No. _____

in the Supreme Court of the United States

AARON ABADI,

Applicant,

v.

INDIANA CIVIL RIGHTS COMMISSION

& APPLE, INC.,

Respondents.

Appendix

for PETITION FOR WRIT OF CERTIORARI

Applicant:
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FILED:
May 4, 2023

STATE OF INDIANA
OFFICE OF ADMINISTRATIVE LAW PROCEEDINGS

Aaron Abadi,	Administrative Cause No.: ICRC-2203-000404
Complainant,	Underlying Agency Action No.:
V.	PAha21090390
Apple, Inc.,	
Respondent.	

Subject to the Ultimate Authority of the Indiana Civil Rights Commission

RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Pursuant to IC 4-21.5 this Recommended Order is not final and shall be presented to the ultimate authority for issuance of a final order.

JURISDICTION

The Commission of the Indiana Civil Rights Commission ("ICRC") has subject matter jurisdiction over public accommodation discrimination complaints based on disability that are filed under the Indiana Civil Rights Law ("ICRL"). IND. CODE § 22-9-1-2; IND. CODE § 22-9-1-6. When a finding of cause is made under the ICRL, pursuant to the Commission's June 19, 2020, Finding of Necessity, the Office of Administrative Law Proceedings ("OALP") shall appoint an Administrative Law Judge ("ALJ") to preside over the matter and to conduct a hearing. IND. CODE § 22-9-1-6; IND. CODE § 4-15-10.5-12; IND. CODE § 4-15-10.5-13.

ISSUE

Should Respondent's Motion for Summary Judgment ("Motion") be granted?

PROCEDURAL HISTORY

Respondent filed Respondent's Motion for Summary Judgment on April 17, 2023. Complainant filed Complainant's Response in Opposition to Respondent's Motion for Summary Judgment ("Response" or "R.") on April 20, 2023.

FINDINGS OF FACT

1. In response to the spread of the COVID-19 pandemic, Respondent closed its retail stores. (Respondent's Exhibit 1)
2. Once stores re-opened, Respondent implemented various policies in the interest of customer and employee safety. These policies included limited occupancy to promote

physical distancing, temperature checks before entry, and the requirement that customers and employees wear masks. (Respondent's Exhibit 1)

3. With respect to masks, Respondent's policy stated as follows: "Face masks will be required for all of our teams and customers while visiting an Apple Store, and we will provide them to customers who don't bring their own. N95 masks with valves, and masks that do not cover your nose and extend below your chin—such as bandanas, are not permitted at Apple Stores. Replacement masks will be provided as needed." (Respondent's Exhibit 1)
4. If a customer were unable to wear a mask or preferred not to enter a Store for any other reason, Apple's website also advised that customers, "[could] get all the same great products and services from [Apple's] online store with free no contact delivery, and one-on-one shopping help from a Specialist via Chat, or by calling 1-800-MY-APPLE." Many stores also had pickup in front of the store or curbside pickup available for online orders. (Respondent's Exhibit 1)
5. The Apple store in the Fashion Mall at Keystone is a store located in Indianapolis, Indiana in Marion County. This store no longer requires the use of masks to enter. (Respondent's Exhibit 1)
6. Complainant has a "sensory processing disorder" or "sensory integration disorder" that results in "extreme sensitivity to touch, mostly in the area of his head," which prevents him from wearing a face mask. (Respondent's Exhibit 5)
7. On August 27, 2021, Complainant contacted the Apple store in the Fashion Mall at Keystone through telephone and spoke to employees from the store. Complainant recorded two telephone calls that he had with the Apple employees. (Respondent's Exhibits 6 and 7)
8. During these two telephone calls, Complainant was on his way to Respondent's store and inquired about Respondent's mask policy. Complainant informed the Apple employees that he could not wear a mask or face shield due to his sensory processing disorder. The Apple employees informed Complainant that he would not be allowed to enter the store without a mask. However, the Apple employees offered Complainant a variety of alternatives to shopping at the Apple Store, including shopping at Apple's online store, no-contact delivery, or visiting Best Buy or his cellphone carrier's retail stores, if he wanted to interact with Apple products before purchasing them. (Respondent's Exhibit 6 and 7)
9. Complainant did not want to take advantage of the alternatives that the Apple employees suggested above. Therefore, Complainant requested a modification for Apple employees to bring out iPhones to Complainant for Complainant to look at and purchase. The Apple employees informed Complainant that they were not going to take the iPhones out of the store for Complainant to look at. (Respondent's Exhibit 6 and 7)
10. At some time after his August 27, 2021, calls to Apple, Complainant used Apple's website to make an appointment at a Best Buy in New Jersey, where they "changed the battery [in his iPhone 7] and it's been working much better since." (Respondent's Exhibit 5)

11. When Complainant placed these calls to Apple, he was "on the highway on [his] way toward Indianapolis" driving back from Colorado to New York on Interstate 70. (Respondent's Exhibit 5)

12. Complainant is a New York resident and has no plans to return to Indiana, or the Apple store in the Fashion Mall at Keystone. Prior to placing his calls on August 27, 2021, he had not been to Indianapolis in the last ten years, and he had never visited the Apple store in the Fashion Mall at Keystone. (Respondent's Exhibit 5)

13. In 2021, at the time of Complainant's interactions with the Apple store in the Fashion Mall at Keystone, the state of Indiana reported that, "Indiana is dealing with increased COVID-19 spread and resurgence of the dangerous virus, which means the fight against it is far from over. Wearing a face mask is one of the simplest, most effective ways to slow the virus's spread. Wearing a mask provides some protection to you and also protects those around you, in case you are unknowingly infected with the virus that causes COVID-19. . . . We're asking each of you to mask up[.]" (Respondent's Exhibit 2)

14. The Center for Disease Control reported that Marion County, Indiana was a COVID-19 "High Transmission" community and recommended that "[e]veryone should wear a mask in public indoor settings." (Respondent's Exhibit 3)

15. On August 30, 2021, the Governor of Indiana issued an Executive Order for the Eighteenth Renewal of the Public Health Emergency Declaration for the COVID-19 Outbreak, in which he observed and ordered:

    > [T]hroughout the Hoosier state, we are seeing a significant and serious increase in new confirmed cases and hospitalization and tragically, continued deaths daily from COVID-19 that is based on a surge driven by the Delta variant which is much more transmissible[.] . . . in light of the above, it is necessary and proper to take further action to protect the health, safety and welfare of all Hoosiers in connection with COVID-19 and, specifically, to renew the state of disaster emergency." (Respondent's Exhibit 4)

16. The Governor renewed and extended the declaration of public health disaster emergency in that order through September 30, 2021. (Respondent's Exhibit 4)

17. Any Conclusion of Law that should have been deemed a Finding of Fact is hereby adopted as such, and this Order's statement of Procedural History is incorporated into these Findings of Fact.

CONCLUSIONS OF LAW

1. "...[A]t any time after a matter is assigned to an administrative law judge...," a Party to an administrative proceeding can "...move for a summary judgment...," which an ALJ must consider under Indiana Rule of Trial Procedure 56 ("Rule 56"). IND. CODE § 4-21.5-3-23.

2. Rule 56 and the Indiana Administrative Orders and Procedures Act ("IAOPA") provide for only a motion for summary judgment and a response. IND. R. TR. PRO. 56(c); IND. CODE § 4-21.5-3-23. Neither Rule 56 nor IAOPA specifically allows Parties to file a reply or sur-reply. IND. R. TR. PRO. 56(c); IND. CODE § 4-21.5-3-23.

3. Summary judgment is only appropriate where "...there is no genuine issue as to any material fact..." and "...the moving party is entitled to a judgment as a matter of law." IND. R. TR. PRO. 56(c).

4. Material facts "...affect the outcome of the case...," and genuine issues are disputes in narrative or conflicts in inferences that must be resolved before one Party's version of events can be credited over the other Party's. *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009). However, "[s]ummary judgment is not an appropriate vehicle for the resolution of questions of credibility or weight of the evidence, or conflicting inferences which may be drawn from undisputed facts." *Bell v. Northside Fin. Corp.*, 452 N.E.2d 951, 953 (Ind. 1983).

5. When considering a motion for summary judgment, an ALJ draws all reasonable inferences in favor of the nonmoving party. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). Importantly, "[I]ndiana consciously errs on the side of letting marginal cases proceed to trial on the merits, rather than risk short-circuiting meritorious claims." *Id.* at 1004.

6. To succeed on a motion for summary judgment, Respondent must "...affirmatively negate..." Complainant's claims. *Id.* at 1003.

7. The ICRC has subject matter jurisdiction over complaints of public accommodation discrimination on the basis of disability. IND. CODE § 22-9-1-2; IND. CODE § 22-9-1-6.

8. The Indiana Civil Rights Law ("ICRL") prohibits a public accommodation from excluding "...a person from equal opportunities because of...disability." IND. CODE § 22-9-1-3. Importantly, "every discriminatory practice relating to...public accommodation... shall be considered unlawful unless it is specifically exempted by..." the ICRL, and Indiana courts look to federal law and precedent for guidance on interpreting the ICRL's prohibition. *Id.*; *Indiana Civil Rights Comm'n v. Alder*, 714 N.E.2d 632, 636 (Ind. 1999); *Filter Specialists, Inc. v. Brooks*, 906 N.E.2d 835, 839 (Ind. 2009). Additionally, the ICRL instructs that the ICRL should be "...construed broadly to effectuate its purpose." IND. CODE § 22-9-1-2(g).

Mootness

9. "'The long-standing rule in Indiana courts [is] that a case is deemed moot when no effective relief can be rendered to the parties before the court.'" *T.W. v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 121 N.E.3d 1039, 1042 (Ind. 2019) (quoting *Matter of Lawrance*, 579 N.E.2d 32, 37 (Ind. 1991)), *reh'g denied*. "When the concrete controversy at issue has been ended or settled, or somehow disposed of so as to render it unnecessary to decide the question involved, the case will be dismissed." *T.W.*, 121 N.E.3d at 1042.

10. In this case, Complainant's claims are moot because Respondent's mask policy at issue in August 2021 is no longer active. Customers, including Complainant, are now permitted to shop in-store at the Apple Fashion Mall at Keystone without a mask.

Standing

11. The party invoking a court's jurisdiction bears the burden to prove standing. *Solarize Indiana, Inc. v. S. Indiana Gas & Elec. Co.*, 182 N.E.3d 212, 215 (Ind. 2022).

12. Indiana courts follow federal law principles when determining whether a litigant has standing. *City of Gary v. Nicholson*, 190 N.E.3d 349, 351 (Ind. 2022) (citing and applying *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992))

13. To establish standing under the Americans with Disabilities Act ("ADA"), a claimant must demonstrate "an intent to return to the building or facility in the near future." *Ass'n. for Disabled Ams. v. Claypool Holdings,* No. IP00–0344–C–T/G, 2001 WL 1112109, at *20 (S.D. Ind. Aug. 6, 2001; *See Deck v. Am. Hawaii Cruises, Inc.,* 121 F.Supp.2d 1292, 1299 (D.Haw.2000) (concluding plaintiff lacked standing because she did not allege any plans to use the defendant's ship in the future and her statement in her declaration that she would "look into" another cruise was too speculative and conditional).

14. In this case, Complainant is a New York resident and has no plans to return to Indiana, or the Apple store in the Fashion Mall at Keystone. Therefore, Complainant lacks standing to pursue his claims under the ADA and ICRL.

Apple's mask policy

15. Title III of the ADA, which prohibits discrimination by a public accommodation on the basis of disability, does not "require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others." 42 U.S.C.A. § 12182. "The ADA's direct threat provision stems from the recognition . . . of the importance of prohibiting discrimination against individuals with disabilities while protecting others from significant health and safety risks, resulting, for instance, from a contagious disease." *Bragdon v. Abbott*, 524 U.S. 624, 648– 49 (1998). Title III regulations expressly provide that "[a] public accommodation may impose legitimate safety requirements that are necessary for safe operation." 28 C.F.R. § 36.301(b).

16. Courts have applied the direct method and safety provisions under the ADA and have upheld a business's mask policies that were implemented for the safety and welfare of their employees, customers, and the community at large. In *Giles v. Sprouts Farmers Mkt.,Inc.*, No. 20-CV-2131-GPCJLB, 2021 WL 2072379, at *5 (S.D. Cal. May 24, 2021, the court dismissed ADA and California Civil Rights Act claims, holding that the retailer was entitled to exclude anyone refusing to wear a face mask from its store because, based on CDC guidance, any such individual posed a direct threat to the health and safety of others in the store based on individualized assessment of whether a customer wore a face mask or not. Hernandez v. El Pasoans Fighting Hunger, 2022 WL 18019437, at *6 (5th Cir. Dec. 30, 2022) ("[T]he ADA does not require Defendants to alter their mask policy for Plaintiff . . . when exempting Plaintiff from their mask policy would pose a direct threat to the health and safety of others, including Plaintiff himself, due to the COVID-19 pandemic.")

17. In this case, Respondent implemented a mask policy to protect the health and safety of Apple's employees and customers in accordance with guidance from national and local health agencies, and the Governor of Indiana. Respondent was not required to waive its mask policy to permit Complainant to enter the store without a face mask under the ADA.

18. Complainant requested to enter the Apple Store without a mask. When Respondent informed Complainant that he could not enter the store without a mask due to Respondent's mask policy, Complainant requested an accommodation for Apple employees to bring out iPhones to Complainant for Complainant to look at and purchase. Complainant argues that Respondent should have provided this modification.

19. Discrimination under Title III of the ADA includes "a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford . . . services . . .to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such . . . services." 42 U.S.C. § 12182(b)(2)(A)(ii)

20. To establish his claims, Complainant bears the burden to prove that his requested accommodation—entering the Apple Store without a mask—was both "reasonable" and "necessary." 42 U.S.C. § 12182(b)(2)(A)(ii); Ind. Code § 22-9-1-2(b)

21. In this case, Complainant's request to enter the Apple Store without a mask was not reasonable and necessary given the nature of the COVID-19 pandemic at that time. The health and safety of the employees and customers would have been put at risk if Complainant was allowed to enter the store without a mask. Furthermore, Complainant's requested modification for Apple employees to bring out iPhones for Complainant to look at and purchase was also not reasonable because it would have put the Apple employees and Complainant himself at risk of exposure to the COVID-19 virus.

22. In addition, Respondent offered various alternatives to Complainant to in-store shopping such as shopping at Apple's online store, no-contact delivery, or visiting Best Buy or his cellphone carrier's retail stores if he wanted to interact with Apple products before purchasing them.

23. Therefore, Complainant cannot demonstrate that his requested modification was necessary for him to access Apple's goods and services, as required to prove his claims.

24. Accordingly, Respondent has affirmatively negated required elements of Complainant's case, there is no genuine issue of material fact that exists, and summary judgment is therefore appropriate.

25. Ultimately, if the ICRC determines that no unlawful discriminatory practice has occurred, then the ICRC must dismiss the complaint. IND. CODE § 22-9-1-6.

26. Any Finding of Fact that should have been deemed a Conclusion of Law is hereby adopted as such, and this Order's Statement of Jurisdiction is incorporated into these Conclusions of Law.

DECISION

Having duly considered the above, the undersigned Administrative Law Judge ("ALJ") for the Office of Administrative Law Proceedings ("OALP") hereby orders as follows:

1. Respondent's Motion is GRANTED.

2. Aaron Abadi's September 30, 2021 Complaint is DISMISSED, with prejudice.

SO ORDERED: May 4, 2023

LaKesha Triggs

Hon. LaKesha Triggs, Administrative Law Judge
Indiana Office of Administrative Law Proceedings
100 North Senate Ave., Room N802
Indianapolis, IN 46204
(317) 234-6689

Distribution List:

The following distribution list includes the names and mailing addresses of all known Parties and other persons to whom notice is being given. IND. CODE § 4-21.5-3-18. *A Party who fails to attend or participate in a prehearing conference, hearing, or other later stage of the proceeding may be held in default or have a proceeding dismissed.* IND. CODE § 4-21.5-3-18(d)(8).

Aaron Abadi: 82 Nassau St., Apt. 140, New York, NY 10038

Apple Store: 8702 Keystone Crossing, Indianapolis, IN 46240

Laurie Martin*: 111 Monument Circle, Ste. 4400, Indianapolis, IN 46244

Chair Slash of the Indiana Civil Rights Commission – ultimate authority and served at docketclerk@icrc.in.gov

**served in care of appearing attorney through ALP system at the email address on file with the Indiana Roll of Attorneys – all other service by mail.*

APPEAL RIGHTS AND ULTIMATE AUTHORITY REVIEW

You are hereby notified of your right to administrative review. If the parties to this action wish to have the ultimate authority administratively review this Recommended Order, the party requesting review must not be in default and must file written objections that:

1) Identify the basis of the objection with reasonable particularity; and,
2) Are filed with the Docket Clerk of the Indiana Civil Rights Commission on or before the 15th day after the date this order was issued by mail or in person at 100 North Senate Ave., Room N300, Indianapolis, IN 46204, by email at docketclerk@icrc.in.gov, or by fax at (317) 232-6580.

A Party shall serve copies of any filed item on all Parties.

ULTIMATE AUTHORITY

The below information is for the Ultimate Authority's use only. Circle, check, or fill in the blanks below.

Timely objections were/were not filed to the above Recommended Order. Timely briefs on objections (if any) were/were not filed. An oral argument on objections (if any) was/was not held.

On _____, the Indiana Civil Rights Commission decided, by the majority vote of _____ out of the _____Commissioners present to:

1. Affirm the above Recommended Order
2. Remand the above Recommended Order as further detailed in ICRC Attachment A.
3. Affirm the above Recommended Order with modifications as further detailed in ICRC Attachment A.

SO ORDERED this _____ day of _____, 2023.

Chair _____: X_____

Unless the ICRC remanded this matter to the ALJ, then **THIS IS A FINAL ORDER.** A Party to a dispute filed under IC 22-9 and/or IC 22-9.5 may, not more than thirty (30) days after the date of receipt of the Commission's final appealable order, appeal to the court of appeals under the same terms, conditions, and standards that govern appeals in ordinary civil actions. IC 22-9-8-1; IC 22-9.5-11-1.

MEMORANDUM DECISION

APPELLANT, PRO SE

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New York, New York

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IN THE
COURT OF APPEALS OF INDIANA

Aaron Abadi, *Appellant* v. Indiana Civil Rights Commission, et al., *Appellee.*	December 20, 2023 Court of Appeals Case No. 23A-EX-1387 Appeal from the Office of the Administrative Law Proceedings The Honorable LaKesha Triggs, Administrative Law Judge Lower Court Cause No. ICRC-2203-404 Underlying Agency Action No. Paha21090390

Memorandum Decision by Judge Pyle

Judges Tavitas and Foley concur.

Pyle, Judge.

Statement of the Case

[1] Aaron Abadi ("Abadi"), pro se, appeals the Indiana Civil Rights Commission's ("the Commission") final order affirming summary judgment in favor of Apple, Inc. ("Apple"). Concluding that the Commission did not err when it granted summary judgment in favor of Apple, we affirm.

[2] We affirm.

Issue

Whether the Commission erred when it granted summary judgment in favor of Apple.

Facts[1]

[3] In response to the COVID-19 Pandemic, Apple closed its stores to the public in 2020. However, in May 2021, Apple reopened its stores and issued a policy requiring that all employees and visitors wear face coverings while shopping at its stores. Specifically, Apple's policy stated that "[f]ace coverings will be required for all of our teams and customers, and we will provide them to customers who don't bring their own." (Appellee's App. Vol. 2 at 71). Apple directed customers who did not want to wear a face covering or mask in its stores to alternatives such as shopping online with curb-side pickup, chatting with a specialist, and visiting nearby retailers without mask policies in order to interact with Apple products.

[4] In August 2021, Abadi, who was driving on the highway from Colorado back to his home in New York, telephoned the Apple store in Indianapolis. Abadi recorded his two phone calls with Apple. During the recorded phone call, Abadi informed the Apple store employee that he had a sensory processing disorder that gave him extreme sensitivity around his head. Abadi further explained that this disorder prevented him from wearing a mask. Abadi asked the Apple store employee if he could enter their store without a mask, and the Apple store employee denied him access to the store pursuant to Apple's policy.

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[1] Abadi failed to cite to the record in his statement of facts as required by Indiana Appellate Rule 46(A)(6). Abadi also failed to cite to relevant authority in the majority of his argument section as required by Indiana Appellate Rule 46(A)(8). Further, Abadi has failed to provide us with a complete appendix as required by Indiana Appellate Rule 50(A)(2)(f). Thus, our opinion will rely on and cite to the Appellee's appendix.

The Apple store employees referred Abadi to the alternative methods to access Apple products. When Abadi asked the employee to bring Apple products outside of the store for him to see them, the employee refused. Abadi's only interaction with the Apple store in Indianapolis was during these two phone calls.

[5] In September 2021, Abadi filed a claim with the Commission alleging that Apple had violated Title III of the Americans with Disabilities Act ("the ADA") and the Indiana Civil Rights Law ("the ICRL") when it had refused to allow Abadi to enter its store without a face mask or covering.[2] In March 2022, the Commission issued a probable cause finding, triggering an administrative hearing of Abadi's claims by an administrative law judge ("ALJ") pursuant to INDIANA CODE § 22-9-1-6. In December 2022, the Commission's counsels moved to withdraw their appearance from the case. In their motion, the Commission's counsels stated that they had "determined [that] there is no longer a public interest in pursuing this matter[.]" (Appellee's App. Vol. 2 at 36). The ALJ granted the Commission's counsels motion to withdraw, and Abadi continued to pursue his claim pro se.

[6] In a February 2023 deposition, Abadi stated that he had been driving on the highway when he had telephoned the Apple store and that he had never visited

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[2] Title III of the ADA protects individuals from discrimination 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[.]" 42 U.S.C. § 12182(a). Under Title III of the ADA, private plaintiffs can only bring actions for injunctive relief. *See* U.S.C. § 12188(a)(1).

the store. Additionally, when Apple's counsel asked Abadi if he had ever been to the Apple store in Indianapolis in the past, Abadi responded, "I don't think so." (Appellee's App. Vol. 2 at 96). The following exchange occurred regarding Abadi's future plans to visit the Apple store in Indianapolis:

> Q. Do you have any . . . specific plan to return to . . . that specific Apple store as of today?
>
> A. I travel a lot. A specific plan, I don't know about specifically Indiana, but I travel a lot and I go to the west, and I pass that area a lot. So if I need an Apple store and I'm in that region, the answer is I don't know, and if I don't, the answer is no.
>
> Q. So I'm hearing you say you don't have any specific plan to return to that Apple location at any point; is that right?
>
> A. I can't change my answer. I travel a lot. I pass through that area a lot. Today, do I have a plan to go in the next few weeks? No. But if I do go and I pass there and I need something from Apple, then I would go into the Apple store.

(Appellee's App. Vol. 2 at 96-97). When Apple's counsel asked Abadi if he had ever been to the Keystone Fashion Mall, where the Apple store is located, Abadi replied, "not in the last 10 years." (Appellee's App. Vol. 2 at 111).

[7] In April 2023, Apple moved for summary judgment on Abadi's claim. Specifically, Apple argued that: (1) Abadi's claim was moot because the Apple store no longer has a policy requiring customers to wear a mask; (2) Abadi did not have standing to pursue his claim; and (3) Apple did not violate the ADA and the ICRL. Apple included Abadi's February 2023 deposition in its

designated evidence. In May 2023, the ALJ recommended granting Apple's summary judgment motion, concluding that Abadi's claim was moot, Abadi did not have standing to pursue his claim, and that Apple had not violated the ADA or the ICRL. The ALJ's recommended order stated, in relevant part, as follows:

> 11. The party invoking a court's jurisdiction bears the burden to prove standing. *Solarize Indiana, Inc. v. S. Indiana Gas & Elec. Co.*, 182 N.E.3d 212, 215 (Ind. 2022).
>
> 12. Indiana courts follow federal law principles when determining whether a litigant has standing. *City of Gary v. Nicholson*, 190 N.E.3d 349, 351 (Ind. 2022) (citing and applying *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)).
>
> 13. To establish standing under the Americans with Disabilities Act ("ADA"), a claimant must demonstrate "an intent to return to the building or facility in the near future." *Ass'n. for Disabled Am. v. Claypool Holdings, [LLC]*, No. IP00-0344-C-T/G, 2001 WL 1112109, at *20 (S.D. Ind. Aug. 6, 2001[)]; *see Deck v. Am. Hawaii Cruises, Inc.*, 121 F.Supp. 2d 1292, 1299 (D.Haw. 2000) (concluding plaintiff lacked standing because she did not allege any plans to use the defendant's ship in the future and her statement in her declaration that she would "look into" another cruise was too speculative and conditional).
>
> 14. In this case, complainant is a New York resident and has no plans to return to Indiana, or to the Apple store in the Fashion Mall at Keystone. Therefore complainant lacks standing to pursue his claims under the ADA and ICRL.

(Appellee's App. Vol. 2 at 14-15). The Commission issued its final order affirming the ALJ's findings and recommendations.

[8] Abadi now appeals.

Decision

[9] At the outset, we note that Abadi has chosen to proceed pro se. It is well settled that pro se litigants are held to the same legal standards as licensed attorneys. *Evans v. State*, 809 N.E.2d 338, 344 (Ind. Ct. App. 2004), *trans. denied.* Thus, pro se litigants are bound to follow the established rules of procedure and must be prepared to accept the consequences of their failure to do so. *Id.* "We will not become a party's advocate, nor will we address arguments that are inappropriate, improperly expressed, or too poorly developed to be understood." *Barrett v. State*, 837 N.E.2d 1022, 1030 (Ind. Ct. App. 2005), *trans. denied.*

[10] Abadi argues that the Commission erred when it granted summary judgment in favor of Apple. Summary judgment may be granted in an administrative proceeding. IND. CODE § 4-21.5-3-23(a). Summary judgment is appropriate only where the moving party has shown that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). A genuine issue of material fact exists where facts concerning an issue which would dispose of litigation are in dispute or where the undisputed facts are capable of supporting conflicting inferences on such an issue. *Indiana Dep't of Environmental Mgmt. v. Schnippel Constr., Inc.*,

778 N.E.2d 407, 412 (Ind. Ct. App. 2002) (cleaned up), *trans. denied.* "The moving party bears the initial burden of making a prima facie showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law." *Chmiel v. US Bank Nat'l Ass'n*, 109 N.E.3d 398, 407 (Ind. Ct. App. 2018) (citing *Gill v. Evansville Sheet Metal Works, Inc.*, 970 N.E.2d 633, 637 (Ind. 2012)). "If the moving party meets this burden, the nonmoving party must designate evidence demonstrating a genuine issue of material fact." *Id.*

[11] Abadi challenges the Commission's finding that: (1) Abadi's claim of discrimination was moot; (2) Abadi did not have standing to pursue his claim; and (3) Apple did not violate the ADA and ICRL by denying Abadi access to the Apple store without a mask. We address the threshold issue of standing.

[12] Abadi argues that the Commission erred in determining that he did not have standing to pursue his claim. Whether a party has standing is a pure question of law that we review de novo. *Hulse v. Indiana State Fair Bd.*, 94 N.E.3d 726, 730 (Ind. Ct. App. 2018). Indiana courts follow federal principles when determining whether a litigant has standing. *City of Gary v. Nicholson*, 190 N.E.3d 349, 351 (Ind. 2022) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)). Article III of the United States Constitution provides that "[t]he judicial power shall extend to all [c]ases . . . [and] [c]ontroversies[.]" U.S. Const., Art. III, sec. 2. Standing to bring and maintain a suit is an essential component of this case-or-controversy requirement. *Lujan*, 504 U.S. at 560. A plaintiff must meet three key requirements to establish standing: the plaintiff must show (1) injury in fact, which must be concrete and particularized, and

actual and imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the defendant's conduct; and (3) redressability. *Id.* at 560-61 (cleaned up). To establish injury in fact when seeking prospective injunctive relief, a plaintiff must allege a real and immediate threat of future violations of their rights. *Scherr v. Marriott Intern, Inc.*, 703 F.3d 1069, 1074 (7th Cir. 2013) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)). "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *Lujan*, 504 U.S. at 564 (internal quotation marks omitted). The 7th Circuit has explained that:

> plaintiffs' professions of an intent to return to the places they had visited before -- where they will presumably, this time, suffer the same injury they suffered before -- is simply not enough. Such some day intentions -- without any description of concrete plans, or indeed even any specifications of when the some day will be -- do not support a finding of the actual or imminent injury that our cases require.

Scherr, 703 F.3d at 1074 (cleaned up).

[13] Here, our review of Abadi's deposition reveals that Abadi, a resident of New York, stated that he had not been at the Apple store or the Fashion Mall at Keystone in over ten years. Further, Abadi stated that he had no concrete plans to visit the Apple store or Indiana in the future. Specifically, Abadi said "I don't know" when he was asked about any future plans to visit the Apple store in Indianapolis. (Appellee's App. at 97). Abadi's contention that he *would* go

to the Apple store *if* he was driving through Indiana in the future does not satisfy the actual or imminent standing requirement. *Scherr*, 703 F.3d at 1074. Further, due to the Apple store no longer requiring face masks or coverings to enter the store, Abadi cannot show "any continuing, present adverse effects" necessary to demonstrate standing. *Lujan*, 504 U.S. at 564 (internal quotation marks omitted). Therefore, we find no error in the Commission's finding that Abadi did not have standing to pursue his claim. Accordingly, we affirm the Commission's order granting summary judgment to Apple.

[14] Affirmed.[3]

Tavitas, J., and Foley, J., concur.

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[3] Because we hold that the Commission did not err when it found that Abadi did not have standing to pursue his claim against Apple, we need not review Abadi's challenges to the Commission's findings on mootness or Title III of the ADA.

In the
Indiana Supreme Court

Aaron Abadi,
Appellant(s),

v.

Indiana Civil Rights Commission; Apple, Inc.,
Appellee(s).

Court of Appeals Case No.
23A-EX-01387

Lower Court Case No.
ICRC-2203-404

Underlying Agency Action No.
Paha 21090390

Order

This matter has come before the Indiana Supreme Court on a petition to transfer jurisdiction, filed pursuant to Indiana Appellate Rules 56(B) and 57, following the issuance of a decision by the Court of Appeals. The Court has reviewed the decision of the Court of Appeals, and the submitted record on appeal, all briefs filed in the Court of Appeals, and all materials filed in connection with the request to transfer jurisdiction have been made available to the Court for review. Each participating member has had the opportunity to voice that Justice's views on the case in conference with the other Justices, and each participating member of the Court has voted on the petition.

Being duly advised, the Court DENIES the petition to transfer.

Done at Indianapolis, Indiana, on 4/4/2024.

Loretta H. Rush
Chief Justice of Indiana

All Justices concur.

IN THE

COURT OF APPEALS OF INDIANA

Aaron Abadi,
Appellant,

v.

Indiana Civil Rights Commission, & Apple, Inc.,
Appellees.

Court of Appeals Cause No. 23A-EX-1387

Appeal from the Indiana Civil Rights Commission ("ICRC")
Administrative Agency Cause No: ICRC-2203-000404
Underlying Agency Action No.: PAha21090390
The Honorable La Kesha Triggs, Judge

APPELLANT'S INITIAL BRIEF

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INTRODUCTION

1) Appellant, Aaron Abadi ("Abadi"), hereby, through this Brief, requests of this Court to review the decision of the Administrative Law Judge ("ALJ") dismissing this case (attached hereto). The Brief will show that the decision was based on errors of law, and does not coincide with the facts presented by Abadi. As the Judge herself wrote in her Order, "Summary judgment is only appropriate where " ... there is no genuine issue as to any material fact..." and " ... the moving party is entitled to a judgment as a matter of law." IND. R. TR. PRO. 56(c)."

2) The Judge further quoted, "Material facts " ... affect the outcome of the case ... ," and genuine issues are disputes in narrative or conflicts in inferences that must be resolved before one Party's version of events can be credited over the other Party's. Williams v. Tharp, 914 N.E.2d 756, 761 (Ind. 2009). However, "[s]ummary judgment is not an appropriate vehicle for the resolution of questions of credibility or weight of the evidence, or conflicting inferences which may be drawn from undisputed facts." Bell v. Northside Fin. Corp., 452 N.E.2d 951, 953 (Ind. 1983}.

3) The Judge erred in regards to the disability laws, mootness, and standing questions. The Judge also allowed the questions of facts to be decided in a summary judgment, in clear contradiction to the laws she herself quoted.

Appellant, Abadi, asks this Court to vacate her decision dismissing this Complaint, and to instruct her to correct her errors as described herein.

STATEMENT OF ISSUES

MOOTNESS

4) The Judge determined the following with regards to Mootness: "In this case, Complainant's claims are moot because Respondent's mask policy at issue in August 2021 is no longer active. Customers, including Complainant, are now permitted to shop in-store at the Apple Fashion Mall at Keystone without a mask."

5) Appellant, Abadi, will ask this Court to find that these claims are not moot.

STANDING

6) The Judge determined the following with regards to Standing: "In this case, Complainant is a New York resident and has no plans to return to Indiana, or the Apple store in the Fashion Mall at Keystone. Therefore, Complainant lacks standing to pursue his claims under the ADA and ICRL."

7) Appellant, Abadi, will ask this Court to find that he does have Standing to pursue his claims under The Americans with Disabilities Act ("ADA")

and under the Indiana Civil Rights Law ("ICRL"), or at a bare minimum, to require the lower court to allow this issue to be addressed at trial, and not to be dismissed in a summary judgment.

DISABILITY LAWS

8) The Judge determined the following with regards to the Disability Laws:

"In this case, Respondent implemented a mask policy to protect the health and safety of Apple's employees and customers in accordance with guidance from national and local health agencies, and the Governor of Indiana. Respondent was not required to waive its mask policy to permit Complainant to enter the store without a face mask under the ADA."

9) Although she referred to ADA, it would seem that she was assuming the same for the ICRL.

10) Appellant, Abadi, will ask this Court to find that the Judge erred on her understanding of the disability laws, for both ADA and ICRL.

STATEMENT OF CASE

11) On Thursday, September 9, 2021, Abadi filed a complaint against Apple for discrimination against him, for not providing equal treatment and for not allowing him to access their store due to his disability.

12) Upon investigation, on March 4, 2022, the ICRC filed a Notice of Finding (Appendix Page ??), determining "There is probable cause to believe an unlawful discriminatory practice occurred in this instance."

13) The Notice explained the following:

> "On September 30, 2021, Aaron Abadi ("Complainant") filed a Complaint with the Commission against Apple, Inc. ("Respondent"), alleging discrimination on the basis of disability in violation of the Indiana Civil Rights Law (Ind. Code art. 22-9, et seq.). Accordingly, the Commission has jurisdiction over the parties and the subject matter of this complaint. An investigation has been completed. Both parties have submitted evidence. Based on the final investigative report and a full review of the relevant files and records, the Deputy Director now finds the following:
> The issue presented to the Commission is whether Complainant was denied equal access to Respondent's place of public accommodation on the basis of disability. In order to prevail, Complainant must show: (1) Complainant is a member of a protected class; (2) Respondent caters or offers its services, facilities, or goods to the public; (3) Complainant attempted to access Respondent's facility and services; (4) Complainant requested an accommodation be made; (5) the accommodation was necessary to afford Complainant equal opportunity to enjoy the public accommodation; and (6) Respondent denied Complainant's accommodation request, failed to engage in the interactive process, or unreasonably delayed the accommodation, thereby constructively denying the request.
> Complainant is a member of a protected class by virtue of having a disability as defined under Indiana Civil Rights Law and Respondent offers its services,

facilities, and goods to the public. Complainant requested a reasonable accommodation be made to afford him equal access to Respondent's facility. Evidence shows Respondent denied the accommodation request, failed to engage in the interactive process, and maintained a policy with a discriminatory impact on people with disabilities...

Sufficient evidence was provided and uncovered to substantiate Complainant's allegation. Further, evidence shows Respondent maintained a mask policy with a disparate impact on people with disabilities which preclude them from wearing masks, such as Complainant...

Respondent also asserts any individual without a mask could present a "direct threat", but no evidence was provided or uncovered to show it made an individual assessment of Complainant or offered reasonable alternatives to his attempt to access its facility. Respondent also asserts its policy was a legitimate requirement for safe operations at the time of the complaint based on the data of COVID-19 cases and transmission; however, as of December 2021, masks are optional at the store in question, despite case numbers being as high or higher than at the time relevant to the complaint.

Ultimately, Respondent's policy had a disparate impact on people with disabilities. Respondent's operations leader stated no exceptions to the mask policy were permitted, regardless of disability status, and stated any customer with a disability who requested an exception would be rejected. The only alternative accommodations offered were to use online shopping, which would not work for Complainant as he sought to physically view and feel the devices, or to visit another store entirely. Visiting a separate store, not operated by Respondent, is not a sufficient accommodation, and violates regulations against maintaining separate public accommodations for people with and people without disabilities.

Evidence shows Respondent's mask policy excluded any individual with a disability which precludes wearing a face covering from entering its facility. Although Respondent provided alternatives to shopping in-person, Respondent's employees were informed no exceptions could be made to the mask policy; as such, customers with disabilities who were precluded from wearing a mask were refused entry to its facility under any circumstances. Ultimately, Respondent's policy causes a discriminatory impact on people with

disabilities and violates relevant laws by not permitting reasonable accommodations to be made for access to its facility.
As such, there is probable cause to believe a discriminatory practice occurred as alleged."

14) For some reason, without properly explaining it to Abadi, the ICRC changed their tune, and chose to withdraw from this case. There was a change of attorneys and thus a change of heart.

15) On December 15, 2022, the ICRC filed a motion to withdraw from the case, citing "ICRC staff attorneys have determined there is no longer a public interest in pursuing this matter..."

16) Abadi has found this kind of treatment common across the country, where agencies responsible for the human rights of people with disabilities, refused to help him even though his rights were constantly denied. It would seem to be some kind of political ideology, that completely disregards the human rights of a disabled person.

17) Abadi chose to continue pursuing the complaint on his own, and continued the exchanging of discovery with the opposing counsel, and made himself available for a deposition, upon Apple's request.

18) On April 17, 2023, Respondent, Apple, filed a Motion for Summary Judgment (Appendix Page ??).

19) On April 20, 2023, Abadi filed his Response (Appendix Page ??).

20) On May 4, 2023, the ALJ filed an Order dismissing the case, which was affirmed by The Ultimate Authority on May 25, 2023 (attached).

21) This Final Order was never sent to Abadi. Abadi tried filing a supplemental petition, and then opposing counsel emailed him the Final Order, on June 19, 2023.

22) There was never any explanation from the ICRC why Abadi never received a copy of the Final Order.

23) Luckily, there was still sufficient time to appeal, and on June 20, 2023, Abadi filed a Notice of Appeal with this Court.

STATEMENT OF FACTS

24) Defendant Apple owns and operates Apple Stores throughout the country.

25) The Covid-19 virus that arrived from Wuhan, China, spread throughout the world, causing significant death and hospitalizations, during the end of 2019, though 2020, and continuing through 2023.

26) The Center for Disease Control ("CDC") announced guidance for requiring all people to wear masks in public places. The guidance varied as the time progressed.

27) Throughout this pandemic, most, if not all mask mandates (including the CDC's), mask guidance, and related laws, included wording to remind people that children under 2-years old and people with a disability that causes that the person cannot wear a mask, are exempt.

28) The CDC Mask Mandate for transportation (Abadi Response to Motion for Summary Judgment Exhibit C - Appendix Page ??) says the following: "This Order exempts the following categories of persons:

A child under the age of 2 years;

A person with a disability who cannot wear a mask, or cannot safely wear a mask, because of the disability as defined by the Americans with Disabilities Act (42 U.S.C. 12101 et seq.)."

29) All the CDC Mask Mandates and Recommendations had a similar exemption written for people with disabilities.

30) The Governor of the State of Indiana signed an Executive Order mandating the wearing of masks in public places (Abadi Response to Motion for Summary Judgment Exhibit D - Appendix Page ??).

31) In that Order, there were exemptions detailed in Paragraph 4. Exemptions to Wearing Face Coverings. Item C of the exemption list reads as follows "any person with a medical condition, mental health condition or disability which prevents wearing a face covering..."

32) The ADA put out a guide elaborating on the types of disabilities that would not be able to wear masks. It's named, "The ADA and Face Mask Policies." It says, "Some people with autism are sensitive to touch and texture. Covering the nose and mouth with fabric can cause sensory overload, feelings of panic, and extreme anxiety." It recommends that they should not wear a mask.[1]

33) Plaintiff, Aaron Abadi, while he does not have autism, he does have sensory processing disorder, which is the actual disorder that an autistic child would have, if sensitive to touch to a point of possibly causing sensory overload. It is listed on his medical records. (See Abadi Response to Motion for Summary Judgment Exhibit H for Doctor's Letter - Appendix Page ??, and see Abadi Response to Motion for Summary Judgment Exhibit J for Doctor's affidavit on a Florida case confirming Abadi's disability status - Appendix Page ??).

34) Plaintiff states that he had this condition his entire life. He could not wear glasses, sunglasses, baseball caps on his head and face, as it will cause a serious sensory overload. He also has difficulties wearing neckties and starched shirts. Anything around the face or head is a serious problem.

35) This is not simply a discomfort. Our senses send messages to our brains, and when there's a dysfunction in those messages, the brain gets the wrong

[1] https://adasoutheast.org/disability-issues/ada-and-face-mask-policies/#:%7E:text=The%20ADA%20does%20not%20have,governments%20or%20private%20business%20owners

message. When I try to wear a mask or any of those other items I mentioned, it starts off with extreme discomfort and pretty quickly turns into unbearable, where I will rip it off without any regard of the consequences. It is also coupled with headaches and other irritations. I cannot wear a mask at all.

36) In clarifying the definition of disability, (ADA) 28 CFR § 36.105 (1) says "Physical or mental impairment means: (i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as: Neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine."

37) Petitioner's disorder affects the body system related to the sense of touch, specifically, and is included in the above definition of disability. Touch is the ability to sense pressure, vibration, temperature, pain, and other tactile stimuli. These types of stimuli are detected by mechanoreceptors, thermoreceptors, and nociceptors all over the body, most noticeably in the skin. These receptors are especially concentrated on the tongue, lips, face, palms of the hands, and soles of the feet. The law recognizes that a disorder in the important sense of touch severely limits many major life activities.

38) The Doctor's letter confirms that Abadi already had Covid and was no longer contagious. The CDC states that Covid reinfection is rare (Abadi Response

to Motion for Summary Judgment Exhibit G - Appendix Page ??). This is not to say it cannot happen, but the public accommodation is responsible to apply logic and make an honest risk assessment. Under these circumstances, Plaintiff argues that without obvious symptoms, he cannot be considered a direct threat, which is defined as a significant risk, when it comes to disability laws. It is certainly a good idea to increase precautions, but it doesn't create a direct threat, and therefore it doesn't allow discrimination.

39) The Equal Employment Opportunity Commission ("EEOC") has a similar guidance to the effect that only those with Covid or its symptoms can be considered a direct threat (Abadi Response to Motion for Summary Judgment Exhibit I - Appendix Page ??).

40) It states the following: "These facts manifestly support a finding that a significant risk of substantial harm would be posed by having someone with COVID-19, or symptoms of it, present in the workplace at the current time." Without even symptoms there's no justification to consider me a "direct threat," which is defined as a significant risk.

41) Now, for arguments sake, if you were to say that anyone without a mask is a direct threat, then you would have to prove that everyone with a mask, including all the most common masks that are useless, are suddenly no longer a direct threat. Otherwise, that's discrimination.

42) The medical community and including the CDC, the NIH, and the WHO, evolved in regards to their expectations of the value of a typical face mask in protecting people from Covid 19. Even to date, there is no clear peer-reviewed study that can confirm the importance and benefits of wearing masks as was being worn. The CDC themselves confirm that we do not have real evidence. Most of us say, it probably cannot hurt, although some studies say that it can. Abadi is not looking to adjudicate that issue, if not requested to by the court, or Apple. Suffice it to say that the typical mask is questionable as to its protection.

43) The right of a public accommodation to deny access to a person with a disability is subject to an individualized assessment if there is a direct threat.

44) In this case, the State mandate was already lifted four months earlier. Apple created its own mandate/policy.

45) This Apple policy had no exemptions for people with disabilities.

THE INCIDENT

46) At 1:28PM on August 27, 2021, Abadi called the Apple Store located at 8702 Keystone Crossing, Indianapolis, IN 46240, at telephone number (317) 814-3740. Abadi spoke to Nick and explained that he is heading to the store, and he asked if they have a mask requirement in effect now. Nick explained that it is required. A recording of these calls was entered into evidence, and is not being disputed.

47) Abadi explained that he has a medical disability, specifically a sensory processing disorder, with a doctor's letter to that effect, and he cannot wear a mask. He asked if they can make an accommodation. Nick from the Apple Store said he will ask around and he put Abadi on hold. He returned to the phone and said "We can't let you in without a mask." He can set a pickup or drop-off for Abadi, but he cannot in any way enter the store. Abadi explained that he wanted to see the phones in person, to try them out for size and be able to make the right choice. He asked if they can at least bring the phones outside the store for him. Nick said he cannot help him with that, as the phones are attached to the tables.

48) Abadi then called the Store Manager, Jess, and told her all of the above. She confirmed the same. She said that they cannot accommodate Abadi. She suggested that he try other retailers.

49) Abadi explained that he was not comfortable spending a thousand dollars on a smart phone and not having the opportunity to hold it in his hand for weight, size, and to get a general idea which model would work best for him.

50) It was to no avail. Mr. Abadi was refused entry into the Apple Store by the Apple, Inc. ("Apple") employees, and they would not bring the phones outside the store either.

SUMMARY OF ARGUMENTS

These arguments have all been presented in the case at the lower court/administrative agency level, as shown in the attached documents that are part of the record. There is a response to the Motion for Summary Judgment (Appendix Page ??) and a Letter to the Ultimate Authority (Appendix Page ??). Between the two documents, all these arguments were already presented.

With regards to Mootness, there should not be an issue of mootness, because there are damages requested. Additionally, the policy in place was not a government policy, but rather Apple's own policy that continued many months after the State canceled its mask mandate. It also was much stricter than the State mandate, as it refused to allow any exemptions to the disabled. When it is a company policy that was stopped voluntarily, the caselaw shows that we do not automatically assume that it won't be reinstated in the future, and therefore it is NOT MOOT.

In this case there is even more indication that the illegal policy may continue, as the federal government predicts more pandemic activity, and even began to encourage masking again. Even Apple themselves in their annual report warned that the regulations and issues related to Covid are not yet over, and they are prepared for possible continuation or reinstatements. Therefore, it is NOT MOOT.

With regards to Standing, the Judge decided that Abadi is no longer coming to Indiana and therefore has no standing to sue. That is not the truth, and to the bare minimum, being that this fact is in dispute, it should not be thrown out in a Motion for Summary Judgment, but rather, Abadi is entitled to a trial to determine disputed facts.

The Judge misrepresented the disability laws, both of ADA and of ICRL. A store cannot make a policy that would provide less than EQUAL access and benefits to a disabled person. The only exceptions are undue burden, which does not apply here in its context, and if the disabled person poses a Direct Threat.

To determine a direct threat, the public accommodation is required to make an individualized evaluation based on real data. This was not done. If it were to be done, being that Abadi had natural immunity, he, without a mask, would have been considered less of a threat than the average customer even with their masks on. The CDC was very clear that Covid reinfection was rare.

The accommodations that were offered that Apple tried to pretend were sufficient alternative options, were not meaningful at all. What Abadi needed for that visit was a full hour of assistance with the purchase of a new iPhone. Besides, accommodations are only allowed if there is an undue burden or direct threat, which was not the case here. A disabled person is entitled to equal access and benefits.

ARGUMENTS

I. MOOTNESS DOES NOT APPLY WHEN THERE ARE DAMAGES

51) In a bizarre argument, Apple suggested that this Complaint was moot and the Judge agreed, because the actions that led to this Complaint are no longer in effect. The first and most important response to this is that Abadi is demanding damages to redress his injuries, and therefore this lawsuit cannot be moot. See Abadi v. City of NY, "Plaintiff's demands for money damages are not mooted by the repeal of the policies at issue..." Abadi v. City of New York, 2023 WL 3295949, at *2 (C.A.2 (N.Y.), 2023).

52) Even if the damages awarded are only nominal damages, according to a recent Supreme Court decision, even nominal damages are considered a redress and survives a mootness claim. To the bare minimum, an award of nominal damages can provide significant redress, as the Supreme Court decided in 2021, "nominal damages can redress Uzuegbunam's injury even if he cannot or chooses not to quantify that harm in economic terms." Uzuegbunam v. Preczewski, 141 S.Ct. 792, 802 (U.S., 2021).

STANDARD OF REVIEW

53) The standard of review here is as follows.

"Under Indiana's Administrative Orders and Procedures Act ("AOPA"), we may set aside an agency's action if it is:
(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence."
"On the other hand, an agency's conclusions of law are ordinarily reviewed de novo." Id. While "[w]e are not bound by the [agency's] conclusions of law, ... '[a]n interpretation of a statute by an administrative agency charged with the duty of enforcing the statute is entitled to great weight, unless this interpretation would be inconsistent with the statute itself.' "
Moriarity v. Indiana Dep't of Nat. Res., 113 N.E.3d 614, 618–19 (Supreme Ct. Ind. 2019)

54) This aspect, the issue of mootness, should be reviewed de novo and overturned, as the agency's conclusion of law was in error.

II. VOLUNTARY CESSATION DOES NOT MOOT THE CLAIMS

55) This policy by the Defendants was not a government policy. The government, which in this case is the Governor of the State of Indiana, was very clear that people with disabilities must be allowed to enter, as described above. The Apple policy to not allow disabled people to enter the store, was their own private policy. It was in contrast to the State Executive Order, and to CDC recommendations. It may have been loosely based in part on a government order, but the aspects related to this lawsuit, and the disability discriminations involved, were Apple's own.

56) As described earlier, the State of Indiana's mask mandate was cancelled four months earlier. This was Apple's own mask policy.

57) Many private companies created policies that exceed any government orders. Some are still in effect today. When a private company ceases its disputed actions, the Supreme Court is very clear about that. It says the following:

> "It is well settled that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." City of Mesquite, 455 U.S., at 289, 102 S.Ct. 1070. "[I]f it did, the courts would be compelled to leave '[t]he defendant ... free to return to his old ways.' " Id., at 289 102 S.Ct. 1070 (citing United States v. W.T. Grant Co., 345 U.S. 629, 632, 73 S.Ct. 894, 97 L.Ed. 1303 (1953)). In accordance with this principle, the standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." United States v. Concentrated Phosphate Export Assn., 393 U.S. 199, 203, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968). The "heavy burden of persua[ding]" the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness. Ibid." Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 120 S.Ct. 693, 708, 528 U.S. 167, 189 (U.S.S.C., 2000).

58) There is another more recent Supreme Court case with a similar decision.

> "That burden is "heavy" where, as here, "[t]he only conceivable basis for a finding of mootness in th[e] case is [the respondent's] voluntary conduct." Friends of the Earth, 528 U.S. at 189, 120 S.Ct. 693. Although the Government briefly argues that the lower court's stay of its mandate extinguished the controversy, it cites no authority for that proposition, and it does not make

sense: Lower courts frequently stay their mandates when notified that the losing party intends to seek our certiorari review. So the Government's mootness argument boils down to its representation that EPA has no intention of enforcing the Clean Power Plan prior to promulgating a new Section 111(d) rule.

But "voluntary cessation does not moot a case" unless it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701, 719, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007). Here the Government "nowhere suggests that if this litigation is resolved in its favor it will not" reimpose emissions limits predicated on generation shifting; indeed, it "vigorously defends" the legality of such an approach. Ibid. We do not dismiss a case as moot in such circumstances. See City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 288–289, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982). The case thus remains justiciable, and we may turn to the merits."

W. Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2607, 213 L. Ed. 2d 896 (2022)

59) In a recent case, the DC Circuit Court of Appeals determined that a Transportation Security Administration ("TSA") mask mandate that was already stopped, was not moot. The Court believed that the even the government agencies might reinstate the mask mandates. The Court wrote the following:

"Ordinarily, the expiration of the challenged security directives would render the petitions for review moot, depriving us of jurisdiction to decide the merits of Wall's claims. See North American Butterfly Ass'n v. Wolf, 977 F.3d 1244, 1258 (D.C. Cir. 2020) (Mootness doctrine "focuses on whether events subsequent to the filing of the complaint have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future.") (formatting modified). These cases, though, fall squarely within the voluntary cessation exception to mootness. That exception provides that a defendant's voluntary decision to halt

challenged conduct will not moot a case unless "subsequent events ma[k]e it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000) (quoting United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203 (1968)); National Black Police Ass'n v. District of Columbia, 108 F.3d 346, 349 (D.C. Cir. 1997). Said another way, a case will not be moot if there is a "more-than-speculative chance" that the court's ruling will affect the parties' rights in the foreseeable future. North American Butterfly Ass'n, 977 F.3d at 1258.
In this case, it is not "absolutely clear" that the TSA will not reinstitute its masking directives." Wall v. Transportation Sec. Admin., No. 21-1220, 2023 WL 1830810, at *1–2 (D.C. Cir. Feb. 9, 2023)

60) The Seventh Circuit Court of Appeals, which is the appeals court for the federal district courts in Indiana, says practically the same thing:

"Voluntary cessation of the contested conduct makes litigation moot only if it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). Otherwise, the defendant could resume the challenged conduct as soon as the suit was dismissed. The list of criteria for moving back to Phase 2 (that is, replacing the current rules with older ones) shows that it is not "absolutely clear" that the terms of Executive Order 2020-32 will never be restored. It follows that the dispute is not moot and that we must address the merits of plaintiffs' challenge to Executive Order 2020-32 even though it is no longer in effect." Elim Romanian Pentecostal Church v. Pritzker, 962 F.3d 341, 345 (7th Cir. 2020)

61) Although Apple on their own choice decided to withdraw its mask policy, Voluntary cessation of the contested conduct makes litigation moot only if

it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." There is no such undisputable evidence, that would warrant a dismissal without a trial.

62) Standard of Review: This aspect should be reviewed de novo and overturned, as the agency's conclusion of law was in error.

III. THE FEDERAL GOVERNMENT PREDICTS MORE PANDEMIC ACTIVITY

63) There are many indications that the federal government would like to reinstate mask mandates, and are considering such recommendations. HHS, which is also the parent agency of the CDC and the NIH, has reiterated its intentions to reinstate mask mandates, and as recently as November 21, 2022, there was a press release from the HHS,[2] stating that a report—published under the title 'The Health+ Long COVID Report[3] — which was "commissioned by HHS and produced by Coforma, an independent third-party design and research agency ... provides recommendations on how to deliver high-quality care, and relevant and intentional resources and supports to individuals and families impacted by Long COVID."

[2] https://www.hhs.gov/about/news/2022/11/21/hhs-releases-long-covid-report-providing-insights-and-opportunities-support.html
[3] https://www.hhs.gov/sites/default/files/healthplus-long-covid-report.pdf

64) In that report on pages 41 and 63, the HHS Health+ ("Health plus") program recommends new guidelines to "mandate policies and protocols regarding masking and social distancing in public spaces," in order to protect from LONG COVID. In other words, the federal government is coming back with recommendations to mandate masks.

65) Moreover, in a separate article published by HHS on their very own website "We Can DO this"[4] —An official website of the U.S. Department of Health and Human Services, as well as an official website of the United States government — the HHS, in content last reviewed on June 15, 2023 [THIS YEAR!!!], published "Updated masking guidance • CDC recommends that vaccinated and unvaccinated people wear masks in public indoor settings when the COVID risk to your community is high." That guidance from the HHS carries a link to the CDC's own website and article "related to masking," and updated on May 11, 2023 — THIS YEAR — on "Use and Care of Masks." On this page, the CDC once again "urges" the public to wear face masks indoors.[5]

66) For some reason much of the medical community is predicting gloom and doom. Dr. Anthony Fauci has suggested on TV recently [about 5 months ago]

[4] https://wecandothis.hhs.gov/resource/updated-cdc-masking-guidance
[5] https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/about-face-coverings.html

that we should be "expecting another pandemic, a worse one, possibly as early as next year."[6]

67) President Biden himself recently confirmed the federal government's position on this matter. The New York Post reported his words as follows: "Even as we work to end COVID-19, we continue building stronger health systems and institutions and accelerating efforts to achieve universal health coverage to make sure we're better prepared to tackle the health challenges including the next pandemic—and there surely will be one," the president said during remarks kicking off the US-Africa Business Forum in Washington."[7] The federal government is very clear that it is expecting and preparing for a pandemic that is expected to happen shortly.

68) With that being said, there is certainly a strong possibility if not probability that we will have further mask mandates. Apple's mask mandate, when in effect, was stricter than the State mandate and lasted longer. It is fair to say that there is a reasonable likelihood that masks might be an issue in the future at Apple's stores. This case is NOT MOOT.

[6] https://www.youtube.com/watch?v=unt4QbDFNF4
[7] https://nypost.com/2022/12/14/biden-warns-surely-will-be-another-pandemic-as-he-unveils-us-aid-for-africa/

69) Standard of Review: This aspect should be reviewed de novo and overturned, as the agency's conclusion of law was in error, and it is unsupported by substantial evidence.

IV. APPLE THEMSELVES INDICATE THEY EXPECT FUTURE COVID-19 REGULATIONS

70) In Apple's own annual financial statement,[8] it states the following:

> "The Company's business, results of operations, financial condition and stock price have been adversely affected and could in the future be materially adversely affected by the COVID-19 pandemic. COVID-19 has had, and continues to have, a significant impact around the world, prompting governments and businesses to take unprecedented measures in response. Such measures have included restrictions on travel and business operations, temporary closures of businesses, and quarantine and shelter-in-place orders. The COVID-19 pandemic has at times significantly curtailed global economic activity and caused significant volatility and disruption in global financial markets. The COVID-19 pandemic and the measures taken by many countries in response have adversely affected and could in the future materially adversely impact the Company's business, results of operations, financial condition and stock price. During the course of the pandemic, certain of the Company's component suppliers and manufacturing and logistical service providers have experienced disruptions, resulting in supply shortages that affected sales worldwide, and similar disruptions could occur in the future. Public safety measures can also adversely impact consumer demand for the Company's products and services in affected areas."

[8] https://d18rn0p25nwr6d.cloudfront.net/CIK-0000320193/b4266e40-1de6-4a34-9dfb-8632b8bd57e0.pdf

71) In Apple's own filing it cannot ignore risks that can easily reoccur and is therefore required by the SEC to be completely honest and open about its risks. Under that pretext, it had no choice but to clarify that Covid is still a problem and can easily be a problem going forward. There is no reason why they would not reinstate their own private mask mandate policy, if the situation warrants it. Even when almost the entire country stopped their mandates, Apple continued their own mask mandate policy for months longer.

72) Standard of Review: This aspect should be reviewed de novo and overturned, as the agency's conclusion of law was in error, and it is unsupported by substantial evidence.

V. ABADI TRAVELS OFTEN TO INDIANA AND SHOULD HAVE STANDING TO SUE

73) Apple suggested in its Motion for Summary Judgment (Appendix Page ??) that I have no standing to sue, because I live in New York and I will not be in Indiana. The Judge took that as fact. That is not true. I have traveled many times through Indiana, and I should be entitled to visit stores when I am there. In the last five years, I have been to Indiana over thirty times. Indiana happens to be smack in the center of the country, as to the normal routes from the Northeast to

the West. I often drive west and always pass through Indiana when I do. The stores in Indiana should be available to me when I am there, and I would expect the stores in New York to do the same for the citizens of Indiana when they visit us.

74) While Apple quotes Abadi in his deposition saying that he was not in Indianapolis in the last ten years. However, that is not the truth, and if you read the transcript provided by Apple in their motion for summary judgment, in their Exhibit 5 (Appendix Page ??), you will see that this is untrue.

75) The deposition transcript reads as follows:

"So Keystone, where the Apple store is located, have you been in that mall at all previously?

A. I don't know. I've been to Indianapolis many times. I don't know -- not in the last 10 years."

76) Apple interpreted that as Abadi stating that he has not been to Indianapolis in ten years. Abadi was actually answering the question that was asked, "have you been to where the Apple Store is located," referring to the Keystone Mall. Abadi initially was not sure. He responded, "I don't know, I've been to Indianapolis many times." He then was confident that he was not at that particular mall in the last ten years. He paused and then answered the original question by saying, "not in the last 10 years." Sometimes these depositions need to have a little context in order to interpret them correctly. It is certainly clear that

Abadi did not say "I have not been to Indianapolis in ten years." That is not what was written there.

77) In any case, this issue, if it is an issue at all, should only be addressed during discovery and trial. The judge herself quoted the law that "Summary judgment is only appropriate where there is no genuine issue as to any material fact." This material fact is clearly in dispute.

78) Standard of Review: This aspect should be reviewed and overturned, as the Judge's determination is unsupported by substantial evidence.

VI. ADA & ICRL REQUIRE EQUAL TREATMENT FOR THE DISABLED

79) Some people seem to be confused about this. They think that it is okay to offer alternative options and they're not required to provide full and equal enjoyment... That is a mistaken reading and/or understanding of both the federal and State laws.

80) Public accommodation discrimination is clear. The ADA says the following:

"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."

81) There is no exclusion for providing less than the full and equal enjoyment, except in cases where there is undue burden or if there is a direct threat. In such cases, the public accommodation is entitled to not provide full and equal services, but they should try to provide an accommodation that is as close as possible to the full & equal enjoyment.

82) The Indiana Laws are the same. In IC 22-9-1-2, it states, "Equal education and employment opportunities and equal access to and use of public accommodations and equal opportunity for acquisition of real property are hereby declared to be civil rights.

(b) The practice of denying these rights to properly qualified persons by reason of the race, religion, color, sex, disability, national origin, or ancestry of such person is contrary to the principles of freedom and equality of opportunity and is a burden to the objectives of the public policy of this state and shall be considered as discriminatory practices."

83) The only way Apple could have denied me FULL EQUAL ACCESS, is if there was a direct threat. As I describe below, there was no direct threat here. Providing an accommodation by telling me to go elsewhere, is not an alternative. My rights are that I get EQUAL ACCESS, just like any non-disabled person.

84) Standard of Review: This aspect should be reviewed de novo and overturned, as the agency's conclusion of law was in error.

VII. DIRECT THREAT EXCEPTION WOULD NOT APPLY HERE

85) While Apple has suggested that the reason for their discrimination is for safety, and the Judge agreed to that, ADA Law is not that simple. In § 36.301 (b) the ADA says, "A public accommodation may impose legitimate safety requirements that are necessary for safe operation. Safety requirements must be based on actual risks and not on mere speculation, stereotypes, or generalizations about individuals with disabilities." This requirement of actual risk is a very similar concept to the next paragraph, discussing direct threat.

86) A public accommodation can deny access when there's a "direct threat."

> § 36.208 (b) "In determining whether an individual poses a direct threat to the health or safety of others, a public accommodation must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: The nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk."

87) Apple seemed to have believed that Plaintiff coming in without a mask will pose a direct threat. As Apple concedes, when something is not so clear in the State disability laws, we look to the federal guidelines. Here it can be assumed that the State guidelines would be identical to those of the ADA.

88) We can look at the direct threat issue and if it is applicable here. The CDC guidelines and almost all State and City mandates exempt children under two years old, people with disabilities, and all regular people during their eating or exercising. The State mandates were mostly developed directly from the CDC guidelines. They did not worry about everyone around them dying from this exemption. That was not the expectation. The concept is that if most of us wear masks most of the time, hopefully it will reduce the overall spreading of the disease. That was the basic idea.

89) If the CDC believed that anyone without a mask was a "direct threat," they would have been careless and negligent in their duties to allow for such exemptions at all. Even for eating and drinking, how can you kill people just because you want to eat and drink?! Obviously, the idea was to reduce the overall spread, and not to suggest that all people are a direct threat, as described above.

90) It is understood from the previous paragraphs that a person, even without already having Covid, is not considered a direct threat or an actual risk, without any symptoms, and without any indication that they may have any disease,

as the rate of transmission and the statistics showing the risk factor are relatively low, when avoiding people who are carrying the disease, maintaining a reasonable distance in general, and utilizing proper cleanliness.

91) Certainly, though, a person who already had Covid, as is the case with this Plaintiff, should not be considered a direct threat or an actual risk without clear symptoms, as the CDC confirms, "Covid reinfection is rare." (Appendix Page ??).

92) The idea that masks are actually effective in reducing a direct threat, is debatable, at best. If an entity discriminates against a person with natural immunity without a mask, treating him different and/or less than another person without natural immunity, but with a mask, that is discrimination. If the fellow with the mask is not considered a direct threat, then the other fellow with natural immunity is less of a threat.

93) The Supreme Court confirms that fear of a contagious disease in itself is not sufficient grounds to permit discrimination. "Allowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of § 504, which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others." School Bd. of Nassau Cty. v. Arline, 480 US 273 - Supreme Court 1987. See the entire decision.

94) There are dozens of reasons and indications that the direct threat exception does not apply here at all. I will mention only a few to avoid overburdening this court.

95) The CDC provided for an exemption for under 2, and those with disabilities. If there was a direct threat, it would have never done that.

96) The Executive Order of the Governor of Indiana provided for the same exemptions. If there was a direct threat, he would have never done that.

97) The direct threat exception requires an individual assessment of Abadi, which was never done.

98) The CDC and the State of Indiana had already recommended against and/or rescinded their mask mandates and related guidance months prior. If there was a direct threat, they would have never done that.

99) Abadi already had Covid, as evidenced by his doctor's letter (Appendix Page ??), and based on the CDC statement that Covid reinfection is rare, Abadi could not have posed a direct threat, as described above.

100) As Apple states in their motion, "Three days after Abadi's interactions with the Apple The Fashion Mall at Keystone, on August 27, 2021, the Governor of Indiana issued an Executive Order for the Eighteenth Renewal of the Public Health Emergency Declaration for the COVID-19 Outbreak..." Yet, the Governor did NOT renew the mask mandates. I know that the opposing counsel was trying to

make it seem that way, but the truth is that the mask mandates were not reinstated. Don't you think that if there was a direct threat (i.e., significant risk) from anyone without a mask, the Governor would reinstate the mandates?!

101) If we were to say that a person without a mask is a direct threat, and deny him access due to his disability, we would have to prove that those other people that are obviously also a direct threat prior to wearing a mask, would now remove the risk significantly enough by wearing a mask, that they will no longer be a direct threat. There is no evidence of that, especially with regards to the typical cloth and surgical masks that the majority wear.

102) The Equal Employment Opportunity Commission ("EEOC") themselves only consider a person a direct threat if they're showing symptoms or have Covid (Appendix Page ??).

103) I can go on for days, but the obvious and clear outcome of these arguments show that people with disabilities who cannot wear a mask are not automatically a direct threat. Without symptoms or some evidence to show the existence of a higher risk of the disease than average, they must not be discriminated against.

104) As the Notice of Finding (Appendix Page ??) pointed out, "Respondent also asserts its policy was a legitimate requirement for safe operations at the time of the complaint based on the data of COVID-19 cases and

transmission; however, as of December 2021, masks are optional at the store in question, despite case numbers being as high or higher than at the time relevant to the complaint."

105) The attorney from the ICRC made a very important point. If the case numbers were higher at a later date, yet they did not reinstate the mask policy, they obviously did not believe that there was a direct threat.

106) Apple had no right to deny me equal access as required by federal and state laws, and the Judge should not have dismissed this case.

107) Standard of Review: This aspect should be reviewed de novo and overturned, as the agency's conclusion of law was in error.

VIII. APPLE'S SUGGESTED ACCOMMODATIONS WERE NOT MEANINGFUL

108) Apple continuously states and argues that they provided a sufficient alternative or accommodation by allowing me to shop instead at other retailers that sell Apple products and/or that they provide sales online, where I can receive the product by mail. THE JUDGE SEEMS TO AGREE TO THAT PREMISE.

109) Those are not alternatives that equal the opportunities and benefits provided to other people; people who do not have disabilities. Both the federal and

state disability laws require public accommodations to treat the disabled the same as the non-disabled and allow them to receive the same benefits as the non-disabled.

110) Purchasing an iPhone at Apple is not a 5-minute process, saying "I'll take that one, please wrap it up." Abadi actually was able to have his iPhone repaired when he was finally allowed to shop, and it lasted another year or so. Eventually, it was time to purchase a new one.

111) Abadi entered into an Apple store at Walnut Street, 1607 Walnut Street, Philadelphia PA 19103 (Exhibit B in Abadi's Response to the Summary judgment – Appendix Page ??). The date was February 17, 2023. The people helping me were wonderful. There were three different sales associates that helped me. The process took over an hour. My girlfriend was there and can testify, if Respondent denies it.

112) First, they helped me figure out which iPhone was best for me. I tried each one out and played with them in the store for a bit. Once I chose the right phone, it took a lot of time transferring the data and info from one phone to another through iCloud. We then had discussions about purchasing Apple Care and several options available. The entire process was awesome. The sales associates were wonderful, and I happily walked out with a new iPhone a bit over an hour later.

113) This was the service available and provided at Apple stores to all non-disabled people during the time when their mask policy was still in effect. This opportunity was denied to me, because I had a disability and could not wear a mask. This was four months after the State of Indiana determined that the health risks were down so significantly, that they removed the State mask mandate.

114) Sure, Apple is entitled to be extra cautious and implement its own mask policy, but NOT AT THE COST OF DISCRIMINATING AGAINST ME DUE TO MY DISABILITY.

115) Standard of Review: This aspect should be reviewed de novo and overturned, as the agency's conclusion of law was in error, and it is unsupported by substantial evidence.

CONCLUSION

116) As described herein, the lower court erred in its decision to dismiss this Complaint. Appellant Abadi asks this Court to overturn this decision, and require the lower court to honor Abadi's human rights based on the ADA and the ICRL.

117) Appellant Abadi hereby requests from this Court the following:

a. To overturn the dismissal of his Complaint.

b. To enjoin Apple from denying Abadi equal access and benefits in the future due to his disability.

c. To declare that this case is not Moot and Abadi has standing.

d. To declare that Abadi was discriminated against based on ADA & ICRL laws.

e. To require the lower court to find judgment in favor of Appellant Abadi for compensatory and punitive damages.

f. and any and all other relief the Court deems just and proper.

Respectfully submitted this 14th day of August, 2023,

s/Aaron Abadi
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Certificate of Compliance

I verify that this Appellant Brief contains no more than 14,000 words, pursuant to Rule 44 (E), and I verify that this motion contains 8,482 words.

s/Aaron Abadi
Aaron Abadi, Appellant

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 14th day of August, 2023, the foregoing was filed with the Clerk of the Indiana Supreme Court, Court of Appeals, and Tax Court. The following automatically received copies of these files electronically.

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s/Aaron Abadi
Aaron Abadi, Appellant

ICRC No.: PAha21090390

AARON ABADI,
Complainant,

v.

APPLE, INC.,
Respondent.

NOTICE OF FINDING

The Deputy Director of the Indiana Civil Rights Commission ("Commission"), pursuant to statutory authority and procedural regulations, hereby issues the following Notice of Finding with respect to the above-referenced case. There is probable cause to believe an unlawful discriminatory practice occurred in this instance. 910 IAC 1-3-2(b).

On September 30, 2021, Aaron Abadi ("Complainant") filed a Complaint with the Commission against Apple, Inc. ("Respondent"), alleging discrimination on the basis of disability in violation of the Indiana Civil Rights Law (Ind. Code art. 22-9, et seq.). Accordingly, the Commission has jurisdiction over the parties and the subject matter of this complaint. An investigation has been completed. Both parties have submitted evidence. Based on the final investigative report and a full review of the relevant files and records, the Deputy Director now finds the following:

The issue presented to the Commission is whether Complainant was denied equal access to Respondent's place of public accommodation on the basis of disability. In order to prevail, Complainant must show: (1) Complainant is a member of a protected class; (2) Respondent caters or offers its services, facilities, or goods to the public; (3) Complainant attempted to access Respondent's facility and services; (4) Complainant requested an accommodation be made; (5) the accommodation was necessary to afford Complainant equal opportunity to enjoy the public accommodation; and (6) Respondent denied Complainant's accommodation request, failed to engage in the interactive process, or unreasonably delayed the accommodation, thereby constructively denying the request.

Complainant is a member of a protected class by virtue of having a disability as defined under Indiana Civil Rights Law and Respondent offers its services, facilities, and goods to the public. Complainant requested a reasonable accommodation be made to afford him equal access to Respondent's facility. Evidence shows Respondent denied the accommodation request, failed to engage in the interactive process, and maintained a policy with a discriminatory impact on people with disabilities.

By way of background, Complainant asserts he called Respondent's facility in advance of a planned visit on August 27, 2021, to request an accommodation to Respondent's mask policy. Complainant provided evidence to the Commission showing he was acting in accordance with medical guidance in requesting this accommodation. Complainant reports he spoke to two employees, requested an accommodation be made so he could visit the store and view products in person, and was advised the policy did not allow for exceptions to the mask policy. Complainant asserts his attempts to engage in the interactive process by offering alternative ideas was also rejected.

Respondent does not deny it maintained a mask policy at all times relevant to the complaint. Respondent asserts Complainant was offered alternatives, such as curbside pickup, online shopping, or visiting a different retailer which would offer the same products, and as such its employees engaged in the interactive process. Respondent further states Complainant did not make a reasonable request and only asked to forego wearing his mask entirely, and asserts Complainant cannot show either discriminatory intent or impact as a result of being denied an accommodation.

Sufficient evidence was provided and uncovered to substantiate Complainant's allegation. Further, evidence shows Respondent maintained a mask policy with a disparate impact on people with disabilities which preclude them from wearing masks, such as Complainant.

Although Respondent initially asserted no employee recalled the phone call in question, the first employee to speak to Complainant, an operations specialist, acknowledged he remembered the phone call. The employee stated he apologized to Complainant but advised him a mask was required for entry. Respondent's operations specialist reported he then spoke to a manager at the store, who reiterated the policy, and he advised Complainant again of his options to do

curbside pickup, online shopping, or visit another store in the vicinity which would have the same products. Respondent's other employee, an operations leader, reported not remembering the phone call, but acknowledged Complainant's narrative – she advised no accommodations could be made and suggested he shop at another store – was consistent with the answers she would give to any individual who requested an accommodation to Respondent's mask policy. Further, Respondent's operations leader confirmed at the time of Complainant's request, no patron would be permitted into the store without a mask, regardless of disability status.

Respondent asserted Complainant did not make any requests beyond foregoing a mask entirely; however, Complainant reports asking at least one of the employees whether someone could bring the phones to the door of the store for him to see and feel in person and being denied. Although there is no proof of this request, the rest of Complainant's narrative was confirmed by Respondent's employees as either accurate to their memory or consistent with their policy and what would have been shared with a hypothetical customer making the same request as Complainant. As such, it is likely Complainant did in fact make this request, but the deviation from Respondent's standard policy was rejected by Respondent's employees as they were instructed to follow specific protocol in processing these types of requests.

Respondent also asserts any individual without a mask could present a "direct threat", but no evidence was provided or uncovered to show it made an individual assessment of Complainant or offered reasonable alternatives to his attempt to access its facility. Respondent also asserts its policy was a legitimate requirement for safe operations at the time of the complaint based on the data of COVID-19 cases and transmission; however, as of December 2021, masks are optional at the store in question, despite case numbers being as high or higher than at the time relevant to the complaint.

Ultimately, Respondent's policy had a disparate impact on people with disabilities. Respondent's operations leader stated no exceptions to the mask policy were permitted, regardless of disability status, and stated any customer with a disability who requested an exception would be rejected. The only alternative accommodations offered were to use online shopping, which would not work for Complainant as he sought to physically view and feel the devices, or to visit another store entirely. Visiting a separate store, not operated by Respondent, is not a sufficient accommodation,

and violates regulations against maintaining separate public accommodations for people with and people without disabilities.

Evidence shows Respondent's mask policy excluded any individual with a disability which precludes wearing a face covering from entering its facility. Although Respondent provided alternatives to shopping in-person, Respondent's employees were informed no exceptions could be made to the mask policy; as such, customers with disabilities who were precluded from wearing a mask were refused entry to its facility under any circumstances. Ultimately, Respondent's policy causes a discriminatory impact on people with disabilities and violates relevant laws by not permitting reasonable accommodations to be made for access to its facility.

As such, there is probable cause to believe a discriminatory practice occurred as alleged.

Probable Cause Claim Under the Indiana Civil Rights Law

A public hearing is necessary to determine whether a violation of the Indiana Civil Rights Law occurred as alleged herein. Ind. Code § 22-9-1-18, 910 IAC 1-3-5. An administrative law judge from the Office of Administrative Law Proceedings will preside over any administrative proceedings and may issue recommended orders. The Commission retains the ultimate authority regarding any disputed issues. The parties may agree to have these claims heard as a civil action in the circuit or superior court in the county in which the alleged discriminatory act occurred. However, both parties must agree to such an election and notify the presiding adjudicator of the election in writing prior to the start of an administrative hearing in this matter. Ind. Code § 22-9-1-16, 910 IAC 1-3-6. Respondent and Complainant may amend the response or complaint, respectively, as a matter of right before a notice of a prehearing conference is issued. 910 IAC 1-2-8.

RESPECTFULLY SUBMITTED,

Gregory L. Wilson Sr.
Executive Director

3/2/2022
Date

By: David A. Fleischhacker
Deputy Director and General Counsel
Indiana Civil Rights Commission

CERTIFICATE OF SERVICE

I certify a copy of the foregoing Notice was served by first-class U.S. mail on the following persons on this 2nd day of March, 2022:

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111 Monument Circle, Ste. 4400
Indianapolis, IN 46244
Certified # 9214 8901 0661 5400 0173 0296 06

Tomika Brougher
Staff, Indiana Civil Rights Commission

ERIC J. HOLCOMB, *Governor*
GREGORY L. WILSON, SR., *Executive Director*

March 3, 2022

Aaron Abadi
82 Nassau St., Apt. 140
New York, NY 10038

RE: Aaron Abadi V. Apple, INC.

ICRC NO: Paha21090390

Dear Mr. Abadi,

Reasonable Cause has been found to believe that Respondent in the above-named case may have violated the Title VII of the Civil Rights Act of 1964, as amended and the Indiana Civil Rights Law, I am writing to inform you that an attorney has been assigned to prosecute this case. The attorney is **Zachary Griffin**. He can be reached at (317) 232-2600 or (800) 628-2909, between the hours of 9:00AM and 4:00PM, Monday through Friday.

You may contact this attorney with any questions you may have about this case. Please be advised, however, that this attorney does NOT represent you personally. Our Staff Attorneys represent the interest of the State of Indiana in enforcing the state civil rights laws. While our Staff Attorneys will seek to recover any damages to which you may be entitled, it is your right to obtain your own attorney to represent your personal interests in this matter. You must notify us, in writing, if your address or phone number change. Thanks for your attention regarding this matter.

Sincerely,

Tomiko Brougher
Intake Specialist

Sent certified mail to the following:

LAURIE E. MARTIN, ATTORNEY	**9214 8901 0661 5400 0173 0296 06**
APPLE STORE	**9214 8901 0661 5400 0173 0295 52**

ERIC HOLCOMB, *Governor*
GREGORY L. WILSON SR., *Executive Director*

ICRC NO: PAha21090390
FILE DATE: 10/1/2021

Aaron Abadi
Complainant,

v.

Apple
Respondent.

NOTICE OF COMPLAINT

This Notice of Complaint shall serve as verification that the Complaint you filed with the Indiana Civil Rights Commission ("Commission") has been accepted for filing on the above-referenced date and will be processed under the above docket number. You will be contacted by an investigator for further information regarding your Complaint; nonetheless, an investigation will be conducted and completed within 180 days of the above-referenced filing date. Upon the completion of the investigation, a determination will be made as to whether there is probable cause to believe that an unlawful discriminatory practice occurred as alleged. If probable cause is found to believe that a discriminatory practice occurred, the matter will be scheduled for an evidentiary hearing before the Administrative Law Judge. In the event a violation is found to have occurred, you may be entitled to recovery including wages lost as a result of the discriminatory employment practice or other forms of relief.

It is your statutory obligation to keep the Commission informed of any changes in contact information including your address or telephone number. The failure to keep the Commission informed of your contact information throughout the entire process including but not limited to the issuance of a finding in this matter may result in the dismissal of your Complaint. We are required to send most correspondence by certified mail; as such, the failure to claim certified mail promptly will delay the processing of the Complaint and may result in dismissal of the Complaint.

Throughout the investigation of this Complaint, you will have the opportunity to engage in mediation in order to resolve the issues. Mediation can be used to resolve the matter instead of a proceeding before an Administrative Law Judge and may be subject to approval by the Commission. Settlement through these means is encouraged and requires the consent of all parties; however, in the event the parties settle the matter after the Administrative Law Judge has conducted a full evidentiary hearing and rendered a decision, the settlement shall go before the ICRC Commissioners who have ultimate authority over the contents of the agreement. Ind. Code 22-9-1-6; 910 IAC 1-3-4. If interested in mediation, please contact ADR Director at 800-628-2909.

100 NORTH SENATE AVENUE, *Room N300* | INDIANAPOLIS, INDIANA *46204*
317.232.2600 *office* | 317.232.6580 *facsimile* | 800.628.2909 *toll free* | WWW.IN.GOV/ICRC

It is important to remember that retaliation against any person because he or she made a complaint, testified, or participated in an investigation, conciliation, or administrative proceeding before the Commission is prohibited by the Indiana Civil Rights Law, Ind. Code § 22-9-1-6(h).

You may contact the investigator, **Phryll Thornton**, at 800-628-2909 with any other questions or concerns.

Served by certified mail, return receipt requested, on the following:

9214 8901 0661 5400 0167 5026 89

AARON ABADI
APT. 140
82 NASSAU ST
NEW YORK, NY 10038-3703

100 NORTH SENATE AVENUE, *Room N300* | INDIANAPOLIS, INDIANA *46204*
317.232.2600 *office* | 317.232.6580 *facsimile* | 800.628.2909 *toll free* | WWW.IN.GOV/ICRC

ERIC HOLCOMB, *Governor*
GREGORY L. WILSON SR., *Executive Director*

ICRC NO: PAha21090390
FILE DATE: 10/1/2021

Aaron Abadi
Complainant,

v.

Apple
Respondent.

PACE RESPONDENT'S NOTICE OF COMPLAINT

A Complaint has been filed which alleges a violation of the Indiana Civil Rights Law (Ind. Code § 22-9, et seq.) Pursuant to regulations of the Indiana Civil Rights Commission, 910 IAC 1-2-7, Respondent must take one of the following actions within twenty (20) days of receipt of this Complaint.

File a written answer. Respondent shall either 1) specifically DENY or ADMIT each allegation OR 2) generally DENY all allegations, WITH VERIFICATION UNDER OATH. Any Answer must be signed by Respondent or Respondent's authorized representative. A detailed statement of your position on the claims should also be provided as it will assist the Commission in determining the merits of the Complaint.

OR

Grant immediate relief. If relief is acceptable to Complainant and the Commission, the Complaint will be dismissed subject to performance of the terms.

Failure to grant immediate relief OR file a written answer to the Complaint within twenty (20) days may be deemed an admission of all allegations in the Complaint. Upon proper application to the Commission, an Order by Default may be entered in favor of the Complainant. 910 IAC 1-2-7(d).

Additionally, the parties may engage in mediation. Mediation can be used to resolve the matter instead of a proceeding before an Administrative Law Judge and may be subject to approval by the Commission. The Commission has seen a high rate of resolution through the use of mediation; as such, the Commission encourages the parties to engage in this process. It is important to remember that both parties must agree with the contents of the settlement agreement; however, in the event the parties settle the matter after the Administrative Law Judge has conducted a full evidentiary hearing and rendered a decision, the settlement shall go before the ICRC Commissioners who have ultimate authority over the contents of the agreement. Ind. Code 22-9-1-6; 910 IAC 1-3-4. If you are interested in

this option, complete and return the enclosed "Agreement to Begin Mediation" ALONG WITH AN ANSWER AS DESCRIBED IN PARAGRAPH 2.

The Indiana Civil Rights Law, Ind. Code § 22-9-1-6, authorizes the Commission to issue subpoenas and order discovery in aid of investigations. Your cooperation in the investigation of this matter is greatly appreciated. Retaliation against any person because he or she made a complaint, testified, or participated in an investigation, conciliation, or administrative proceeding before the Commission is prohibited and may result in another claim of discrimination against you.

You may contact the investigator, **Phryll Thornton**, at 800-628-2909 with any other questions or concerns.

Served by certified mail, return receipt requested, on the following:

9214 8901 0661 5400 0167 5025 97

APPLE
8702 KEYSTONE XING
INDIANAPOLIS, IN 46240-7621

100 NORTH SENATE AVENUE, *Room N300* | INDIANAPOLIS, INDIANA *46204*
317.232.2600 *office* | 317.232.6580 *facsimile* | 800.628.2909 *toll free* | WWW.IN.GOV/ICRC

COMPLAINT OF DISCRIMINATION

State Form 42782 (R2 / 6-14)

ICRC:PAha21090390

Date Received

SEP 2 0 2021

Indiana Civil Rights Commission

INDIANA CIVIL RIGHTS COMMISSION
100 North Senate Avenue, Room N103
Indianapolis, IN 46204
Telephone: (317) 232-2600
Toll free: (800) 628-2909

INSTRUCTIONS: Please type or print legibly.

Any person or representative aggrieved by a discriminatory practice or act contrary to the provisions of the Indiana civil rights laws may file a complaint with the Indiana Civil Rights Commission (ICRC). A complaint must be filed within one hundred eighty (180) days from the date of the last occurrence of the discriminatory act (except in housing cases). A complaint alleging a discriminatory housing practice must be filed within one (1) year from the date of the last occurrence.

COMPLAINANT INFORMATION

Name *(first, last)*: Aaron Abadi

Home telephone number	Work telephone number	Mobile telephone number	E-mail address
(516) 6394100	( )	(516) 6394100	aa@neg.com

Address *(number and street, city, state, and ZIP code)*: 82 Nassau Street, Apt. 140, New York, NY, 10038

SECONDARY CONTACT INFORMATION

(In the event that we cannot reach you at the above contact)

Name *(first, last)*	Relationship

Home telephone number	Work telephone number	Mobile telephone number
( )	( )	( )

RESPONDENT INFORMATION

Name of respondent: Apple (Jess (Manager))

Address *(number and street, city, state, and ZIP code)*	Telephone number
8702 Keystone Crossing, Indianapolis, IN, 46240	(317) 8143740

Mailing address *(number and street, city, state, and ZIP code)*:

Number of employees *(please check one only)*

☐ 1 - 5 ☐ 6 -14 ☐ 15 or more ☑ N/A

AREA OF DISCRIMINATION

I believe I have been discriminated against in the area of:

☐ Credit ☐ Education ☐ Employment ☑ Public Accommodation ☐ Housing

I believe I have been discriminated against on the basis of:

☐ Age ☐ Ancestry ☐ Color ☑ Disability ☐ Race ☐ Religion
☐ Gender ☐ Retaliation ☐ Familial Status ☐ National Origin ☐ Veteran Status

What date did the alleged discriminatory act occur? *(month, day, year)*: 08/27/2021

How were you referred to the ICRC?

☐ Attorney / Lawyer ☐ Government Agency ☐ Friend ☐ Advertisement ☐ Brochure/Poster ☑ Internet ☐ Other _____

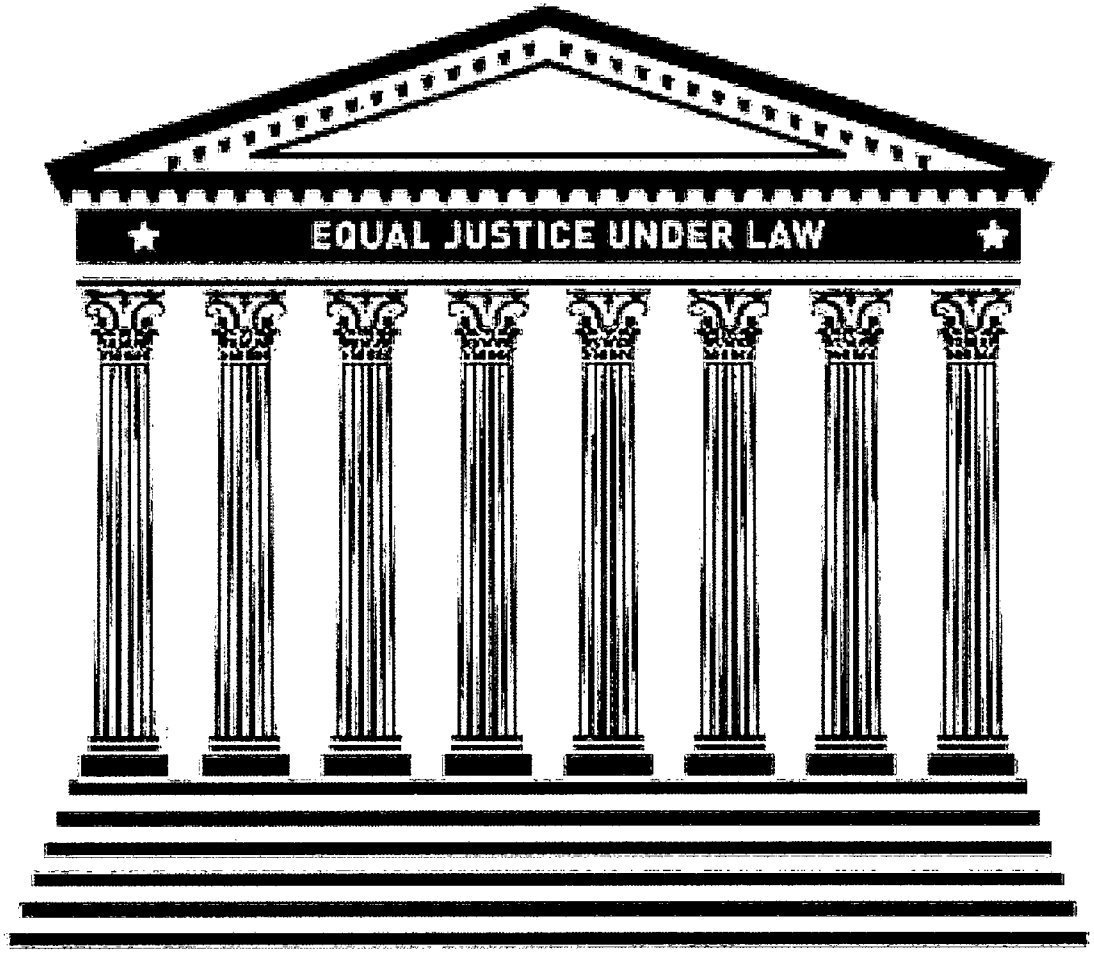
GRIEVANCE OR OTHER ACTION FILED REGARDING THIS MATTER

Name of procedure or agency		Date filed *(month, day, year)*
Status / Disposition	**Date of disposition *(month, day, year)***	**Date of alleged discriminatory act *(month, day, year)***

STATEMENT OF ALLEGATIONS
On August 27, 2021, I was denied entry to the Apple Store located at 8702 Keystone Crossing, Indianapolis, IN 46240. I believe I was discriminated against based on my disability. I said that I have a medical disability, specifically a sensory processing disorder, with a doctor ' s letter to that effect, and I cannot wear a mask. I am seeking all available remedies for a violation of Title I of the Americans with Disability Act, The Amendments Act and The Indiana Civil Rights Law.

AFFIRMATION	
I affirm, under the penalties for perjury that the foregoing representations are true.	
Signature of complainant	Date *(month, day, year)*
[signature]	9/27/2021

FOR OFFICE USE ONLY *(DO NOT WRITE BELOW THIS LINE.)*	
How was intake inquiry received? ☐ Telephone ☐ Walk-in ☐ Web ☐ Other: _____	Intake taken by 9/13/2021 TGB
Assign to	Date *(month, day, year)*


EQUAL JUSTICE UNDER LAW