the reach of the ADA." *Ibid.*

Plaintiffs attempt such an unwarranted expansion of the ADA in this case. Relying on their (incorrect) argument that Southwest itself is a place of public accommodation, plaintiffs maintain that "there is a sufficient nexus between [Southwest's] physical 'facilities' and their off site internet use to prohibit discrimination due to the extensive use of the internet communication device to provide its travel service." PB 22-23. But that argument misses the point that the alleged discrimination – the alleged inaccessibility of southwest.com – does not preclude access to any physical place covered by the ADA. At most, plaintiffs' allegations amount to a claim that they are unable to purchase airplane tickets in one of several ways offered by Southwest. See *id.* at 20 ("Southwest's internet site is an

'intangible' gatekeeper to promotional/discounted tickets"). But this claim does not allege a nexus between the alleged discrimination and a physical location that meets the definition of a place of public accommodation.

II. THE ACAA – NOT THE ADA – PROHIBITS DISABILITY DISCRIMINATION BY AIR CARRIERS

The explicit omission of air transportation providers and facilities from the ADA, see 42 U.S.C. §§ 12181(7)(G), (10), 12184(a), is alone sufficient to establish that air carriers such as Southwest are not subject to that statute. Yet an examination of the ACAA and its implementing regulations offers further support for the conclusion that the ADA does not apply to entities engaged in the provision of air transportation services.

A. The ACAA Prohibits Discrimination on the Basis of Disability in the Provision of Services by and in Facilities Owned, Operated, or Leased by Air Carriers

The ACAA forbids disability discrimination by air carriers "[i]n providing air transportation." 49 U.S.C. § 41705. Congress enacted the ACAA in 1986 to "creat[e] protection for disabled individuals against discrimination by commercial air carriers," thereby filling a void left by the Supreme Court's holding in *United States Dep't of Transp.* v. *Paralyzed Veterans of America*, 477 U.S. 597 (1986), that the Rehabilitation Act did not apply to air carriers who were not recipients of federal

funding. *Love* v. *Delta Air Lines*, 310 F.3d 1347, 1358 (11th Cir. 2002).

Senator Robert Dole, the principal proponent of the bill that became the ACAA, stated that the bill would reduce restrictions in air travel faced by disabled persons, and that any other restrictions on the activities of air carriers "must be only for safety reasons found necessary by the Federal Aviation Administration." See Paul S. Dempsey, *The Civil Rights of the Handicapped in Transportation: The Americans with Disabilities Act and Related Legislation*, 19 TRANS. L.J. 309, 318 (citing 132 Cong. Rec. 21,771 (Aug. 15, 1986)). To effectuate that purpose, the ACAA, in its first iteration, required the Secretary of Transportation to promulgate regulations "to ensure non-discriminatory treatment of qualified handicapped individuals consistent with safe carriage of all passengers on air carriers." 49 U.S.C. § 1347(c)(3). See also *Deterra* v. *America West Airlines*, 226 F. Supp. 2d 298, 307-08 n.34 (D. Mass. 2002) (discussing the history of the ACAA).[11]

Pursuant to this requirement, in 1990, the Department of Transportation (DOT) promulgated a series of regulations interpreting the ACAA. 14 C.F.R. §§ 382.1-382.65 (1990). Under the regulations, an "air carrier" is one who undertakes "to engage in air transportation". 14 C.F.R. § 382.5. A "qualified individual with a disability" is an individual with a disability (a term that is defined separately) who

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[11] In 1994, the statute was revised and recodified at 49 U.S.C. § 41705.

(1) avails himself of facilities or services offered by an air carrier, (2) offers, or makes a good-faith attempt to offer, to purchase or otherwise validly to obtain a ticket, or (3) purchases a ticket and presents himself at the airport for travel and meets the requirements for travel applicable to all passengers. *Ibid*. Thus, the statute protects prospective and actual air travelers with disabilities with respect to the provision of air transportation.

The regulations' scope is expansive, covering virtually all aspects of an air carrier's operations and physical facilities – but not websites. See 14 C.F.R. §§ 382.1-382.65; see also Aviation Consumer Protection Home Page, Passengers with Disabilities, <http://airconsumer.ost.dot.gov/publications/disabled.htm>. In addition to a general prohibition of discrimination, the regulations require that air carriers make their physical facilities accessible in specified ways. *Id*. § 382.7 (general prohibition of discrimination), § 382.21 (aircraft accessibility), and § 382.23 (airport facilities).[12] The regulations also prescribe the provision of certain passenger services. See *id*. §§ 382.31-382.59. In some instances, the air carrier is prohibited

[12] In the regulations interpreting the ACAA, the term "facility" is defined as "all or any portion of aircraft, buildings, structures, equipment, roads, walks, parking lots, and any other real or personal property, normally used by passengers or prospective passengers visiting or using the airport, to the extent the carrier exercises control over the selection, design, construction, or alteration of the property." 14 C.F.R. § 382.5. Thus, the ACAA applies to physical places owned by air carriers.

from imposing special requirements on travelers with disabilities, see, *e.g.*, *id.* § 382.33 (advance notice may not be required except for specified reasons), and, in others, the air carrier is required to provide certain assistance and services, see, *e.g.*, *id.* § 382.39 (requiring the air carrier to help travelers enplane and deplane upon request). Perhaps most significantly, for purposes of this case, the regulations specify that an air carrier must make its telephone reservation and information system available for persons with hearing impairments through the use of a telecommunications device for the deaf (TDD) service. *Id.* § 382.47. Thus, the ACAA and its implementing regulations plainly speak to accommodations for persons with disabilities in the making of airline reservations – *precisely* the kind of claim plaintiffs assert here.

The ACAA empowers the Secretary of Transportation to investigate complaints that air carriers have violated its provisions. 49 U.S.C. § 41705(c)(1). This "elaborate administrative enforcement scheme" provides DOT and aggrieved individuals several means for redressing alleged violations of the Act. See *Love*, 310 F.3d at 1358 (recognizing the existence of an extensive administrative scheme under the ACAA). In addition, DOT's Aviation Consumer Protection Division (ACPD) takes an active role in combating disability discrimination in air travel by promoting knowledge and awareness of the rights of disabled travelers and by addressing

problems when they arise. The ACPD provides a wealth of information about the ACAA and the rights of disabled travelers in general, which is available on its website, <http://airconsumer.ost.dot.gov/>.

B. Air Carriers Are Not Subject to the ADA Because of the ACAA – Which Is Specifically Tailored to the Air Transportation Industry.

Without mentioning the ACAA, plaintiffs ask this Court to apply the ADA to Southwest alleging that it is a "travel service." PB 13. In so doing, plaintiffs implicitly ask this Court to ignore the ADA's statutory exclusion of air transportation providers and instead to subject such entities to two overlapping and potentially inconsistent statutes and sets of regulations regarding disability discrimination. To adopt this approach would be to introduce confusion and inefficiency into disability discrimination law as it pertains to air carriers.

Congress excluded air carriers from the ADA because the ACAA prohibits disability discrimination in air travel services. See *Love* v. *Delta Air Lines*, 179 F. Supp. 2d 1313, 1323-24 (M.D. Ala. 2001) ("[I]t is clear that Congress did not prohibit air carriers from discriminating against disabled individuals under the ADA because Congress considered that air carriers were already prohibited from doing so by the ACAA.") (citing legislative history), *rev'd on other grounds*, 310 F.3d 1347 (11th Cir. 2002). Nonetheless, if, despite the express exclusion and the legislative intent behind

it, the Court were to extend the ADA's application to air carriers, air carriers would face regulation under two different statutory schemes and by two different agencies – the Departments of Transportation and Justice. Regulating under two different statutory and regulatory schemes would be inefficient, and could potentially force air carriers to comply with competing, and perhaps inconsistent, standards. This inefficiency is wholly unnecessary because the ACAA already achieves what the ADA was designed to address – remedying the problem of disability discrimination.

Perhaps even more significant, however, is the fact that the ADA is poorly suited for the air transportation industry. Unlike the ACAA, which was designed to address disability discrimination in the specific context of air travel, the ADA is general in scope and applies to a variety of public accommodations. See *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 675 (2001) (noting the ADA's "comprehensive character" and "sweeping purpose"). Indeed, if plaintiffs were permitted to assert a claim under the ADA, Southwest (and other airlines) would be exposed to liability under a statute that does not address (indeed, excludes) its conduct and whose regulations do not provide any standards for an airline to follow in order to avoid liability.

In contrast, the ACAA and its implementing regulations take into account considerations unique to the air transportation industry, such as Federal Aviation

Administration requirements and air passenger safety. For example, the DOT regulations address airplane seat assignments and discuss how airlines can accommodate passengers with disabilities without violating FAA safety regulations, including ones regarding emergency exit accessibility. See 14 C.F.R. § 382.37. The regulations also include standards for aircraft accessibility and adopt differing standards depending on the size of the aircraft. *Id*. § 382.21. Additionally, pursuant to the DOT regulations, an air carrier is required to provide specific services for passengers with disabilities but is not required to provide other services. *Id*. §§ 382.39-382.41 (requiring assistance for enplaning, deplaning, and stowage of personal and medical equipment, but not requiring the provision of assistance for feeding, using the restroom, or medical treatment). As mentioned above, the DOT regulations also address the issue of the accessibility of air carrier reservations systems by requiring TDD services. *Id*. § 382.47.

On the other hand, because it is a statute of general applicability, the ADA does not make such distinctions or address the substantial body of federal laws and regulations that apply to the air transportation industry. In short, the ACAA is much better suited than the ADA to address the issue of disability discrimination in the air transportation industry. This Court should hold that the ACAA alone applies to discrimination claims brought by disabled travelers against air carriers.

CONCLUSION

For the foregoing reasons, the district court's order dismissing plaintiffs' complaint with prejudice should be affirmed.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) and Eleventh Circuit Rule 28-1. This brief contains 4978 words and uses a monospaced face and contains 441 lines of text.

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Kathryn S. Zecca

CERTIFICATE OF SERVICE

I hereby certify that an original and six copies of this brief have been served on the Court (with a .pdf file on a CD-ROM) this 15th day of April, 2003. This same day two copies have been served by Federal Express overnight delivery on each of the following counsel of record:

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