No.

In the Supreme Court of the United States

DOMINO'S PIZZA LLC, PETITIONER,

v.

GUILLERMO ROBLES, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Title III of the Americans with Disabilities Act (ADA) provides, in relevant part, that "[n]o 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." The question presented is:

Whether Title III of the ADA requires a website or mobile phone application that offers goods or services to the public to satisfy discrete accessibility requirements with respect to individuals with disabilities?

CORPORATE DISCLOSURE STATEMENT

Petitioner Domino's Pizza LLC, is a subsidiary of Domino's Pizza, Inc., a publicly held company. Domino's Pizza, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1
JURISDICTION 1
STATUTORY PROVISIONS INVOLVED 1
STATEMENT 3
A. Statutory and Regulatory Framework 7
B. Factual Background and Proceedings Below 11
REASONS FOR GRANTING THE PETITION 14
A. The Decision Below Exacerbates a Circuit Split Over Whether Website Inaccessibility Violates Title III 15
B. The Question Presented Is Recurring and Important 25
C. The Ninth Circuit's Decision Is Wrong 31
CONCLUSION 35

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Page

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Page

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Page

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Page

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Page

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Page

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OPINIONS BELOW

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JURISDICTION

The judgment of the court of appeals was entered on January 15, 2019. On March 6, 2019, Justice Kagan extended the time to file a petition for a writ of certiorari to June 14, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12181 et seq., provides, in relevant part:

> 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.

Section 301 of Title III, 42 U.S.C. § 12181, provides that "[t]he following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce":

> (A) an inn, hotel, motel, or other place of lodging * * *;

(B) a restaurant, bar, or other establishment serving food or drink;

(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;

(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

STATEMENT

This case concerns whether Title III of the Americans with Disabilities Act (ADA) imposes accessibility mandates on the Internet. The ADA was enacted in 1990, in the age of landlines and snail mail. Congress designed Title III to ensure that individuals with disabilities obtain equal access to goods and services available at a wide range of physical places open to the public, which the statute terms "places of public accommodation." That mission has succeeded in no small part because Congress legislated at length and in hyper-specific detail about which physical places must be accessible, and how those "places of public accommodation" can ensure accessibility.

But Title III says nothing about the accessibility of websites or applications on smartphones, whether standing alone or in connection with restaurants, stores, or any other brick-and-mortar establishments that qualify as public accommodations. When Congress passed the ADA in 1990, websites were in their infancy, and apps did not yet exist.

Since then, the Internet has become ubiquitous, and courts have struggled to fit the square peg of the web into the round hole that is Title III. Federal courts of appeals have long split over whether Title III imposes accessibility requirements on web-only businesses with no fixed physical location. And the same line of cases has produced confusion in the circuits over whether Title III imposes discrete accessibility requirements on websites maintained by businesses whose brick-and-mortar locations constitute ADA-covered public accommodations.

The Department of Justice—the agency charged with implementing Title III—has expressed varying positions on its applicability to the online environment. In 2010, DOJ recognized that confusion reigns over whether Title III applies to websites. DOJ announced its intent to propose rules governing website accessibility, but acknowledged daunting challenges—including that companies would require at least two years to comply with any accessibility mandate. Seven years passed, but no proposed rule emerged, and DOJ abandoned the effort in 2017.

In the face of this uncertainty, plaintiffs have stepped in to fill the void. In 2018 alone, litigants filed over 2,250 federal lawsuits asserting ADA violations based on website inaccessibility, nearly tripling the number in 2017. Minh N. Vu, et al., *Number of Federal Website Accessibility Lawsuits Nearly Triple, Exceeding 2250 in 2018*, ADA Title III: News & Insights (Jan. 31, 2019), <https://tinyurl.com/y3y7o3rg>. Plaintiffs, often repeat litigants, have targeted nearly every type of industry and non-profit—including many websites maintained by businesses that also offer their goods or services at brick-and-mortar locations. Lisa Fickenscher, *Judges expand ADA rule to include more websites*, N.Y. Post (Aug. 14, 2017), <https://tinyurl.com/yyq6649l>.

Plaintiffs have pursued restaurants, retailers, grocery stores, car dealerships, hotels, banks, exercise studios, and universities. Their suits claim that these defendants' websites were inadequately accessible to individuals with disabilities, and that this alone triggers ADA liability. Plaintiffs have gone after New York's art galleries in alphabetical order, claiming that their websites inadequately describe the artwork and other products available at those places of public accommodation. Elizabeth A. Harris, *Galleries From A to Z Sued Over Websites the*

Blind Can't Use, N.Y. Times (Feb. 18, 2019), <https://tinyurl.com/y4ywjm9q>. Plaintiffs have even sued Beyoncé, alleging that her website is a public accommodation that is insufficiently accessible to visually impaired users. Evan Minsker, *Beyoncé's Website Violates Americans With Disabilities Act, Lawsuit Claims*, Pitchfork (Jan. 4, 2019), <https://tinyurl.com/y8v9mps6>.

Left undisturbed, the Ninth Circuit's decision would turn that flood of litigation into a tsunami. This case involves allegations that Domino's intentionally discriminated against respondent Guillermo Robles, who is blind, because he could not complete his custom pizza order using the Domino's website or mobile app. The Ninth Circuit recognized that a public accommodation under Title III must be a physical location, like a restaurant—reinforcing the existing circuit split over that question. But the court then held that, because Domino's physical restaurants are public accommodations, each method of ordering a pizza, in isolation, must be accessible to customers with disabilities. That holding effectively treated Domino's website and app as standalone public accommodations that must themselves comply with Title III.

Worse, the Ninth Circuit is the first circuit to expressly extend Title III to websites maintained by brick-and-mortar establishments, and the first to extend Title III to mobile apps. That holding conflicts with the rule in three other circuits, which hold that Title III requires equal access to the goods and services of a physical place of public accommodation based on the sum total of means to access those goods or services—so website or mobile app inaccessibility, in and of itself, is not unlawful.

This Court's review is imperative to stem a burdensome litigation epidemic. Title III has always required companies operating brick-and-mortar outposts within

the Ninth Circuit—which is to say, virtually any company with a national presence—to ensure that their physical locations were equally accessible to non-disabled and disabled customers. But the decision below has rendered the ADA applicable to websites and apps that offer access to companies' in-store goods and services. Those websites and apps must provide full accessibility, even if other means of accessing the same goods and services are readily available. No company or non-profit can design its website for the Ninth Circuit alone—so the ruling below effectively sets a nationwide mandate.

Businesses and non-profits have no interest in discriminating against potential customers or other individuals who happen to have disabilities. But these suits put their targets in an impossible situation. Unless this Court steps in *now*, defendants must retool their websites to comply with Title III without any guidance on what accessibility in the online environment means for individuals with the variety of disabilities covered by the ADA. Each defendant must figure out how to make every image on its website or app sufficiently accessible to the blind, how to render every video or audio file sufficiently available to the deaf, or how to provide content to those who cannot operate a computer or mobile phone. Businesses and non-profits must maintain that accessibility as their online content constantly changes and grows through links to other content.

Even if a business or non-profit tries to comply, nothing stops the next litigant from suing again by claiming that these attempts failed to satisfy elusive accessibility standards. This is a no-win scenario for the wide array of defendants facing these suits. And it is also a no-win scenario for individuals with disabilities, because defendants

faced with these suits overwhelmingly enter into piecemeal monetary settlements with individual plaintiffs or eliminate their online offerings instead of trying to keep up with moving-target compliance standards. If this Court has any doubts about the correctness of the decision below, it should grant review now to put an end to this untenable situation.

A. Statutory and Regulatory Framework

1. Enacted in 1990, the ADA prohibits discrimination against disabled individuals in three "major areas of public life": "employment (Title I of the Act), public services (Title II), and public accommodations (Title III)." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001).

To implement that prohibition, Congress throughout the ADA established specific rules governing which entities must comply, and how. For instance, Title II applies to state and local governments, their instrumentalities, the National Railroad Passenger Corporation, and "any commuter authority." 42 U.S.C. § 12131(1).

This case concerns Title III's mandates for public accommodations. The statute defines "public accommodation[s]" by providing an exhaustive and exclusive list of twelve specific categories of facilities that can qualify. *See PGA Tour, Inc.*, 532 U.S. at 675–76. Each category covers a "place" or "establishment" open to the public, 42 U.S.C. § 12181(7), including (as relevant here) "a restaurant, bar, or other establishment serving food or drink." *Id.* § 12181(7)(B). Other categories cover, for example, "an inn, hotel, motel, other place of lodging"; "a bakery, grocery store, clothing store, * * * or other sales or rental establishment"; and "a park, zoo, amusement park, or

other place of recreation." *Id.* § 12181(7). And a "[f]acility" means "buildings, structures, sites, complexes * * * or other real or personal property." 28 C.F.R. § 36.104.

Title III then prescribes how a "place of public accommodation" must accommodate disabled individuals. Its anti-discrimination provision begins with a "[g]eneral rule": any "person who owns, leases (or leases to), or operates a place of public accommodation" cannot discriminate "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). The statute then spells out specific types of conduct that Title III prohibits. For instance, public accommodations must provide their benefits in settings that integrate able-bodied and disabled individuals to the extent possible. *Id.* § 12182(b)(1)(B).

Title III also imposes highly detailed "[s]pecific prohibitions" to flesh out its anti-discrimination rule. One forbids "architectural barriers * * * in existing facilities." 42 U.S.C. § 12182(b)(2)(A)(iv). Another proscribes the "failure to take such steps as may be necessary to ensure that" no covered individual suffers discrimination "because of the absence of auxiliary aids and services." *Id.* § 12182(b)(2)(A)(iii). Such "auxiliary aids and services" include "Brailled materials and displays," "large print materials," "text telephones," and "telephones compatible with hearing aids." 28 C.F.R. § 36.303(b).

Despite its broad coverage and specific requirements, the ADA never mentions the Internet. Congress amended the ADA in 2008, well into the Internet age, but still never described online accessibility.

2. Congress charged DOJ with issuing regulations to implement Title III. 42 U.S.C. § 12186(b). But DOJ has never issued regulations regarding the accessibility of websites and online content. Rather, DOJ recently abandoned a stalled proposal to consider rules in this area, suggesting that it was uncertain "whether promulgating regulations about the accessibility of Web information and services is necessary and appropriate." *Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions*, 82 Fed. Reg. 60,932, 60,932 (Dec. 26, 2017). Meanwhile, DOJ has taken shifting positions in letters, litigation, and consent decrees that have exacerbated uncertainty over how (if at all) Title III applies to websites.

In 1996, DOJ stated that websites do not run afoul of Title III if there are alternative means of access to the information provided by a given website. Deval L. Patrick, Assistant Attorney General, Letter to Senator Tom Harkin (Sept. 9, 1996). Yet by 2000, DOJ had changed its mind, arguing that Title III applies to websites just like services offered in a physical place of public accommodation. Brief of the United States as Amicus Curiae Supporting Appellant at 7–8, 20, *Hooks v. OKbridge, Inc.*, 232 F.3d 208 (5th Cir. 2000).

Ten years and several amicus briefs later, DOJ in 2010 issued an advance notice of proposed rulemaking "to begin the process of soliciting comments and suggestions with respect to what [a proposed rule] regarding Web access should contain." *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations*, 75 Fed. Reg. 43,460, 43,461 (July 26, 2010). DOJ acknowledged that "[t]he Internet as it is known today did not exist when Congress enacted the

ADA and, therefore, neither the ADA nor the regulations the Department promulgated under the ADA specifically address access to Web sites." *Id.* at 43,463. Nonetheless, DOJ posited that "Web sites * * * operate as places of public accommodation," *id.* at 43,461, based on Congress's purported understanding "that the Department would apply the statute in a manner that evolved over time," *id.* at 43,463. DOJ conceded that "a clear requirement * * * does not exist." *Id.* at 43,464.

DOJ further indicated that any rule mandating website accessibility would likely need a two-year delay for existing websites to comply with whatever accessibility standards DOJ adopted, because "many Web sites have hundreds (and some thousands) of pages that will need to be made accessible." *Id.* at 43,466. DOJ also recognized the considerable "complexity and potential impact" of mandatory web accessibility, soliciting responses to difficult line-drawing questions. *Id.* at 43,464. For instance, DOJ was unsure which accessibility criteria (out of multiple options) would be best. *Id.* at 43,465. In light of these complications and the ever-changing nature of online content, DOJ asked whether compliance with any set of accessibility standards was even possible. *Id.* at 43,466.

Seven years passed. DOJ failed to issue any specific regulatory proposal, much less a final rule. Instead, DOJ took inconsistent positions in amicus briefs and consent decrees. In 2012, for example, DOJ argued that Netflix, a video streaming website, was itself a public accommodation. Statement of Interest at 5–7, *Nat'l Assoc. of the Deaf v. Netflix*, No. 11-30168 (D. Mass. May 15, 2012). But in 2015, DOJ deemed MIT's online programming merely a "service" of the university, which was a public accommodation. Statement of Interest at 18, *Nat'l Assoc. of the Deaf v. MIT*, No. 15-300024 (D. Mass. Jun. 25, 2015).

In 2017, DOJ withdrew the 2010 advance notice of proposed rulemaking and warned parties against "rely[ing] upon" the ANPRM "as presenting the Department of Justice's position on these issues." *Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions*, 82 Fed. Reg. 60,932, 60,932, 60,933 (Dec. 26, 2017).

In 2018, DOJ contended that "the ADA applies to public accommodations' websites," again backing away from the notion that websites are themselves public accommodations. Stephen E. Boyd, Assistant Attorney General, Letter to Rep. Ted Budd (Sept. 25, 2018). DOJ also indicated that "noncompliance with a voluntary technical standard for website accessibility does not necessarily indicate noncompliance with the ADA." *Id.* In sum, despite decades of ad hoc pronouncements, DOJ has never coherently explained how Title III could extend to websites.

B. Factual Background and Proceedings Below

1. Petitioner Domino's operates one of America's most popular restaurants, which has grown into "the largest pizza company in the world." Domino's Pizza, Inc., Annual Report (Form 10-K) (Feb. 20, 2018). Domino's sells over 2.5 million pizzas daily, *id.*, in part by offering at least 15 ways to order pizza. Dennis Maloney, *Why Domino's delivers more than 15 ways to order pizza*, Think with Google (Aug. 2017), <https://tinyurl.com/yyf8hmc6>. Customers can visit a Domino's restaurant location. They can call for delivery or in-store pickup. They can also order pizza by sending a text message, using voice-activated devices such as Amazon Alexa, and even via Twitter. Bruce Horovitz, *Domino's to roll out tweet-a-pizza*, USA Today (May 12, 2015), <https://tinyurl.com/yxhgyzxt>; Domino's AnyWare (last visited Jun. 11, 2019), <https://anyware.dominos.com>.

Like many businesses, Domino's allows customers to order through its website and mobile app for delivery or in-store pickup. On the Domino's website, users first select a nearby restaurant location. They then choose the size, sauce, cheese, crust, and toppings for their pizza. To order, customers go to the website's "Checkout" page and choose their preferred payment option. Domino's, <https://www.dominos.com> (last visited Jun. 10, 2019). Customers follow a similar ordering process using the Domino's app on their mobile phones.

Since at least February 2017, both the Domino's website and its mobile app have included an accessibility banner, which directs visitors to a telephone hotline staffed by a live representative. App. 24a. The banner reads: "If you are using a screen reader and are having problems using this website, please call 800-252-4031 for assistance." *Id.*

2. In 2016, respondent Guillermo Robles, who is blind, sued Domino's in the U.S. District Court for the Central District of California. This case kicked off at least 14 suits that Robles would file against various businesses, including Pizza Hut. All of these suits rest on the theory that if a company's website or app is not fully accessible to Robles, the company has violated Title III, regardless of the effectiveness of the other means it offers to access those goods and services. *E.g.*, *Robles v. Yum! Brands, Inc.*, 2:16-cv-08211, 2018 WL 566781, at *3 (C.D. Cal. Jan. 24, 2018).

In particular, this suit alleges that Domino's website and mobile app were incompatible with the screen-reading software Robles uses to access the Internet, App. 57a-60a, which translates online content into verbal speech or a Braille display. Robles alleges that the Domino's website and app did not include adequate written descriptions

for every image and required users of screen-reading software to go through "additional navigation and repetition" when placing orders. App. 56a. Robles thus allegedly could not select toppings for his pizza or "add the pizza to checkout and complete a transaction" on the website. App. 56a–57a. Robles did not call for delivery or in-store pickup from the Domino's store that would have received his order or try any of Domino's other available methods for ordering pizza.

According to Robles, the ADA demands that Domino's website and app comply with the Web Content Accessibility Guidelines, voluntary website-accessibility standards developed by the World Wide Web Consortium. App. 58a–59a. Version 2.0 of those guidelines ("WCAG 2.0") advises that websites and apps should provide written descriptions of all images, audio content, and videos that communicate the same information as the visual, audio, or video content. *Web Content Accessibility Guidelines (WCAG) 2.0, Guideline 1.1*, <https://tinyurl.com/jpqa733>. Further, these descriptions should be updated every time website or app content changes. *Id.*; W3C, *F20: Failure of Success Criterion 1.1.1 & 4.1.2* (last visited Jun. 11, 2019), <tinyurl.com/yyvymcqc>.

Robles sought a permanent injunction requiring Domino's to hire a "qualified consultant acceptable to Plaintiff" to ensure compliance with WCAG's voluntary standards. App. 60a–61a. The injunction would require Domino's to train employees on compliance with the WCAG 2.0 guidelines and would mandate regular tests to verify the accessibility of Domino's website and app. *Id.*

2. The district court granted Domino's motion to dismiss. App. 22a-42a. The court viewed the ADA as applying to the websites and mobile apps maintained by brick-and-mortar places of public accommodation. App. 27a-

29a. But the court held that requiring Domino's website and mobile app to comply with Title III in the absence of any "meaningful guidance" from DOJ "flies in the face of due process." App. 34a.

3. The Ninth Circuit reversed, holding that the Domino's website and mobile app are subject to Title III and that Domino's had fair notice of its Title III obligations. App. 1a-21a.

The Ninth Circuit acknowledged that under its precedent, Title III covers only physical places. App. 8a. But the court held that Title III imposes standalone accessibility requirements on Domino's website and mobile app because they "connect customers to the goods and services of Domino's physical restaurants," which are places of public accommodation. App. 8a-9a. Because customers could "use the website and app to locate a nearby Domino's restaurant and order pizzas for at-home delivery or in-store pickup," the court reasoned, there was a sufficient "nexus" between the website and app and Domino's restaurants. App. 8a. Given that nexus, the court concluded, "the ADA applies to the Domino's website and app," App. 9a, which must therefore "provide the blind with effective communication and full and equal enjoyment of its products and services," App. 21a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision explodes the reach of Title III into the online world, in defiance of the holdings of three other courts of appeals and the statutory text. The decision worsens a circuit split over whether Title III extends to companies that operate solely online. It also furthers a divide over whether the statute applies to websites or mobile apps operated by businesses and non-profits

that maintain brick-and-mortar locations. And these inconsistent rulings affect virtually every enterprise in America. Companies across every industry are battling website-accessibility lawsuits with no consistent message from the courts on whether or how to comply. The Ninth Circuit's decision is also profoundly wrong. It conflicts with Title III's clear text and creates a nonsensical rule for when websites fall within Title III's ambit. This Court should intervene immediately so that Congress, not the courts, can decide whether or how to extend the statute it passed in 1990 to the Internet.

A. The Decision Below Exacerbates a Circuit Split Over Whether Website Inaccessibility Violates Title III

The decision below deepens a circuit conflict over whether Title III imposes discrete accessibility obligations on websites. All courts agree that Title III imposes accessibility obligations on a brick-and-mortar business that offers its goods and services to the general public. But circuits have divided over whether Title III extends to enterprises that solely exist online, and whether Title III mandates discrete accessibility requirements for websites maintained by brick-and-mortar enterprises. That lack of clarity has become untenable for businesses, nonprofit institutions, and other organizations, which face different rules in different jurisdictions depending on their web presence.

1. Start with web-only businesses. Within the First, Second, and Seventh Circuits, enterprises without any physical location—including web-only businesses—can face Title III liability based on alleged inaccessibility. In those circuits, something can be a "public accommodation" even if it does not offer its goods or services at a brick-and-mortar physical location. According to the

First Circuit, "[t]he plain meaning" of a public accommodation "is not limited to" "physical structures for persons to enter." *Carparts Distribution Ctr., Inc. v. Auto. Wholesaler's Ass'n of New Eng., Inc.*, 37 F.3d 12, 19 (1st Cir. 1994).

Similarly, the Second Circuit in *Pallozzi v. Allstate Life Insurance Co.*, 198 F.3d 28 (2d Cir. 1999), declined to limit Title III to discrimination happening at insurance offices, which are public accommodations. *Id.* at 33. Instead, relying on *Carparts*, the court read Title III to apply to the sale of insurance policies more broadly and to "guarantee * * * more than mere physical access" to where the policies are sold. *Id.* at 32.

Likewise, the Seventh Circuit has held that Title III covers any "owner or operator of a store, hotel, restaurant, dentist's office, travel agency, theater, Web site, or other facility (*whether in physical space or in electronic space*) that is open to the public." *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999) (emphasis added). Either way, the court reasoned, enterprises that offer their goods or services to the public "can no more refuse to sell [goods or services] to a disabled person over the Internet than a furniture store can refuse to sell furniture to a disabled person who enters the store." *Morgan v. Joint Admin. Bd., Ret. Plan*, 268 F.3d 456, 459 (7th Cir. 2001).

In sum, in the First, Second, and Seventh Circuits, websites offering goods or services to the public are standalone public accommodations. And if those websites, as public accommodations, are inaccessible to individuals with disabilities, they necessarily fail to provide "full and equal enjoyment of the goods, services . . . or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a).

The Third, Sixth, and Ninth Circuits have openly disagreed with the above decisions, concluding that web-only enterprises cannot face Title III liability.

The en banc Sixth Circuit was the first to conclude that a "public accommodation" can only refer to "a physical place." *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1010 (6th Cir. 1997) (en banc). The Sixth Circuit emphasized that Title III's prohibition on discrimination is "restricted to 'places' of public accommodation," *id.* at 1011 (internal quotation marks omitted), and that all twelve categories of public accommodations listed in Title III refer to "a physical place open to public access," *id.* at 1014. The Sixth Circuit thus expressly "disagree[d] with the First Circuit's decision in *Carparts*." *Id.* at 1013.

The Third Circuit followed suit in *Ford v. Schering-Plough Corp.*, concluding that all the categories of public accommodations "refer to places with resources utilized by physical access." 145 F.3d 601, 614 (3d Cir. 1998). Thus, Title III does not "provid[e] protection from discrimination unrelated to [such] places." *Id.* at 613; *see Peoples v. Discover Fin. Servs., Inc.*, 387 F. App'x 179, 183 (3d Cir. 2010) ("Our court is among those that have taken the position that the term ["public accommodation"] is limited to physical accommodations.").

Finally, the Ninth Circuit has held that a public accommodation must be a physical location, meaning that a standalone website or mobile app does not count. *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000).

2. This same line of cases has created a significant, related divide over whether Title III imposes accessibility requirements on websites maintained by companies and

non-profits that also offer their goods and services at brick-and-mortar locations.

In the First, Second, and Seventh Circuits, the brick-and-mortar location and any online offerings are each considered a standalone "public accommodation" subject to Title III. Under the reasoning of those decisions, any forum offering goods or services to the public is a "place of public accommodation," whether that forum exists online or at a physical location. As the Seventh Circuit explained, "[t]he site of the sale is irrelevant to Congress's goal of granting the disabled equal access to sellers of goods and services. What matters is that the good or service be offered to the public." *Morgan*, 268 F.3d at 459; *accord Carparts*, 37 F.3d at 19; *Pallozzi*, 198 F.3d at 32–33. Thus, Title III applies to *each* means of offering goods and services to the public, whether in person, by telephone, by mail, or via a website. Each is a separate "place of public accommodation." So, if the same enterprise operates a store, website, and mobile app, all three must abide by Title III. And if an individual lacks equal access to a particular means on account of a disability, he or she could assert a Title III claim on that basis alone.

In the Third, Sixth, and Eleventh Circuits, however, defendants face Title III liability only if individuals with disabilities lack equal access to the goods or services of the *physical* place of public accommodation. There may be many means of accessing the benefits offered at that physical location—for instance, telephone ordering, website access, or an app. But the key is whether an individual with disabilities lacks equal access to the goods or services of the physical location, considering the aggregate effect of all methods of accessing those goods or services. The inaccessibility of a website or any other particular means of accessing the goods or services of a physical

place of public accommodation, standing alone, does not necessarily support a Title III claim. Had Robles sued in the Third, Sixth, or Eleventh Circuits, his Title III claim could not have proceeded solely based on the alleged inaccessibility of Domino's website or app, as the Ninth Circuit allowed.

Start with the Third Circuit's interpretation of Title III. "'[G]oods, services, facilities, privileges, advantages, or accommodations' concerning which a disabled person cannot suffer discrimination are not free-standing concepts but rather all refer to the statutory term 'public accommodation' and thus to what *these places* of public accommodation provide." *Ford*, 145 F.3d at 613 (emphasis added). Title III thus centers on the accessibility of the goods or services of a particular physical location. *Id.* (reasoning that the statute does not "provid[e] protection from discrimination unrelated to places"). Just because one means of accessing those goods or services is inaccessible does not mean that the *overall* goods or services of that physical location are inaccessible.

The Third Circuit's decision in *Peoples v. Discover Financial Services, Inc.* underscores the point. 387 F. App'x 179. There, a blind customer brought a Title III claim against a credit card company. He claimed that it failed to accommodate his blindness when considering a fraud claim arising from his use of his credit card to purchase services at a personal residence. That claim failed, the court held, because the credit card company's allegedly inadequate investigation of plaintiff's fraud claim did not affect his "equal enjoyment of goods, services, facilities, [etc.] * * * on physical property" that the company owns or operates. *Id.* at 184.

The Sixth Circuit similarly looks to whether plaintiffs lack equal access to goods or services offered by a physical

location. In *Parker v. Metropolitan Life Insurance Company*, the court found no "nexus" between an allegedly discriminatory employer-offered insurance policy and goods the insurance company offered at its physical office because the plaintiff "did not access her policy from MetLife's insurance office" and thus, "the good that plaintiff seeks is not offered by a place of public accommodation." 121 F.3d at 1011. Because "Title III covers only physical places," the court left open whether "a plaintiff must physically enter a public accommodation" or must "merely access[], by some other means, a service or good provided by a public accommodation." *Id.* at 1011 n.3. Either way, the Sixth Circuit's inquiry zeroes in on overall access to the goods the physical location provides.

Stoutenborough v. National Football League, Inc., 59 F.3d 580 (6th Cir. 1995), is illustrative. There, hearing-impaired plaintiffs claimed discrimination based on the National Football League's "blackout rule," which banned live local broadcasts of home football games that are not sold out. Plaintiffs claimed that their disabilities prevented them from accessing football games any other way when the blackout rule was in effect, because they cannot, for instance, hear radio broadcasts. But the court held they failed to state a Title III claim. The court reasoned that a stadium where games take place is a public accommodation, so the relevant goods and services are those the stadium provided, i.e., in-person football games. Because the stadium itself did not offer the televised broadcast of games, plaintiffs were not deprived of equal access to any "service" offered by the stadium. *Id.* Again, the Sixth Circuit emphasized, the inquiry looks to overall access to goods or services offered by a place of public accommodation. *Id.*; *see Parker*, 121 F.3d at 1011.

The Eleventh Circuit likewise scrutinizes overall access to the goods or services at the place of public accommodation. In *Rendon v. Valleycrest Productions, Ltd.*, the court considered whether a telephone selection process connected with an in-person studio game show violated Title III. 294 F.3d 1279 (11th Cir. 2002). The studio qualified as a "tangible public accommodation," because it offered the public an opportunity to appear on the show. *Id.* at 1282. There was a sufficient "nexus between the [telephone selection process] and the premises of the public accommodation" because the telephone selection process was the *only* means of accessing the studio game show. *Id.* at 1284 n.8. Because that telephone process was inaccessible to individuals with certain disabilities, the ultimate benefit—participation in a game show at the studio—was not equally accessible to members of the public regardless of disability. *Id.* at 1286.

In short, the Third, Sixth, and Eleventh Circuits focus on whether a particular means of access, including a website or mobile app, impedes overall access to the benefits of a brick-and-mortar public accommodation.

3. The decision below is the ideal vehicle for resolving judicial confusion over Title III's applicability to websites and apps. This case concerns a company that operates both brick-and-mortar locations and an online presence—a ubiquitous combination across many industries. The Ninth Circuit below weighed in both on whether the website or app alone is a public accommodation and on whether either comes within Title III based on the connection to Domino's restaurants. The Ninth Circuit reiterated its prior holding that website-only businesses cannot face Title III liability. App. at 8a (citing *Weyer*, 198 F.3d at 1114). The Ninth Circuit thus doubled down on

the existing circuit split over whether Title III applies to online-only businesses.

Critically, the decision below also articulated a new rule for entities that operate both a website or app and a brick-and-mortar location. The website or app, viewed in isolation, must comply with Title III if either provides access to what the physical public accommodation offers. The Ninth Circuit thus extended Title III to Domino's website and mobile app because they bear a sufficient "nexus" to Domino's restaurants, namely they "facilitate access" or "connect customers" to the restaurants' products. *Id.* at 9a–10a. Put differently, because the website and app were two means of accessing Domino's products, they each must adhere to Title III.

The Ninth Circuit's rule conflicts with that of the Third, Sixth, and Eleventh Circuits. The Ninth Circuit recognized a valid Title III claim even though Robles did not allege overall inaccessibility of the goods and services of Domino's restaurants. It was enough that the website or app—taken in isolation—was allegedly inaccessible.

4. The enduring divide among the circuits over whether Title III extends to websites has not gone unnoticed. Courts, the Department of Justice, and commentators have all recognized the conflict, now aggravated by the decision below. As the Third Circuit put it: "The Courts of Appeals are split on whether the term 'public accommodation' . . . refers to an actual physical structure or whether it has some broader meaning." *Peoples*, 387 F. App'x at 193. Indeed, when the Third and Sixth Circuits held that a "public accommodation" can only be a physical location, they noted their express disagreement with the First Circuit's contrary conclusion. *Ford*, 145 F.3d at 614; *Parker*, 121 F.3d at 1013. And, in joining the First Circuit, the Seventh Circuit acknowledged that its

reasoning departed from the decisions of the Third and Sixth Circuits. *See Morgan*, 268 F.3d at 459.

District courts have likewise recognized that the circuits are in disarray over whether Title III applies to web-only businesses and non-profits. District courts within the First, Second, and Seventh Circuits consistently apply Title III to web-only enterprises. *Access Living of Metro. Chi. v. Uber Techs., Inc.*, 351 F. Supp. 3d 1141, 1155-56 (N.D. Ill. 2018) (following *Morgan* in rejecting the argument that a "public accommodation" must be a physical location); *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 391-92 (E.D.N.Y. 2017) (reading *Pallozzi* to extend Title III to a website); *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 200 (D. Mass. 2012) (finding that "*Carparts's* reasoning applies with equal force to services purchased over the Internet").

But district courts within the Third Circuit follow that circuit's precedent and limit "public accommodations" to physical places. *E.g.*, *Walker v. Sam's Oyster House, LLC*, No. 18-193, 2018 WL 4466076, at *2 (E.D. Pa. Sept. 18, 2018). Likewise, taking cues from the Eleventh Circuit, some district courts within that region have refused to recognize a Title III claim where an inaccessible website did not impede access to the benefits of a physical location. *See, e.g.*, *Gomez v. Bang & Olufsen Am., Inc.*, No. 1:16-cv-23801, 2017 WL 1957182 at *4 (S.D. Fla. Feb. 2, 2017); *Access Now, Inc. v. Sw. Airlines, Co.*, 227 F. Supp. 2d 1312, 1321 (S.D. Fla. 2002).

DOJ, too, has repeatedly acknowledged a circuit split over whether Title III imposes accessibility requirements on "nonphysical establishments including websites or digital services." Brief for the United States as Amicus Curiae at 22, *Magee v. Coca-Cola Refreshments USA, Inc.*, 138 S. Ct. 55 (2017) (No. 16-668); *see* Statement of Interest

at 11–13, *Gil v. Winn Dixie Stores, Inc.*, No. 16-civ-23020 (S.D. Fla. Mar. 15, 2017). Further, DOJ has deemed it irrelevant that circuit decisions rejecting a physical-location requirement for public accommodations did not involve web-only businesses. "Although the First Circuit has not addressed specifically whether a [web-only business or non-profit] is a public accommodation" subject to Title III accessibility mandates, DOJ has insisted that "the [First Circuit's] analysis in *Carparts* clearly compels such a result"—and the Second and Seventh Circuits follow *Carparts*. *See* Statement of Interest at 6 & n.4, *Nat'l Assoc. of the Deaf v. Netflix*, No. 11-30168 (D. Mass. May 15, 2012). In 2010, when announcing its ultimately abortive plans to develop rules for website accessibility, DOJ attributed "uncertainty regarding the applicability of the ADA to Web sites of entities covered by [T]itle III" in part to "inconsistent court decisions." 75 Fed. Reg. at 43,464.

Commentators as well regularly highlight the division among courts "as to how to apply the ADA to the internet in general and to websites in particular." 1 Americans with Disabilities Act: Public Accommodations and Commercial Facilities § 2.04 (Nov. 2018); *accord* Nathaniel Vargas Gallegos & Jesse Sealey, *The Coming Ubiquity of ADA Compliance to the Internet and Its Extension to Online Education*, 20 J. Tech. L. & Pol'y 1, 9 (2015); Drew Rawl & Minh Vu, *As Lawsuits Accumulate, Will We See Clarifying ADA Website Regulations?*, LexisNexis Corporate Law Advisory (Mar. 7, 2017) <https://tinyurl.com/y38jyvjx>. Many have called on the Court to weigh in on the question presented—including in this very case. *See, e.g.*, Ted North, *Domino's Pizza May Deliver the Supreme Court a Chance to Modernize the ADA*,

Health L. & Pol'y Brief (Mar. 28, 2019) <https://tinyurl.com/y2ncgfdx>.[1]

B. The Question Presented Is Recurring and Important

1. Unless this Court steps in, the Ninth Circuit's decision will provoke endless litigation and impose immense costs on businesses and non-profits. The decision below squarely holds that the websites and apps of brick-and-mortar businesses are subject to Title III. That decision removes any ambiguity on this point within the nation's largest circuit. And because virtually every national business and non-profit offers its goods and services at physical locations within the Ninth Circuit, as well as offering those goods and services on websites or mobile apps, an immense range of organizations would have to conform to accessibility mandates or risk liability. The Ninth Circuit's rule will apply nationwide no matter what. No one can tailor their online presence to fit different rules in different circuits.

Plaintiffs are already targeting businesses in every sector of the economy, from retailers to hotels to health care companies.[2] Web accessibility litigation particularly

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[1] See also Charles S. Marion, *Attention businesses: Are your websites and mobile apps ADA compliant?*, Philadelphia Business Journal (May 10, 2019) <https://tinyurl.com/y58btvqr>; Denise Power, *ADA Website Accessibility Lawsuits: How to Protect Your Business*, CO, U.S. Chamber of Commerce (Apr. 18, 2019), <https://tinyurl.com/y2qvf8qt>; Clyde Hughes, *Advocates, businesses say ADA causes trouble for disabled in digital world*, United Press Int'l (Mar. 19, 2019), <https://tinyurl.com/y3ftue2k>; Jean-Paul Cart, *9th Circ. Has Made ADA Website Suits More Attractive*, Law360 (Mar. 11, 2019), https://tinyurl.com/y5h49dz7.

[2] *E.g.,* Iolanda Bulgaru, *4 Healthcare Companies Sued Over ADA Website Compliance (and Why it Matters?)*, Healthcare Weekly (Jan. 30, 2019), <https://tinyurl.com/y3w6ajrg>; Todd Hutchinson,

affects small businesses that need an online presence to stay competitive. *E.g.*, Shannon Behnken, *Businesses 'sitting ducks' for lawsuits because websites aren't ADA compliant*, WLFA (Feb. 7, 2019), <https://tinyurl.com/y5eqvgvm>. And it harms non-profit institutions that provide free online resources to the public, including schools, libraries, museums, and art galleries. *See, e.g.*, Lindsay McKenzie, *50 Colleges Hit With ADA Lawsuits*, Inside Higher Ed (Dec. 10, 2018), <https://tinyurl.com/yd9t9ag5>. By requiring websites and mobile apps to satisfy all of Title III's requirements, the Ninth Circuit's rule will force companies and non-profits large and small to reconsider how they engage with the public online. These entities need to know now whether they must comply with the Ninth Circuit's rule. The importance of this issue alone warrants the Court's review.

2. If this Court fails to act, the alternative is de facto regulation by the plaintiffs' bar. Plaintiffs filed over 10,000 Title III cases last year. Minh N. Vu et al., *Number of ADA Title III Lawsuits Filed in 2018 Tops 10,000*, ADA Title III: News & Insights (Jan. 22, 2019), <https://tinyurl.com/yyj9zfcv>. Several thousand of those suits involved web accessibility—nearly triple the number from 2017, and almost ten times the amount filed in 2016. Minh N. Vu et al., *Number of Federal Website Accessibility Lawsuits Nearly Triple, Exceeding 2250 in 2018*, ADA Title III: News & Insights (Jan. 31, 2019) <https://tinyurl.com/y3y7o3rg>; Marisa Harrilchak, *ADA website lawsuits a growing problem for retailers*,

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Burt's Bees Hit With Accessibility Suit Over Website, Law360 (Oct. 15, 2018), <https://tinyurl.com/y4k2p99c>; Carol C. Lumpkin & Stephanie N. Moot, *Hotels fight recurring website accessibility lawsuits*, Hotel Management (July 26, 2018), <https://tinyurl.com/y2m4ssja>.

Nat'l Retail Fed'n (Aug. 28, 2018), <https://tinyurl.com/ycpcslnz>. And 20% of the web accessibility lawsuits plaintiffs filed last year—or approximately 450 suits—targeted companies that had been sued before. Sara Randazzo, *Lawsuits Surge Over Websites' Access for the Blind*, Wall St. J. (Feb. 17, 2019), <https://tinyurl.com/y5j4ooc9>.

Observers are already predicting that the Ninth Circuit's decision will open the floodgates further and steer web accessibility litigation to the Ninth Circuit. Kristina M. Launey & Minh N. Vu, *Ninth Circuit Allow the* Robles v. Domino's *Website and Mobile App Accessibility Lawsuit to Move Forward*, Employment Law Lookout (Jan. 23, 2019), <https://tinyurl.com/y5ztmb2z>. These cases often feature copy-and-paste allegations that the same plaintiffs' lawyers trot out for multiple lawsuits featuring the same plaintiffs. The law firm representing Robles, for example, filed 355 ADA cases in twelve months, mostly in California federal and state courts. Hugo Martin, *Lawsuits targeting business websites over ADA violations are on the rise*, L.A. Times (Nov. 11, 2018), <https://tinyurl.com/y4tcarm9>. In addition to the 14 cases the firm filed on Robles' behalf, the firm filed more than three dozen lawsuits for the same Montana resident. *Id.*

These suits are not just prolific; they are costly, and the costs are rising. Plaintiffs' accessibility demands impose myriad costs. Achieving online accessibility involves creating "alternative text" descriptions for every image and incorporating other features into websites and apps. Those upgrades often require retaining outside consultants to create and maintain websites. *See* App. 60a (demanding that Domino's hire a "qualified consultant ac-

ceptable to Plaintiff"); Comment of National Small Business Association, Proposed Rulemaking, Docket No. 110 RIN-1190-AA61 (Jan. 24, 2011).

Compliance costs can run into the tens or hundreds of thousands of dollars. One grocery chain estimated it would need $250,000 to make its website accessible. *Gil v. Winn Dixie Stores, Inc.*, 257 F. Supp. 3d 1340, 1345–47 (S.D. Fla. 2017). For more complex websites with video content, interactive features, and links to other webpages, costs can reach even higher. Banks estimated that satisfying website-accessibility requirements could reach $3 million per website. *See, e.g.*, Comments of American Bankers Association, Proposed Rulemaking, Docket No. 110 RIN 1190-AA61 (Jan. 24, 2011). Publishers pegged their minimum estimate for interactive websites at $100,000, with possible costs of $ 1 million. Comments of Association of American Publishers, Inc., Docket No. 110 RIN 1190-AA61 (Jan. 24, 2011). This wide variation reflects not only differences in the complexity of websites, but uncertainty over what compliance even means.

Then there is the investment of time. The training required to ensure website accessibility is "the most expensive unquantifiable cost." Comments of American Bar Association, Proposed Rulemaking, Docket No. 110 RIN 1190-AA61 (Jan. 21, 2011). For instance, the American Bar Association estimated that overhauling the ABA website "would equate to around 450 hours of training." *Id.* Organizations simply lack "the financial and manpower resources to retrofit these sites." Comments of American Society of Travel Agents, Inc., Proposed Rulemaking, Docket No. 110 RIN 1190-AA61 (Jan. 24, 2011).

Unclear and shifting standards add to the cost. Multiple accessibility guidelines exist for websites and apps. The complaint in this case, for example, cited both WCAG

and Apple's accessibility guidelines for mobile apps. App. 51a. But those guidelines leave gaping holes for compliance. Take the WCAG requirement that each image have an accompanying textual description. The drafters of WCAG provided the following example of an adequate description: "President X of Country X shakes hands with Prime Minister Y of country Y." *Understanding Success Criterion 1.1.1: Non-text Content*, <https://tinyurl.com/y47k8br4>.

But not every image is so easy to describe. As one gallery owner asked, "How do you describe a black and white Franz Kline? Or any abstract picture, how do you describe it and to what depth of description does one need to put?" Harris, *supra*. Nor is it clear how to render online video content fully accessible. *See* Comments of eBay Inc., Proposed Rulemaking, Docket No. 110 RIN 1190-AA61 (Jan. 24, 2011) ("[T]here is no viable technique for making certain content accessible," including "[e]merging technologies such as HTML5 and Flash."). And, to the extent there are identifiable standards, they are open-ended and evolving, so compliance with one version may not protect against the next lawsuit. For instance, WCAG recently published version 2.1, adding new accessibility criteria. *Web Content Accessibility Guidelines (WCAG) Overview*, <https://tinyurl.com/ya9taclw>.

These burdens encourage businesses and non-profits to settle at an alarming rate—over 95 percent by one estimate. UsableNet, *ADA Web Accessibility Lawsuits*, (Feb. 20, 2019), <https://tinyurl.com/y2d8qlt6>. Other defendants eliminate online offerings instead of attempting compliance—a choice that ultimately hurts all consumers, including people with disabilities. Many businesses and non-profits lack the resources required to overhaul their websites and mobile apps. Faced with the

threat of ADA liability, they may decide to jettison online content. That is what the University of California, Berkeley did when DOJ in 2016 informed the university that its online educational content violated the ADA because it lacked adequate text descriptions, had poor color contrast, improper formatting, and lacked closed captions. Rebecca B. Bond, Disability Rights Section, Letter of Findings to Chancellor Nicholas B. Dirks et al. (Aug. 30, 2016). Citing the "extremely expensive measures" DOJ mandated for ADA compliance, Berkeley opted to instead remove public access to over 20,000 free online video and audio lectures. Carl Straumsheim, *Berkeley Will Delete Online Content*, Inside Higher Ed (Mar. 6, 2017), <https://tinyurl.com/zh4d22n>. By fostering yet further website accessibility lawsuits, the Ninth Circuit's decision threatens the availability of online content for everyone.

3. This case is an ideal vehicle for the Court to address whether and how Title III applies to websites, and that issue need not percolate any further. The question was squarely presented to and answered by the Ninth Circuit. There are no jurisdictional or procedural issues that would bar this Court's review.

The time is ripe for this Court to intervene. Courts have thoroughly aired the competing arguments over whether Title III applies to the Internet, and have chosen their sides. DOJ has muddied the waters further for decades. And the decision below has removed any doubt over whether the circuit split squarely applies to websites.

Time is also of the essence. As noted, most website accessibility suits settle. In the remaining cases, defendants are particularly unlikely to appeal adverse rulings in the First, Second, and Seventh Circuits, where a loss is virtually guaranteed. For example, after the Second Circuit "strongly suggest[ed] that" Title III "extends to

'places' on the Internet," at least five district court decisions have held that websites are subject to Title III. *Del-Orden v. Bonobos*, No. 17 Civ. 2744, 2017 WL 6547902, at *5 (S.D.N.Y. Dec. 20, 2017). Additional decisions in those circuits that make even clearer that Title III extends to both web-only businesses and the websites of brick-and-mortar establishments are unlikely, and in any event unnecessary because those circuits have already addressed the issue.

This Court should decide once and for all whether Title III applies to the Internet. Otherwise, the Ninth Circuit's decision will let serial plaintiffs impose a vague accessibility mandate on the entire country.

C. The Ninth Circuit's Decision Is Wrong

The Ninth Circuit's decision below rests on contradictory logic. Standalone websites cannot qualify as public accommodations, because public accommodations are physical locations. Yet websites maintained by enterprises with brick-and-mortar locations are, in effect, standalone public accommodations. By maintaining a physical presence, companies somehow transform their websites into standalone public accommodations that must meet Title III accessibility requirements. That reasoning cannot be squared with the statutory text and produces illogical results.

1. Title III defines public accommodations as actual physical places. That is the antithesis of a website or mobile app, which is "located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet." *Reno v. ACLU*, 521 U.S. 844, 851 (1997).

a. Title III's plain text cabins the scope of public accommodations to tangible physical locations. For starters, Title III covers "any person who owns, leases (or leases to), or operates a *place of public accommodation*." 42 U.S.C. § 12182(a) (emphasis added). And the text forbids discrimination based on disability "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of *any place of public accommodation*." *Id.* (emphasis added). The ordinary meaning of the word "place" is a "physical environment" or "physical surroundings." 2 *Webster's Third New International Dictionary* 1727 (1986); *see Wilmette Park Dist. v. Campbell*, 338 U.S. 411, 415 (1949) (a "place" refers to a "specific location.").

Title III's definition of "public accommodation" confirms that reading. The definition sets forth twelve categories of public accommodations, all describing physical locations ("inn," "restaurant," "motion picture house," "auditorium," "bakery," "laundromat," and so on). 42 U.S.C. § 12181(7). "[A] word is known by the company it keeps." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). It would be particularly strange to conclude that Congress listed twelve sets of physical venues but forgot to include language covering intangible places. To read any one term to cover virtual spaces would "giv[e] unintended breadth" to the definition of "public accommodation." *Gustafson*, 513 U.S. at 575 (internal quotation marks omitted).

b. Websites and mobile apps do not become public accommodations simply by virtue of providing access to the goods and services of a brick-and-mortar enterprise. Title III does not demand full accessibility for each and every means of accessing the goods or services a public accommodation provides to the public. Instead, the Act

focuses on "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) (emphasis added).

The Ninth Circuit's contrary conclusion misconceives the nexus that Title III requires between means of accessing the goods or services of a public accommodation and the public accommodation itself. The decision below requires each means of access to comply with Title III accessibility requirements if that means "facilitates access" to goods and services on offer at a physical place. App. 8a–9a. But that reading rewrites Title III to effectively require "full and equal enjoyment of [every means of accessing]" the benefits a public accommodation offers.

Nothing in Title III requires that a public accommodation choose any particular means of accessing its goods and services. And nothing mandates that each chosen means be adequately accessible in isolation. Title III guarantees "full and equal enjoyment" of the goods and services offered at physical places of public accommodation, based on the combined means of access to those goods or services. If a website is insufficiently accessible, but the business or non-profit provides "full and equal enjoyment" to individuals with disabilities in person and through a telephone hotline, for example, there is no discrimination under Title III.

The Ninth Circuit's rule that every means of access must be equally accessible would have outlawed widespread practices used before and after the ADA's enactment. Since before the advent of the Internet, department stores have sent customers mail-order catalogues that allow them to order products available at the stores. Companies have also deployed door-to-door salesmen and

maintained telephone hotlines as additional ways for customers to place orders without having to visit their physical locations. Those methods parallel today's websites and mobile apps. Yet, under the Ninth Circuit's view, these longstanding methods would have violated Title III unless the mail-order catalogues were available in Braille, the door-to-door salesmen knew American Sign Language, and the telephone hotlines were equipped for the hearing-impaired. Had Congress intended such specific requirements, it would have said so in Title III. The omission of such specific language confirms that Title III concerns overall access to what a public accommodation provides, not each means of access it offers.

2. The Ninth Circuit's interpretation of Title III also makes little practical sense. On the one hand, the Ninth Circuit holds that all businesses or non-profits that operate solely online—like e-commerce, online entertainment, or social media—face no Title III accessibility mandates, no matter what or how much they provide to the public. On the other hand, as long as a company or organization operates even one brick-and-mortar location and its online offerings bear a connection to that one location, all the online offerings come within Title III's ambit. For instance, now that Amazon has built a few brick-and-mortar bookstores, the Ninth Circuit's decision suggests its gargantuan online platform must comply with Title III as long as it somehow facilitates access to the bookstores' products. Trevor Mogg, *Amazon Is Opening a New Brick-and-Mortar Store with A Twist*, Digital Trends (Sept. 26, 2018), <https://tinyurl.com/y9zo67lm>.

Congress, however, passed a statute to apply only to places of public accommodation, which must be physical locations, and only to ensure adequate overall access to

the benefits of those places. Any different policy choice is up to Congress, not the judiciary.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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JUNE 13, 2019

APPENDIX

TABLE OF APPENDICES

Appendix A

Opinion of the United States Court of Appeals for the Ninth Circuit (January 15, 2019) App-1a

Appendix B

Order Granting Defendant's Alternative Motion to Dismiss or Stay of the United States District Court for the Central District of California (March 20, 2017)..... App-22a

Appendix C

Complaint for Damages and Injunctive Relief filed by Guillermo Robles in the United States District Court for the Central District of California (September 1, 2016)..... App-43a

Appendix D

42 U.S.C. § 12101 ..... App-71a

42 U.S.C. § 12181 ..... App-74a

42 U.S.C. § 12182 ..... App-79a

28 C.F.R. § 36.303 ..... App-87a

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GUILLERMO ROBLES, an individual,
Plaintiff-Appellant,

v.

DOMINO'S PIZZA, LLC, a limited liability corporation,
Defendant-Appellee.

No. 17-55504

D.C. No. 2:16-cv-06599-SJO-FFM

OPINION

Appeal from the United States District Court
for the Central District of California
S. James Otero, District Judge, Presiding

Argued and Submitted October 12, 2018
Pasadena, California

Filed January 15, 2019
Before: Paul J. Watford and John B. Owens, Circuit Judges, and Jennifer G. Zipps,[*] District Judge.

Opinion by Judge Owens

[*] The Honorable Jennifer G. Zipps, United States District Judge for the District of Arizona, sitting by designation.

OPINION

OWENS, Circuit Judge:

Plaintiff Guillermo Robles, a blind man, appeals from the district court's dismissal of his complaint alleging violations of the Americans with Disabilities Act, 42 U.S.C. § 12101, and California's Unruh Civil Rights Act (UCRA), California Civil Code § 51. Robles alleged that Defendant Domino's Pizza, LLC, (Domino's) failed to design, construct, maintain, and operate its website and mobile application (app) to be fully accessible to him. We have jurisdiction under 28 U.S.C. § 1291, and we reverse and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

Robles accesses the internet using screen-reading software, which vocalizes visual information on websites. Domino's operates a website and app that allows customers to order pizzas and other products for at-home delivery or in-store pickup, and receive exclusive discounts.

On at least two occasions, Robles unsuccessfully attempted to order online a customized pizza from a nearby Domino's. Robles contends that he could not order the pizza because Domino's failed to design its website and app so his software could read them.

In September 2016, Robles filed this suit seeking damages and injunctive relief based on Domino's failure to "design, construct, maintain, and operate its [website and app] to be fully accessible to and independently usable by Mr. Robles and other blind or visually-impaired people," in violation of the ADA and UCRA. Robles sought a "permanent injunction requiring Defendant to

. . . comply with [Web Content Accessibility Guidelines (WCAG) 2.0] for its website and Mobile App."[1] Domino's moved for summary judgment on the grounds that (1) the ADA did not cover Domino's online offerings; and (2) applying the ADA to the website or app violated Domino's due process rights. Domino's alternatively invoked the primary jurisdiction doctrine, which permits a court to dismiss a complaint pending the resolution of an issue before an administrative agency with special competence. *See Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008) (defining primary jurisdiction doctrine).

The district court first held that Title III of the ADA applied to Domino's website and app. The court highlighted the ADA's "auxiliary aids and services" section, 42 U.S.C. § 12182(b)(2)(A)(iii), which requires that covered entities provide auxiliary aids and services to ensure that individuals with disabilities are not excluded from accessing the services of a "place of public accommodation"—in this case, from using the website or app to order goods from Domino's physical restaurants.

The district court then addressed Domino's argument that applying the ADA to its website and app violated its due process rights because the Department of Justice

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[1] WCAG 2.0 guidelines are private industry standards for website accessibility developed by technology and accessibility experts. WCAG 2.0 guidelines have been widely adopted, including by federal agencies, which conform their public-facing, electronic content to WCAG 2.0 level A and level AA Success Criteria. 36 C.F.R. pt. 1194, app. A (2017). In addition, the Department of Transportation requires airline websites to adopt these accessibility standards. *See* 14 C.F.R. § 382.43 (2013). Notably, the Department of Justice has required ADA-covered entities to comply with WCAG 2.0 level AA (which incorporates level A) in many consent decrees and settlement agreements in which the United States has been a party.

(DOJ) had failed to provide helpful guidance, despite announcing its intention to do so in 2010.[2] *See* Nondiscrimination on the Basis of Disability, 75 Fed. Reg. 43460-01 (July 26, 2010) (issuing Advance Notice of Proposed Rulemaking (ANPRM) to "explor[e] what regulatory guidance [DOJ] can propose to make clear to entities covered by the ADA their obligations to make their Web sites accessible").[3]

The district court, relying heavily on *United States v. AMC Entertainment, Inc.*, 549 F.3d 760 (9th Cir. 2008), concluded that imposing the WCAG 2.0 standards on Domino's "without specifying a particular level of success criteria and without the DOJ offering meaningful guidance on this topic . . . fl[ew] in the face of due process."[4] The

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[2] DOJ is charged with issuing regulations concerning the implementation of the ADA. *See* 42 U.S.C. § 12186(b) ("[T]he Attorney General shall issue regulations in an accessible format to carry out the provisions of this subchapter . . . ."); *Bragdon v. Abbott*, 524 U.S. 624, 646 (1998) (noting that DOJ is "the agency directed by Congress to issue implementing regulations, to render technical assistance explaining the responsibilities of covered individuals and institutions, and to enforce Title III in court") (internal citations omitted).

[3] We recognize that DOJ withdrew its ANPRM on December 26, 2017, so the district court did not have the benefit of considering this withdrawal when it issued its decision on March 20, 2017. *See* Nondiscrimination on the Basis of Disability, 82 Fed. Reg. 60932-01 (Dec. 26, 2017).

[4] Only after Robles filed this suit, Domino's website and app began displaying a telephone number that customers using screen-reading software could dial to receive assistance. The district court noted that Robles had "failed to articulate why [Domino's] provision of a telephone hotline for the visually impaired . . . does not fall within the range of permissible options afforded under the ADA." However, the district court did not reach whether a genuine issue of material fact

district court held that DOJ "regulations and technical assistance are necessary for the Court to determine what obligations a regulated individual or institution must abide by in order to comply with Title III." In the district court's view, therefore, only the long-awaited regulations from DOJ could cure the due process concerns, so it had no choice but to invoke the primary jurisdiction doctrine. The district court granted Domino's motion to dismiss without prejudice, and this appeal followed.

II. STANDARD OF REVIEW

We review de novo the district court's interpretation and construction of a federal statute—here, the court's application of the ADA to websites and apps. *See ASARCO, LLC v. Celanese Chem. Co.*, 792 F.3d 1203, 1208 (9th Cir. 2015). As the constitutionality of a statute or regulation is a question of law, we also review de novo the district court's holding that applying the ADA to websites and apps would violate due process. *See Az. Libertarian Party v. Reagan*, 798 F.3d 723, 728 (9th Cir. 2015); *Preminger v. Peake*, 552 F.3d 757, 765 n.7 (9th Cir. 2008). Finally, we review de novo the court's invocation of the primary jurisdiction doctrine. *See Reid v. Johnson & Johnson*, 780 F.3d 952, 958 (9th Cir. 2015).

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existed as to the telephone hotline's compliance with the ADA, including whether the hotline guaranteed full and equal enjoyment and "protect[ed] the privacy and independence of the individual with a disability." 28 C.F.R. § 36.303(c)(1)(ii) (2017). We believe that the mere presence of the phone number, without discovery on its effectiveness, is insufficient to grant summary judgment in favor of Domino's.

III. DISCUSSION

This appeal presents three questions. First, whether the ADA applies to Domino's website and app. Second, if so, whether that holding raises due process concerns. Third, whether a federal court should invoke the primary jurisdiction doctrine because DOJ has failed to provide meaningful guidance on how to make websites and apps comply with the ADA.

A. The ADA's Application to Domino's Website and App

The ADA "as a whole is intended 'to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.'" *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 589 (1999) (quoting 42 U.S.C. § 12101(b)(1)). Title III of the ADA advances that goal by providing that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). We agree with the district court that the ADA applies to Domino's website and app.

The ADA expressly provides that a place of public accommodation, like Domino's, engages in unlawful discrimination if it fails to "take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services."[5] *Id.* §

[5] The ADA exempts covered entities from the requirement to provide auxiliary aids and services where compliance would "fundamentally

12182(b)(2)(A)(iii). DOJ regulations require that a public accommodation "furnish appropriate auxiliary aids and services where necessary to ensure *effective communication* with individuals with disabilities." 28 C.F.R. § 36.303(c)(1) (emphasis added); *see Bragdon*, 524 U.S. at 646 (holding that DOJ's administrative guidance on ADA compliance is entitled to deference). And DOJ defines "auxiliary aids and services" to include "accessible electronic and information technology" or "other effective methods of making visually delivered materials available to individuals who are blind or have low vision." 28 C.F.R. § 36.303(b)(2).

Therefore, the ADA mandates that places of public accommodation, like Domino's, provide auxiliary aids and services to make visual materials available to individuals who are blind. *See id.* § 36.303. This requirement applies to Domino's website and app, even though customers predominantly access them away from the physical restaurant: "The statute applies to the services of a place of public accommodation, not services in a place of public accommodation. To limit the ADA to discrimination in the provision of services occurring on the premises of a public accommodation would contradict the plain language of the statute." *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 953 (N.D. Cal. 2006) (emphasis in original) (internal citation omitted).

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alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden." 42 U.S.C. § 12182(b)(2)(A)(iii); *see also* 28 C.F.R. § 36.303(a). At this stage, Domino's does not argue that making its website or app accessible to blind people would fundamentally alter the nature of its offerings or be an undue burden.

The alleged inaccessibility of Domino's website and app impedes access to the goods and services of its physical pizza franchises—which are places of public accommodation. *See* 42 U.S.C. § 12181(7)(B) (listing a restaurant as a covered "public accommodation"). Customers use the website and app to locate a nearby Domino's restaurant and order pizzas for at-home delivery or in-store pickup. This nexus between Domino's website and app and physical restaurants—which Domino's does not contest—is critical to our analysis.[6]

In *Weyer v. Twentieth Century Fox Film Corp.*, our court examined whether an insurance company that administered an allegedly discriminatory employer-provided insurance policy was a covered "place of public accommodation." 198 F.3d 1104, 1113–14 (9th Cir. 2000). We concluded that it was not. Because the ADA only covers "actual, physical places where goods or services are open to the public, and places where the public gets those goods or services," there had to be "some connection between the good or service complained of and an actual physical place." *Id.* at 1114. While the insurance company had a physical office, the insurance policy at issue did not concern accessibility, or "such matters as ramps and elevators so that disabled people can get to the office." *Id.* And although it was administered by the insurance company, the employer-provided policy was not a good offered by the insurance company's physical office. *Id.* at 1115.

Unlike the insurance policy in *Weyer*, Domino's website and app facilitate access to the goods and services

[6] We need not decide whether the ADA covers the websites or apps of a physical place of public accommodation where their inaccessibility does not impede access to the goods and services of a physical location.

of a place of public accommodation—Domino's physical restaurants. They are two of the primary (and heavily advertised) means of ordering Domino's products to be picked up at or delivered from Domino's restaurants. We agree with the district court in this case—and the many other district courts that have confronted this issue in similar contexts[7]—that the ADA applies to Domino's website and app, which connect customers to the goods and services of Domino's physical restaurants.

B. Due Process

The second question we address is whether applying the ADA to Domino's website and app raises due process concerns. Despite concluding that the ADA covered Domino's website and app, the district court held that imposing liability on Domino's here would violate its Fourteenth Amendment right to due process.[8]

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[7] *See, e.g.*, *Robles v. Yum! Brands, Inc.*, 2018 WL 566781, at *4 (C.D. Cal. Jan. 24, 2018); *Rios v. N.Y. & Co., Inc.*, 2017 WL 5564530, at *3 (C.D. Cal. Nov. 16, 2017); *Reed v. CVS Pharmacy, Inc.*, 2017 WL 4457508, at *3 (C.D. Cal. Oct. 3, 2017); *Gorecki v. Hobby Lobby Stores, Inc.*, 2017 WL 2957736, at *3–4 (C.D. Cal. June 15, 2017); *Target*, 452 F. Supp. 2d at 953; *Gomez v. Gen. Nutrition Corp.*, 323 F. Supp. 3d 1368, 1375–76 (S.D. Fla. 2018); *Castillo v. Jo-Ann Stores, LLC*, 286 F. Supp. 3d 870, 881 (N.D. Ohio 2018); *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340, 1348–49 (S.D. Fla. 2017), appeal docketed, No. 17-13467 (11th Cir. Aug. 1, 2017).

[8] The district court also held (in error) that Robles conceded Domino's due process argument by not squarely addressing it at the motion to dismiss stage. The relevant issue here is whether Domino's website and app comply with the ADA. Domino's due process argument is a defense to that issue. Domino's cites no authority holding that a plaintiff's failure to respond to a defense waives the plaintiff's cause of action (here, the ADA). Regardless, "an issue will generally be deemed waived on appeal if the argument was not raised sufficiently

As a preliminary matter, we hold that Domino's has received fair notice that its website and app must comply with the ADA. An impermissibly vague statute violates due process because it does not "give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). However, "[a] statute is vague not when it prohibits conduct according 'to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.'" *Botosan v. Paul McNally Realty*, 216 F.3d 827, 836 (9th Cir. 2000) (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971)). Moreover, "[b]ecause the ADA is a statute that regulates commercial conduct, it is reviewed under a less stringent standard of specificity" than, for example, criminal laws or restrictions on speech. *Id.* (citing *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498–99 (1982)).[9] Therefore, the ADA would be vague "only if it is so indefinite in its terms that it fails to articulate

for the trial court to rule on it." *In re Mercury Interactive Corp. Secs. Litig.*, 618 F.3d 988, 992 (9th Cir. 2010) (internal quotation marks omitted). Here, the parties raised the matter sufficiently for the district court to dedicate four pages to this issue, and Robles did not waive his ability to respond to Domino's due process argument.

[9] In *Village of Hoffman Estates*, the Supreme Court explained: "The degree of vagueness that the Constitution tolerates—as well as relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action." 455 U.S. at 498 (internal footnotes omitted).

comprehensible standards to which a person's conduct must conform." *Id.*

The ADA articulates comprehensible standards to which Domino's conduct must conform. Since its enactment in 1990, the ADA has clearly stated that covered entities must provide "full and equal enjoyment of the[ir] goods, services, facilities, privileges, advantages, or accommodations" to people with disabilities, 42 U.S.C. § 12182(a), and must "ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services," *id.* § 12182(b)(2)(A)(iii). DOJ has clarified that these provisions require "effective communication." 28 C.F.R. § 36.303(c)(1). Moreover, since it announced its position in 1996, DOJ has "repeatedly affirmed the application of [T]itle III to Web sites of public accommodations." 75 Fed. Reg. 43460-01, 43464 (July 26, 2010). Thus, at least since 1996, Domino's has been on notice that its online offerings must effectively communicate with its disabled customers and facilitate "full and equal enjoyment" of Domino's goods and services. *See* 42U.S.C. § 12182(a); *see also Gorecki*, 2017 WL 2957736, at *5 ("Title III's general prohibition of discrimination on the basis of disability, and its requirements to provide appropriate auxiliary aids and services, where necessary to ensure effective communication, place an affirmative obligation on places that meet the definition of a public accommodation to ensure disabled individuals have as full and equal enjoyment of their websites as non-disabled individuals.").

However, the heart of Domino's due process argument is not that Domino's lacked fair notice that its website and

app must comply with the ADA. Instead, Domino's argues that imposing liability would violate due process because Robles seeks to impose liability on Domino's for failing to comply with WCAG 2.0, which are private, unenforceable guidelines; and (2) DOJ has not issued regulations specifying technical standards for compliance, so Domino's does not have "fair notice of what *specifically* the ADA requires companies to do in order to make their websites accessible."

1. Robles Does Not Seek to Impose Liability Based on WCAG 2.0

First, we address Domino's argument that Robles seeks to impose liability based on Domino's failure to comply with WCAG 2.0. Relying heavily on our decision in *AMC*, Domino's argues that this would violate due process because Domino's has not received fair notice of its obligation to comply with the WCAG 2.0 guidelines. Yet, as explained below, Domino's overstates both the holding of *AMC* and the significance of WCAG 2.0 in this case.

AMC concerned movie-theater accessibility for wheelchair-bound patrons. *See* 549 F.3d at 762. Our court reversed an injunction ordering that AMC's stadium-style theaters (many built before 1998) undergo a massive reconfiguration to comply with DOJ's interpretation of an ambiguous accessibility regulation (finalized in 1998). *Id.* at 768–70. Our court held that requiring AMC to reconfigure theaters built before DOJ announced its interpretation of the ambiguous regulation would violate due process. *Id.*

This case does not present the fair notice concerns of *AMC*, and the district court erred in equating the

relevance of WCAG 2.0 with the regulation at issue in *AMC*. Here, Robles does not seek to impose liability based on Domino's failure to comply with WCAG 2.0. Rather, Robles merely argues—and we agree—that the district court can order compliance with WCAG 2.0 as an equitable remedy if, after discovery, the website and app fail to satisfy the ADA. At this stage, Robles only seeks to impose liability on Domino's for failing to comply with § 12182 of the ADA, not for the failure to comply with a regulation or guideline of which Domino's has not received fair notice. *See Reed*, 2017 WL 4457508, at *5 ("[A]t this point in the litigation . . . Plaintiff does not seek to require [Defendant] to adopt any particular set of guidelines. Plaintiff simply alleges that her difficulty accessing [Defendant's] website and mobile app violate the ADA.").

Also unlike in *AMC*—where the overbroad injunction would have required AMC to retrofit theaters built before it received fair notice of DOJ's position—Domino's does not allege that its website or app were created prior to (or never updated since) 1996, when DOJ announced its position that the ADA applies to websites of covered entities. Further, the regulation at issue in *AMC* was ambiguous. *See* 549 F.3d at 764–67 (summarizing circuit split on how to interpret this regulation, which all courts agreed was ambiguous). It was unfair to expect AMC to have guessed which interpretation to follow when circuits were in disagreement and DOJ had not announced its position. *Id.* at 768. By contrast, the statutory provisions of § 12182 at issue here—requiring "auxiliary aids and services" and "full and equal enjoyment"—are flexible, but not ambiguous, and have been interpreted many times

by federal courts.[10] Finally, in *AMC*, our court limited its due process holding to the district court's remedy without disturbing liability. *Id.* at 768–70. Here, the district court dismissed the case at the pleading stage before Robles could conduct discovery and establish liability. Even if due process concerns akin to those in *AMC* were present here, further consideration of them "would be premature because due process constrains the *remedies* that may be imposed," *Fortyune v. City of Lomita*, 766 F.3d 1098, 1106 n.13 (9th Cir. 2014) (citing *AMC*, 549 F.3d at 768–70) (emphasis added), and not the initial question of ADA compliance. *See Reed* 2017 WL 4457508, at *4 ("[W]hether or not [defendant's] digital offerings must comply with [WCAG], or any other set of noncompulsory guidelines, is a question of *remedy*, not liability.") (emphasis in original).

2. The Lack of Specific Regulations Does Not Eliminate Domino's Statutory Duty

Second, we address Domino's argument that imposing liability here would violate due process because Domino's

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[10] *See*, *e.g.*, *Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1135 (9th Cir. 2012) (holding that, to provide "full and equal enjoyment," public accommodations must "consider[] how their facilities are used by non-disabled guests and then take reasonable steps to provide disabled guests with a like experience"); *Fortyune v. American Multi- Cinema*, 364 F.3d 1075, 1085 (9th Cir. 2004) (interpreting "full and equal enjoyment" to require theater to provide wheelchair seating and adjacent seat for plaintiff's wife); *see also*, *e.g.*, *McGann v. Cinemark*, 873 F.3d 218, 223 (3d Cir. 2017) (holding that theater's failure to provide deaf patron with sign language interpreter—an auxiliary aid or service—excluded him from services); *Argenyi v. Creighton Univ.*, 703 F.3d 441, 449 (8th Cir. 2013) (holding that university must provide reasonable auxiliary aids and services to partially deaf medical student to afford him opportunity equal to his nondisabled peers).

lacked "fair notice of what specifically the ADA requires companies to do in order to make their websites accessible." In other words, Domino's argues it "needs consistent standards when it designs its website." While we understand why Domino's wants DOJ to issue specific guidelines for website and app accessibility, the Constitution only requires that Domino's receive fair notice of its legal duties, not a blueprint for compliance with its statutory obligations. And, as one district court noted, the lack of specific instructions from DOJ might be purposeful:

> The DOJ's position that the ADA applies to websites being clear, it is no matter that the ADA and the DOJ fail to describe exactly how any given website must be made accessible to people with visual impairments. Indeed, this is often the case with the ADA's requirements, because the ADA and its implementing regulations are intended to give public accommodations maximum flexibility in meeting the statute's requirements. This flexibility is a feature, not a bug, and certainly not a violation of due process.

Reed, 2017 WL 4457508, at *5. A desire to maintain this flexibility might explain why DOJ withdrew its ANPRM related to website accessibility and "continue[s] to assess *whether specific technical standards are necessary and appropriate* to assist covered entities with complying with the ADA." 82 Fed. Reg. 60932-01 (Dec. 26, 2017) (emphasis added).

And in any case, our precedent is clear that, "as a general matter, the lack of specific regulations cannot

eliminate a statutory obligation." *City of Lomita*, 766 F.3d at 1102; *see also Gorecki*, 2017 WL 2957736, at *4 ("The lack of specific regulations [regarding website accessibility] does not eliminate [defendant's] obligation to comply with the ADA or excuse its failure to comply with the mandates of the ADA.").

For example, in *City of Lomita*, the defendant-city argued that although existing Title II regulations broadly prohibited it from discriminating in its services, requiring the city to provide accessible on-street parking would violate its due process rights absent specific regulatory guidance. 766 F.3d at 1102. Our court rejected that argument, and held that the ADA's regulations did not "suggest[] that when technical specifications do not exist for a particular type of facility, public entities have no accessibility obligations." *Id.* at 1103 (citing *Barden v. City of Sacramento*, 292 F.3d 1073, 1076–78 (9th Cir. 2002) (holding that Title II requires public entities to maintain accessible public sidewalks, notwithstanding absence of implementing regulations addressing sidewalks)).

Similarly, in *Kirola v. City & County of San Francisco*, we explained that even if there were no technical accessibility requirements for buildings and facilities under Title II of the ADA, "[p]ublic entities would not suddenly find themselves free to ignore access concerns when altering or building new rights-of-way, parks, and playgrounds." 860 F.3d 1164, 1180 (9th Cir. 2017). Instead, our court applied Title II's "readily accessible" and "usable" standards to determine whether the city violated the ADA. *Id.* Although DOJ guidance might have been helpful, "[g]iving content to general standards is foundational to the judicial function." *Id.* (citing *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

Moreover, the possibility that an agency might issue technical standards in the future does not create a due process problem. In *Reich v. Montana Sulphur & Chemical Company*, our court held that although the Secretary of Labor would likely promulgate specific standards for safe and healthy working conditions, these standards would only "amplify and augment" the existing statutory obligation to provide a safe workspace and would not "displace" it. 32 F.3d 440, 445 (9th Cir. 1994); *cf. Or. Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 339 F.3d 1126, 1132–33 (9th Cir. 2003) (following DOJ's interpretation of existing regulation, even though Access Board was addressing the specific topic at issue through rulemaking). The same logic applies here.

In sum, we conclude that the district court erred in holding that imposing liability in this case would violate Domino's due process rights. Domino's has received fair notice that its website and app must provide effective communication and facilitate "full and equal enjoyment" of Domino's goods and services to its customers who are disabled. Our Constitution does not require that Congress or DOJ spell out exactly how Domino's should fulfill this obligation.

C. Primary Jurisdiction Doctrine

Finally, we address the primary jurisdiction doctrine, which "allows courts to stay proceedings or to dismiss a complaint without prejudice pending the resolution of an issue within the special competence of an administrative agency." *Clark*, 523 F.3d at 1114. It is a prudential doctrine that does not "implicate[] the subject matter jurisdiction of the federal courts." *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 759 (9th Cir. 2015) (quoting *Syntek Semiconductor Co., Ltd. v. Microchip*

Tech. Inc., 307 F.3d 775, 780 (9th Cir. 2002)). Rather, it permits courts to determine "that an otherwise cognizable claim implicates technical and policy questions that should be addressed in the first instance by the agency with regulatory authority over the relevant industry rather than by the judicial branch." *Id.* at 760 (quoting *Clark*, 523 F.3d at 1114).

While "no fixed formula exists for applying the doctrine of primary jurisdiction," we consider: "(1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration." *Davel Commc'n, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1086– 87 (9th Cir. 2006); *see also Astiana*, 783 F.3d at 760 (same).

Here, the district court erred in invoking primary jurisdiction. The purpose of the doctrine is not to "secure expert advice" from an agency "every time a court is presented with an issue conceivably within the agency's ambit." *Brown v. MCI WorldCom Network Servs., Inc.*, 277 F.3d 1166, 1172 (9th Cir. 2002); *see also Astiana*, 783 F.3d at 760 ("Not every case that implicates the expertise of federal agencies warrants invocation of primary jurisdiction."). Rather, "'efficiency' is the 'deciding factor' in whether to invoke primary jurisdiction." *Astiana*, 783 F.3d at 760 (citation omitted). Our precedent is clear:

> [E]ven when agency expertise would be helpful, a court should not invoke primary jurisdiction when the agency *is aware of but has expressed no interest* in the subject matter of the litigation. Similarly, primary

> jurisdiction is not required *when a referral to the agency would significantly postpone a ruling* that a court is otherwise competent to make.

Id. at 761 (emphases added). Both circumstances are present here.

First, DOJ is aware of the issue—it issued the ANPRM in 2010, 75 Fed. Reg. 43460-01 (July 26, 2010), and withdrew it in 2017, 82 Fed. Reg. 60932-01 (Dec. 26, 2017). Second, DOJ's withdrawal means that the potential for undue delay is not just likely, but inevitable. Robles has no ability to participate in an administrative hearing process with remedies. *See Arizona ex rel. Goddard v. Harkins Admin. Servs., Inc.*, 2011 WL 13202686, at *3 (D. Az. Feb. 8, 2011) ("[T]he DOJ does not have an administrative process in which these parties can directly participate to resolve their dispute. The absence of such an administrative process argues against referral to an agency under the primary jurisdiction doctrine.").

Therefore, according to the district court, Robles cannot vindicate his statutory rights unless DOJ reopens and completes its rulemaking process. This would "needlessly delay the resolution of" Robles' claims and undercut efficiency, "the 'deciding factor' in whether to invoke primary jurisdiction." Astiana, 783 F.3d at 760 (citation omitted); *see also Reid*, 780 F.3d at 966–67 (declining to invoke primary jurisdiction in part because "it has been over a decade since the FDA indicated that it would issue a new [rule]").

The delay is "needless" because the application of the ADA to the facts of this case are well within the court's competence. Properly framed, the issues for the district

court to resolve on remand are whether Domino's website and app provide the blind with auxiliary aids and services for effective communication and full and equal enjoyment of its products and services. Courts are perfectly capable of interpreting the meaning of "equal" and "effective" and have done so in a variety of contexts. *See supra* note 10 (providing examples of circuit courts interpreting ADA's requirements of "full and equal enjoyment" and "auxiliary aids and services" in non-website contexts); *see also Georgia v. Ashcroft*, 539 U.S. 461, 462 (2003) (interpreting "effective exercise of the electoral franchise"), superseded by statute, 52 U.S.C. §§ 10304(b)(d), as recognized in *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1273 (2015); *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984) (interpreting right to "effective assistance of counsel"). In addition, if the court requires specialized or technical knowledge to understand Robles' assertions, the parties can submit expert testimony. *See, e.g., Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 501–02 (4th Cir. 2016) (relying on credited expert testimony on security risks associated with "online ballot marking tool," which the court held was a "reasonable modification" to make absentee voting accessible to blind voters); *cf. Strong v. Valdez Fine Foods*, 724 F.3d 1042, 1046–47 (9th Cir. 2013) (holding that expert testimony is not required to understand plaintiff's straightforward ADA claim about physical barriers). Whether Domino's website and app are effective means of communication is a fact-based inquiry within a court's competency.

Thus, we reverse the district court's reliance on the primary jurisdiction doctrine. Rather than promote efficiency—the deciding factor in whether to invoke primary jurisdiction—the district court's ruling unduly

delays the resolution of an issue that a court can decide. *See Astiana*, 783 F.3d at 760–62.

IV. CONCLUSION

We express no opinion about whether Domino's website or app comply with the ADA. We leave it to the district court, after discovery, to decide in the first instance whether Domino's website and app provide the blind with effective communication and full and equal enjoyment of its products and services as the ADA mandates.[11]

REVERSED AND REMANDED.

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[11] We also reverse the dismissal of Robles' UCRA claims and remand for proceedings consistent with this opinion.

Appendix B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA,
WESTERN DIVISION

GUILLERMO ROBLES,
Plaintiff,

Case No.
2:16-cv-06599

v.

Hon. S. James Otero

DOMINO'S PIZZA LLC,
Defendant.

ORDER GRANTING DEFENDANT'S ALTERNATIVE MOTION TO DISMISS OR STAY

This matter is before the Court on Defendant Domino's Pizza, LLC's ("Defendant") Motion for Summary Judgment or, in the Alternative, Dismissal or Stay ("Motion"), filed February 22, 2017. Plaintiff Guillermo Robles ("Plaintiff") opposed the Motion ("Opposition") on March 6, 2017, and Defendant replied ("Reply") on March13, 2017. The Court found this matter suitable for disposition without oral argument and vacated the hearing scheduled for January 27, 2017. *See* Fed. R. Civ. P. 78(b). For the following reasons, the Court **GRANTS** Defendant's Motion to Dismiss.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case, which commenced on September 1, 2016, centers on allegations that Defendant has failed "to design, construct, maintain, and operate its website [and mobile application] to be fully accessible to and independently usable by Plaintiff and other blind or

visually-impaired people" using "screen-readers." (*See* Compl. ¶¶ 2-3, ECF No. 1.) In particular, Plaintiff contends Defendant's website, Dominos.com, does not permit a user to complete purchases using a particular screen-reading software program, Job Access With Speech ("JAWS"). (Compl. ¶¶ 18, 27-29.) Plaintiff also contends Defendant's mobile application ("Mobile App") does not permit him to access the menus and applications on his iPhone using the iPhone's "VoiceOver" software program. (Compl. ¶¶ 30-33.) Plaintiff alleges neither Dominos.com nor the Mobile App are in compliance with version 2.0 of W3C's Web Content Accessibility Guidelines ("WCAG 2.0"), and further alleges that "simple compliance with the WCAG 2.0 Guidelines would provide Plaintiff and other visually-impaired consumers with equal access" to these access portals. (Compl. ¶ 36.) Plaintiff asserts the following four causes of action against Defendant: (1) violation of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12181 *et seq*. (Dominos.com); (2) violation of the ADA, 42 U.S.C. § 12181 *et seq*. (Mobile App); (3) violation of the Unruh Civil Rights Act ("UCRA"), California Civil Code § 51 *et seq*. (Dominos.com); and (4) violation of the UCRA, California Civil Code § 51 *et seq*. (Mobile App). (*See generally* Compl.) Plaintiff seeks, among other things, preliminary and permanent injunctive relief, an award of statutory minimum damages of $4,000 per violation, and attorneys' fees and expenses. (*See* Compl. at 18-19.)

Defendant filed its Answer on September 29, 2016, and the Court held a scheduling conference on November 28, 2016, setting a discovery cutoff deadline of May 29, 2017, a motion cutoff deadline of June 26, 2017, and a trial date of August 29, 2017. (*See* Answer, ECF No. 15; Minutes of

Scheduling Conference, ECF No. 26.) The following facts are undisputed.

Since February 20, 2017 at the latest, both Defendant's website, www.dominos.com, and its mobile website have included accessibility banners that direct users who access the website using a screen reader with the following statement: "If you are using a screen reader and are having problems using this website, please call 800-254-4031 for assistance." (*See* Pl.'s Statement of Genuine Disputes of Materials Facts ("Pl.'s Response") ¶¶ 1-2, ECF No. 35.) This phone number, 800-252-4031, is staffed by a live representative who can provide blind or visually impaired individuals with assistance using Defendant's websites, although callers may experience delays and be placed on hold. (Pl.'s Response ¶¶ 3-4.) Customers may also directly call their local Domino's Pizza restaurant to order food, purchase goods, or ask questions. (Pl.'s Response ¶ 5.)

II. DISCUSSION

Defendant, not pleased with having to defend against what it characterizes on the first page of its Motion as both a "form lawsuit" and a "nuisance lawsuit[ ]," moves for summary judgment as to each of Plaintiff's four causes of action, submitting that dismissal is warranted for a bevy of reasons. (*See* Mot. 1, ECF No. 32.) First, Defendant asks the Court to find that neither Dominos.com nor the Mobile App are "places of public accommodation" within the meaning of the ADA. (Mot. 3-7.) Second, it contends that the instant lawsuit violates fundamental principles of due process because the ADA, its implementing regulations, and the DOJ's accessibility guidelines not only are silent with respect to the standards that apply to private and public websites, but also fail to indicate

whether compliance with the WCAG or the Apple Standards is tantamount to compliance with the statute. (Mot. 7-16.) Third, Defendant argues Plaintiff cannot establish violations of any applicable accessibility standards. (Mot. 16-19.) Fourth, it submits that Plaintiff's UCRA claims should be denied because Plaintiff cannot prove that Defendant intentionally discriminated against him. (Mot. 19-20.) Fifth, Defendant contends Plaintiff's UCRA claims fail because Defendant lacks fair notice of the barriers Plaintiff claims exist. (Mot. 20-23.) Finally, Defendant argues that, in the alternative, Plaintiff's claims should be stayed because the Department of Justice ("DOJ") has not promulgated any accessibility regulations governing the website or mobile applications of private businesses. (Mot. 23-25.)

Plaintiff responds by challenging procedural, evidentiary, and substantive aspects of Defendant's Motion. First, Plaintiff argues the Court should deny the Motion because of the following two procedural shortcomings: (1) Defendant's failure to meet and confer regarding the instant motion; and (2) Defendant's filing of an oversized memorandum of points and authorities. (Opp'n 1-2, ECF No. 33.) Second, Plaintiff contends that because Defendant's evidence only establishes the websites at issue bore the "accessibility banner" in February of this year, this "banner" cannot support Defendant's claim of "effective communication" in 2016 and does not necessarily render this case moot. (Opp'n 4-7.) Third, Plaintiff argues that even if the "banner" had been present on Defendant's websites in 2016, there would still be triable issues as to whether Defendant's websites violate the ADA given regulations concerning effective

communication titled "auxiliary aids and services." (Opp'n 7-10.)

A. Legal Standard

Federal Rule of Civil Procedure 56(a) mandates that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted).

Once the moving party meets its initial burden, the "party asserting that a fact cannot be or is genuinely disputed must support the assertion." Fed. R. Civ. P. 56(c)(1). "The mere existence of a scintilla of evidence in support of the [nonmoving party]'s position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *accord Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) ("[O]pponent must do more than simply show that there is some metaphysical doubt as to the material facts."). Further, "[o]nly disputes over facts that might affect the outcome of the suit . . . will properly preclude the entry of summary judgment [and

f]actual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248. At the summary judgment stage, a court does not make credibility determinations or weigh conflicting evidence. *See id.* at 249. A court is required to draw all inferences in a light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at 587.

B. Analysis

1. Whether and to What Extent the ADA Regulates Web Accessibility

The central question Defendant asks the Court to answer is whether and to what extent the ADA, a statute enacted before the widespread adoption of the Internet, regulates the manner in which companies can permissibly engage in e-commerce. Before attempting to answer this difficult question, the Court must provide some background.

The ADA "as a whole is intended 'to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.'" *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 589, 119 S. Ct. 2176, 144 L.Ed.2d 540 (1999) (citing 42 U.S.C. § 12101(b)(1)). Title III of the ADA, which Plaintiff claims covers this case, provides that, as a general rule, "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). "The statute applies to the services **of** a place of public accommodation, not services **in** a place of public

accommodation. To limit the ADA to discrimination in the provision of services occurring on the premises of a public accommodation would contradict the plain language of the statute." *Nat'l Fed'n of the Blind v. Target Corp. ("Target")*, 452 F. Supp. 2d 946, 953 (N.D. Cal. 2006) (emphasis in original) (citations omitted).[1]

Moreover, Title III of the ADA, in a section entitled "specific prohibitions," defines discrimination to include:

> a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the **absence of auxiliary aids and services, unless** the entity can demonstrate that taking such steps would **fundamentally alter the nature** of the goods, service, facility, privilege, advantage, or accommodation being offered or would **result in an undue burden**.

42 U.S.C. § 12182(a)(2)(A)(iii) (emphasis added). "This section explicitly exempts public accommodations from

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[1] In light of this authority, the Court rejects Defendant's argument that the Court should dismiss this action because "the ADA was simply not drafted with the specific regulation of virtual spaces in mind," which relies on a bevy of Eleventh Circuit authority. (*Cf.* Mot. 4- 7.) The Court also finds this case distinguishable from those that have determined that Title III does not apply to internet-based retailers or service providers, as Defendant operates a chain of brick-and-mortar pizza stores. *Cf. Young v. Facebook, Inc.*, 790 F. S[u]pp. 2d 1110, 1114-16 (N.D. Cal. 2011) (explaining that a website is not a physical structure and plaintiff had not alleged a sufficient nexus to a physical place of public accommodation). Indeed, Defendant does not challenge the existence of a "nexus" between its websites and its pizza franchises. (Mot. 5.)

the obligation to provide auxiliary aids or services if doing so would fundamentally change the nature of the good or service, or result in an undue burden." *Target*, 452 F. Supp. 2d at 955 (citation omitted). "In regulations implementing this section, the Department of Justice has explained that the ADA obligates public accommodations to communicate effectively with customers who have disabilities concerning hearing, vision, or speech." *Id.* (citing 28 C.F.R. § 36.303(c)). Moreover, regulations provide "examples" of "auxiliary aids and services," including "screen reader software" and "other effective methods of making visually delivered materials available to individuals who are blind or have low vision[.]" 28 C.F.R. § 36.303(b)(2).

Notwithstanding the above, Defendant contends the Court must either dismiss or stay this action because the DOJ has not promulgated concrete guidance regarding the accessibility standards an e-commerce webpage must meet, much less required that companies operating such webpages comply with the specific standards Plaintiff references in his Complaint. In support of this position, Defendant places great weight on the fact that the United States Department of Justice ("DOJ") has not yet issued a formal adjudication or rule on the subject. In order to address the merits of Defendant's contention, the Court must review the DOJ's position on the issue of web accessibility.

As a threshold matter, the DOJ has consistently stated its view that the ADA's accessibility requirements apply to websites belonging to private companies. *See*, e.g., Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearing before the House Subcommittee on the Constitution of the House

Committee on the Judiciary, 106th Cong., 2d Sess. 65-010 (2000) ("It is the opinion of the Department of Justice currently that the accessibility requirements of the Americans with Disabilities Act already apply to private Internet Web sites and services."); 75 Fed. Reg. 43460-01 (July 6, 2010) ("The Department believes that title III reaches the Web sites of entities that provide goods or services that fall within the 12 categories of 'public accommodations,' as defined by the statute and regulations."). Contrary to Plaintiff's suggestion, however, this realization does not end the inquiry, for the Court must analyze whether the DOJ has issued guidance regarding the type of access at issue in this case. (*Cf.* Mot. 19-20.)

On July 26, 2010, the DOJ issued a Notice of Proposed Rulemaking ("NOPR"), stating it was "considering revising the regulations implementing title III of the [ADA] in order to establish requirements for making the goods, services, facilities, privileges, accommodations, or advantages offered by public accommodations via the Internet, specifically at sites on the [web], accessible to individuals with disabilities." Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations ("NOPR"), 75 Fed. Reg. 43460-01, 2010 WL 2888003 (July 26, 2010). In the section of this NOPR titled "Need for Department Action," the DOJ explains that "[t]he Internet has been governed by **a variety of voluntary standards** or structures developed through nonprofit organizations using multinational collaborative efforts," including the W3C's "develop[ment] [of] a variety of technical standards and guidelines ranging from **issues related to mobile devices** and

privacy to internationalization of technology," as well as the "**creat[ion] of the [WCAG].**" *Id.* at *43463 (emphasis added). A few paragraphs down, the DOJ notes that

> For years, businesses and individuals with disabilities alike have urged the Department to provide guidance on the accessibility of Web sites of entities covered by the ADA. While some actions have been brought regarding access to Web sites under the ADA that have resulted in courts finding liability or in the parties agreeing to a settlement to make the subject Web sites accessible, **a clear requirement that provides** the disability community consistent access to Web sites and covered entities **clear guidance on what is required under the ADA does not exist**.

Id. at *43464 (emphasis added). The NOPR concludes with the DOJ stating its "interest[ ] in gathering other information or data relating to the Department's objective to provide requirements for Web accessibility under titles II and III of the ADA" and soliciting feedback and public comment. *Id.* at *43467.

Although the NOPR issued in July 2010, the DOJ has yet to issue a final rule regarding web access. In light of this undisputed fact, Defendant argues that Plaintiff's request to impose liability under the ADA for Defendant's alleged failure to abide by certain accessibility standards would violate Defendant's constitutional right to due process. In so arguing, Defendant relies on *United States v. AMC Entertainment, Inc.*, a Ninth Circuit Court of Appeals decision in which the court considered whether the ADA obligated theater owners to retroactively incorporate a comparable viewing angle requirement in

movie theaters. 549 F.3d 760 (9th Cir. 2008). The district court had held that AMC's existing facilities violated a particular standard, § 4.33.3, awarded summary judgment in favor of the government, and issued a comprehensive remedial order. *Id.* at 762. The Ninth Circuit reversed, holding that "[b]ecause the injunction requires modifications to multiplexes that were designed or built before the government gave fair notice of its interpretation of § 4.33.3, the injunction violates due process[.]" *Id.* In reaching this conclusion, the Ninth Circuit surveyed the history of litigation involving § 4.33.3, which primarily turned on different possible interpretations of the phrase "lines of sight comparable." *Id.* at 764-67. After noting that its sister circuits had reached different conclusions regarding the meaning of this phrase, the court emphasized that "[a]ll circuits considering § 4.33.3 found common ground on the proposition that the regulation was vague or ambiguous." *Id.* at 767 (citation omitted).

After examining these decisions, the Ninth Circuit stated "it is clear that the text of § 4.33.3 did not even provide our colleagues, armed with exceptional legal training in parsing statutory language, a 'reasonable opportunity to know what is prohibited'—let alone those of 'ordinary intelligence.'" *Id.* at 768 (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). Moreover, the court "share[d] the First Circuit's frustration that the government could have solved this problem [of vagueness], without time- and cost-consuming litigation, by merely clarifying § 4.33.3 through amendment or some other form of public pronouncement[.]" *Id.* at 769 (citation omitted). "The government has had ample opportunity throughout the stadium-seating era to update the regulation to respond to the overhaul of the nation's

movie-theaters." *Id.* Notwithstanding being provided with "ample opportunity" to update or clarify this provision, the government had not done so:

> As late as 1999, the Access Board indicated that it was still "**considering whether to include specific requirements** in the final rule that are consistent with DOJ's interpretation of 4.33.3 to stadium-style movie theaters." . . . **No new rule was forthcoming**. Again, in April of 2002, the Access Board published a **new proposed draft regulation** that included a viewing angle requirement. . . . This proposal was **never formally accepted**. When Regal Cinemas sought certiorari from the Supreme Court to resolve the circuit split between the Ninth and Fifth Circuits, the Solicitor General of the United States represented to the Supreme Court that review was not necessary because the **DOJ planned to issue new regulations** to resolve the split: "There is no need for this Court to exercise its certiorari jurisdiction to address an issue of regulatory interpretation that is presently being addressed directly by the relevant regulatory bodies themselves." . . . . Despite this representation to the Court, made now **over four years ago**, § 4.33.3 has not been replaced with something more specific. **We decline to require AMC to have determined the precise meaning of the regulation when the government did not do so**.

Id. (emphasis added) (internal citations omitted). A similarly lengthy timeline of DOJ inaction exists in this

case, leaving "in-house counsel [and] others to read correctly legislative tea-leaves . . ." *Id.* at 770.

The phrase "due process" does not appear once in Plaintiff's Opposition, and Plaintiff's sole citation to *AMC* is couched in a footnote for an inapposite point of law. (*See* Opp'n 20 n. 9.) Whether inadvertent or purposeful, this omission is telling, and the Court is independently authorized to grant summary judgment on this conceded issue. *See Garrett v. City of Los Angeles*, No. CV 12-1670 FMO (SSx), 2014 WL 11397949, at *11 (C.D. Cal. Mar. 3, 2014) (granting summary judgment in favor of defendant on a particular claim where plaintiff failed to address defendant's arguments regarding this claim); *Silva v. U.S. Bancorp*, No. 5:10-cv-01854-JHN-PJWx, 2011 WL 7096576, at *3 ("In addition, the Court finds that Plaintiff concedes his recordkeeping claim should be dismissed by failing to address Defendants' arguments in his Opposition.").

In any event, the Court finds Defendant's due process challenge to be meritorious, largely because it finds *AMC* to be squarely on point. In *AMC*, the Ninth Circuit was troubled by the inclusion of ambiguous language in a particular guideline and by the DOJ's quest to have its late-announced interpretation of this language—offered for the first time in an amicus brief—apply to movie theaters that had already invested substantial sums in building their theaters under a particular set of operating assumptions. Here, too, Plaintiff seeks to impose on all regulated persons and entities a requirement that they "compl[y] with the WCAG 2.0 Guidelines" without specifying a particular level of success criteria and without the DOJ offering meaningful guidance on this topic. (*Cf.* Compl. ¶ 36.) This request flies in the face of due process.

Notwithstanding his failure to address Defendant's four-page argument regarding *AMC* and due process, Plaintiff appears to argue that because the DOJ has issued several "Statements of Interest" and has entered into consent decrees and settlements obligating entities to abide by particular WCAG 2.0 success criteria, this lawsuit cannot be dismissed. (*See* Opp'n 19-20.) This argument does not hold water.

As a threshold matter, the Ninth Circuit "has declined to give deference to Access Board guidelines that have not yet been adopted by the DOJ." *Arizona ex rel. Goddard v. Harkins Amusement Enters., Inc.*, 603 F.3d 666, 674 (9th Cir. 2010). "Moreover, [the Ninth Circuit] ha[s] refused to defer to a proposed regulation published by the DOJ itself." *Id.* (citing *Cal. Rural Legal Assistance v. Legal Servs. Corp.*, 917 F.2d 1171, 1173 (9th Cir. 1990)). Furthermore, "[t]he DOJ's interpretation in a notice of proposed rulemaking is similarly unpersuasive." *Id.* Given the Ninth Circuit's decision not to give deference to these categories of concrete, public statements made in the ADA context, the Court concludes that little or no deference is owed to statements made by the DOJ through documents filed in the course of litigation with regulated entities.

Even if the Court were to give deference to the cited Statements of Interest, consent decree, or settlement, it would nevertheless conclude that imposing the requirements urged by Plaintiff would violate Defendant's right to due process. First, the Statements of Interest cited by Plaintiff were filed in connection with cases that are materially distinct from the case at bar, and even suggest that Domino's provision of a telephone number for disabled customers satisfies its obligations under the

ADA. In the first of these Statements of Interest, attached as Exhibit A to Plaintiff's Request for Judicial Notice ("RJN"), the DOJ asked a court in the Southern District of Florida not to be persuaded by defendant Lucky Brand's arguments (1) that because the ADA contains no specific requirement mandating that point-of-sale ("POS") devices have tactile key pads, it has no obligation to ensure that customers who are blind can make purchases using it's debit payment option; or (2) that because disabled individuals can purchase items using cash, credit, or by processing their debit card as a credit card, there was no discrimination under the ADA. (*See* RJN, Ex. A at 1-2, ECF No. 7.)[2] The DOJ was primarily concerned that Lucky Brand's use of a touch-screen POS device, for which Plaintiff alleged there was a readily available substitute, required blind customers either to divulge their personal identification number ("PIN") to a third party, violating the ADA's mandate that companies "protect the privacy and independence of" individuals with disabilities, *see* 28 C.F.R. Section 36.303(c)(1)(ii), or to use a different form [of] payment. (*See generally* RJN, Ex. A.) The DOJ began by rejecting Lucky Brand's argument that POS devices did not fall within the scope of the ADA, analogizing its consistently expressed view that "websites [are] covered by title III despite the fact that there are no specific technical requirements for websites currently in the regulation or ADA Standards." (RJN, Ex. A at 7.) The DOJ then noted, however, that until the process of establishing specific technical requirements for a particular technology is complete, "public accommodations have a **degree of**

[2] The Court takes judicial notice of this publicly filed litigation document pursuant to Rule 201(b) of the Federal Rules of Evidence.

flexibility in complying with title III's more general requirements of nondiscrimination and effective communication—but they still must comply." (RJN, Ex. A at 8-9 [emphasis added].) Plaintiff has failed to articulate why either Defendant's provision of a telephone hotline for the visually impaired or it's compliance with a technical standard other than WCAG 2.0 does not fall within the range of permissible options afforded under the ADA.

The Statements of Interest attached as Exhibits B and C to the RJN offer similarly little help to Plaintiff. In these two cases, the plaintiffs sought to require Harvard University and Massachusetts Institute of Technology ("MIT") to provided closed captions on their free online programming and the universities moved to stay or dismiss these cases. (*See generally* RJN, Exs. B, C.) No "due process" challenge was raised in connection with these motions, perhaps because the plaintiffs requested a particular auxiliary aid that the universities simply had not been providing. Indeed, in her Report and Recommendation, the assigned Magistrate Judge noted the "DOJ has identified the 'auxiliary aid requirement [a]s a flexible one,' insofar as the 'public accommodation can choose among various alternatives as long as the result is effective communication.'" R. & R. Regarding Defs.' Mot. to Stay or Dismiss, *Nat'l Ass'n of the Deaf v. Harvard Univ.*, No. 3:15-cv-30023-MGM, at *24 (D. Mass. February 9, 2016), ECF No. 50 (quoting Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35544, 35566 (July 26, 1991)). She went on to note that "[t]he flexibility to choose an appropriate auxiliary aid does not extend so far as to allow a public accommodation to choose to provide **no** auxiliary aid when

one is required for effective communication if a reasonable one exists." *Id.* (emphasis added). Here, by contrast, Plaintiff asks the Court to require Defendant to comply with a particular—but not fully identified—web accessibility standard issued by a non-government entity that is subject to modification. The Court thus finds the Harvard and MIT cases to be inapposite.

The consent decree and settlement proffered by Plaintiff offer him less assistance. Plaintiff has submitted evidence indicating the DOJ has, at least twice, required entities subject to Title III to adopt measures to ensure that their websites and mobile applications conform to, at a minimum, certain WCAG 2.0 success criteria. For example, Plaintiff points to a settlement agreement between the DOJ and Peapod LLC, America's leading Internet grocer, under which Peapod was obligated, among other things, to "ensure that www.peapod.com and its mobile applications conform to, at minimum, the Web Content Accessibility Guidelines 2.0 Level AA Success Criteria (WCAG 2.0 AA), except for certain third party content[.]" *See* Press Release, Justice Department Enters into a Settlement Agreement with Peapod to Ensure that Peapod Grocery Delivery Website is Accessible to Individuals with Disabilities, THE UNITED STATES DEPARTMENT OF JUSTICE (Nov. 17, 2014), available at https://www.justice.gov/opa/pr/justice-department-enters-settlement-agreement-peapod-ensure-peapod-grocery-delivery-website. Plaintiff also points to a consent decree reached in *National Federation of the Blind, et al. v. HRB Digital LLC, et al.*, under which the defendants would, inter alia, ensure that their website, www.hrblock.com, and their Online Tax Preparation Product "conform to, at minimum, the Web Content

Accessibility Guidelines 2.0 Level A and AA Success Criteria[.]" Consent Decree, No. 1:13-cv-10799-GAO, at *5 (D. Mass. Mar. 24, 2014), ECF No. 60.

These two examples highlight, rather than dispel, the vagueness concern that forms the basis of Defendant's Motion, and demonstrate why a lack of formal guidance in this complex regulatory arena places those subject to Title III in the precarious position of having to speculate which accessibility criteria their websites and mobile applications must meet. In the Peadpod case, the DOJ required the defendants to fashion their website and mobile applications to conform with WCAG 2.0 Level AA Success Criteria. In HRB, by contrast, the DOJ obligated the defendants to instead comply with WCAG 2.0 Level AA **or Level A** Success Criteria. In its own NOPR, the DOJ noted that "the WCAG 2.0 contains 12 guidelines addressing Web accessability" and requires that a "Web page must satisfy the criteria for all 12 guidelines under one of three conformance levels: A, AA, or AAA," which "indicate a measure of accessability and feasability." 75 Fed. Reg. at *43465. Moreover, immediately below this discussion, the DOJ sought feedback regarding the following difficult-to-answer questions:

> Question 1. Should the Department **adopt the WCAG 2.0's "Level AA Success Criteria"** as its standard for Web site accessability for entities covered by titles II and III of the ADA? Is there any reason why the Department should consider adopting another success criteria level of the WCAG 2.0? Please explain your answer.
>
> Question 2. Should the [DOJ] adopt the **section 508 standards instead of the WCAG**

> guidelines as its standard for Web site accessability under titles II and III of the ADA? Is there a **difference in compliance burdens and costs** between the two standards? Please explain your answer.
>
> Question 3. How should the [DOJ] address the **ongoing changes to WCAG** and section 508 standards" and "[s]hould covered entities be given the option to comply with the latest requirements?
>
> Question 4. Given the **ever-changing nature of many Web sites**, should the Department adopt **performance standards instead** of any set of **specific technical standards** for Web site accessibility? . . . .

Id. (emphasis added). Almost seven years have transpired since the DOJ first posed these questions to the interested public, but the public has yet to receive a satisfactory answer.[3] Indeed, the Court, after conducting a diligent search, has been unable to locate a single case in which a court has suggested, much less held, that persons and entities subject to Title III that have chosen to offer online access to their goods or services must do so in a manner that satisfies a particular WCAG conformance level.

The Court therefore **GRANTS** Defendant's Motion and **DISMISSES** each of Plaintiff's causes of action **without prejudice** pursuant to the primary jurisdiction

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[3] Even more problematic to Plaintiff's case is the apparent absence of any discussion by the DOJ regarding whether a mobile website or mobile application must conform with "Apple's iOS accessibility guidelines." (*Cf.* Compl. ¶ 31.)

doctrine, which "allows courts to stay proceedings or dismiss a complaint without prejudice pending the resolution of an issue within the special competence of an administrative agency." *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008) (affirming dismissal of a case referring the issue of "slamming," a question of federal telecommunications policy, to the Federal Communications Commission for consideration in the first instance). Congress has vested the Attorney General with promulgating regulations clarifying how places of public accommodation must meet their statutory obligations of providing access to the public under the comprehensive ADA. Congress has further provided that the DOJ's mandate with respect to Title III of the ADA is "to issue implementing regulations, *see* 42 U.S.C. § 12186(b), to render technical assistance explaining the responsibilities of covered individuals and institutions, § 12206(c), and to enforce Title III in court, § 12188(b)." *Bragdon v. Abbott*, 524 U.S. 624, 646 (1998). Such regulations and technical assistance are necessary for the Court to determine what obligations a regulated individual or institution must abide by in order to comply with Title III. Moreover, the Court finds the issue of web accessibility obligations to require both expertise and uniformity in administration, as demonstrated by the DOJ's multi-year campaign to issue a final rule on this subject. *See* Clark, 523 F.3d at 1115. The Court concludes by calling on Congress, the Attorney General, and the Department of Justice to take action to set minimum web accessibility standards for the benefit of the disabled community, those subject to Title III, and the judiciary.

III. RULING

For the foregoing reasons, the Court **GRANTS** Defendant Domino's Pizza, LLC's Alternative Motion to Dismiss or Stay. This matter shall close.

IT IS SO ORDERED.

Appendix C

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA-
WESTERN DIVISION

GUILLERMO ROBLES, An individual, Plaintiff, v. DOMINO'S PIZZA LLC, a limited liability corporation, Defendant.	**COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF:** **1. VIOLATION OF THE AMERICANS WITH DISABILITIES ACT OF 1990, 42 U.S.C. §12181 *ET SEQ.*** [DOMINOS.COM] **2. VIOLATION OF THE AMERICANS WITH DISABILITIES ACT OF 1990, 42**

U.S.C. §12181 *ET SEQ.*
[DOMINO'S MOBILE APP]
3. VIOLATION OF THE UNRUH CIVIL RIGHTS ACT, CALIFORNIA CIVIL CODE § 51 *ET SEQ.*
[DOMINOS.COM]
4. VIOLATION OF THE UNRUH CIVIL RIGHTS ACT, CALIFORNIA CIVIL CODE § 51 *ET SEQ.*
[DOMINO'S MOBILE APP]

Plaintiff, Guillermo Robles ("Plaintiff"), alleges the following upon information and belief based upon investigation of counsel, except as to his own acts, which he alleges upon personal knowledge:

INTRODUCTION

1. Plaintiff is a blind person who requires screen-reading software to read website content using his computer and to interact with mobile applications on his iPhone. Plaintiff uses the terms "blind" or "visually-impaired" to refer to all people with visual impairments who meet the legal definition of blindness in that they have a visual acuity with correction of less than or equal to 20 x 200. Some blind people who meet this definition have limited vision. Others have no vision.

2. Plaintiff brings this civil rights action against Defendant Domino's Pizza LLC ("Defendant" or "Domino's") for its failure to design, construct, maintain, and operate its website to be fully accessible to and independently usable by Plaintiff and other blind or visually-impaired people. Defendant's denial of full and equal access to its website, and therefore denial of its products and services offered thereby and in conjunction with its physical locations, is a violation of Plaintiff's rights under the Americans with Disabilities Act ("ADA") and California's Unruh Civil Rights Act ("UCRA").

3. Plaintiff further brings this action against Defendant for failing to design, construct, maintain, and operate its mobile application ("Mobile App" or "Mobile

Application") to be fully accessible to, and independently usable by Plaintiff and other blind or visually-impaired individuals. Defendant's denial of full and equal access to its Mobile App also denies Plaintiff products and services Defendant offers, which in conjunction with its physical locations is a violation of Plaintiff's rights under the ADA and UCRA.

4. Because Defendant's website, Dominos.com, is not equally accessible to blind and visually-impaired consumers in violation of the ADA, Plaintiff seeks a permanent injunction to cause a change in Defendant's corporate policies, practices, and procedures so that Defendant's website will become and remain accessible to blind and visually-impaired consumers.

5. Defendant's Mobile App, a separate portal of access to Defendant's products and services, is also not equally accessible to blind and visually-impaired consumers in violation of the ADA. Plaintiff therefore seeks a permanent injunction to cause a change in Defendant's corporate policies, practices, and procedures so that Defendant's Mobile App also becomes and remains accessible to blind and visually-impaired consumers.

JURISDICTION AND VENUE

6. This Court has subject-matter jurisdiction of this action pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 128188, as Plaintiff's claims arise under Title III of the ADA, 42 U.S.C. § 1281, *et seq.*, and 28 U.S.C. § 1332.

7. This court has supplemental jurisdiction over Plaintiff's non-federal claims pursuant to 28 U.S.C. § 1367, because Plaintiff's UCRA claims are so related to Plaintiff's federal ADA claims, they form part of the same case or controversy under Article III of the United States Constitution.

8. This Court has personal jurisdiction over Defendant because it conducts and continues to conduct a substantial and significant amount of business in the State of California, County of Los Angeles, and because Defendant's offending website and Mobile App are available across California.

9. Venue is proper in the Central District of California pursuant to 28 U.S.C. §1391 because Plaintiff resides in this District, Defendant is subject to personal jurisdiction in this District, and a substantial portion of the conduct complained of herein occurred in this District.

PARTIES

10. Plaintiff resides in Los Angeles County, California. Plaintiff is a blind and handicapped person, and a member of a protected class of individuals under the ADA, pursuant to 42 U.S.C. § 12102(1)-(2), and the regulations implementing the ADA set forth at 28 CFR §§ 36.101 *et seq*. Plaintiff uses a screen reader to access the internet and read internet content on his computer and iPhone. Despite multiple attempts to navigate Dominos.com, Plaintiff has been denied the full use and enjoyment of the facilities, goods, and services offered by

Domino's as a result of accessibility barriers on the website Dominos.com.

11. Plaintiff has also attempted several times to navigate Defendant's Mobile App on his iPhone. However, on each occasion Plaintiff has been denied full use and enjoyment of the facilities, goods, and services offered by Defendant as a result of accessibility barriers on its Mobile App.

12. The access barriers on both Defendant's Dominos.com website and its Mobile App have deterred Plaintiff from visiting Domino's brick-and-mortar restaurant locations.

13. Plaintiff is informed and believes, and thereon alleges, Defendant Domino's is a limited liability company incorporated in Delaware and has its principal place of business in Michigan. Defendant is registered to do business in the State of California and has been doing business in the State of California, including the Central District of California. Defendant operates thousands of pizzerias across the nation. Many of these pizzerias are in the State of California, and a number of these pizzerias are located in the Central District of California. These Domino's pizzerias constitute places of public accommodation. Defendant's pizzerias provide to the public important goods and services. Defendant also provides the public the Dominos.com website and the Domino's Mobile App. Defendant's website and Mobile App provide consumers with access to an array of goods

and services including restaurant locators, product descriptions, product sales, special pricing offers, customizable orders, pick-up and delivery services, and many other benefits related to these goods and services.

14. Defendant's pizzerias are public accommodations within the definition of Title III of the ADA, 42 U.S.C. § 12181(7). Dominos.com is a service, privilege, or advantage of Domino's pizzerias. Domino's Mobile App is a service, privilege, or advantage of Domino's pizzerias.

15. Defendant is subject to personal jurisdiction in this District. Defendant has been and is committing the acts or omissions alleged herein in the Central District of California that caused injury, and violated rights prescribed by the ADA and UCRA, to Plaintiff and to other blind and other visually impaired-consumers. A substantial part of the acts and omissions giving rise to Plaintiff's claims occurred in the Central District of California. Specifically, on several separate occasions, Plaintiff attempted to purchase customized pizzas using Defendant's website Dominos.com and with Domino's Mobile App in Los Angeles County.

THE AMERICAN[S] WITH DISABILITIES ACT AND THE INTERNET

16. The Internet has become a significant source of information, a portal, and a tool for conducting business, as well as a means for doing everyday activities such as shopping, learning, banking, etc. for sighted, blind and visually-impaired persons alike.

17. In today's tech-savvy world, blind and visually-impaired people have the ability to access websites and mobile applications using keyboards in conjunction with screen access software that vocalizes the visual information found on a computer screen or displays the content on a refreshable Braille display. This technology is known as screen-reading software. Screen-reading software is currently the only method a blind or visually-impaired person may independently access the internet. Unless websites and mobile apps are designed to be read by screen-reading software, blind and visually-impaired persons are unable to fully access websites or mobile apps, and the information, products, and services contained thereon.

18. Blind and visually-impaired users of Windows operating system-enabled computers and devices have several screen reading software programs available to them. Some of these programs are available for purchase and other programs are available without the user having to purchase the program separately. Job Access With Speech, otherwise known as "JAWS," is the most popular, separately purchased and downloaded screen-reading software program available for a Windows computer.

19. For blind and visually-impaired users of Apple operating system-enabled computers and devices, the screen access software available and built into all Apple products is VoiceOver. Apple's devices, including the iPhone, have the VoiceOver program integrated into their

iOS operating system for use by blind and visually-impaired users.

20. For screen-reading software to function, the information on a website or on a mobile application must be capable of being rendered into text. If the website or mobile app content is not capable of being rendered into text, the blind or visually-impaired user is unable to access the same content available to sighted users.

21. The international website standards organization known throughout the world as W3C, published version 2.0 of the Web Content Accessibility Guidelines ("WCAG 2.0" hereinafter). WCAG 2.0 are well-established guidelines for making websites accessible to blind and visually-impaired people. These guidelines are universally followed by most large business entities to ensure their websites and mobile apps are accessible.

22. Apple also provides iOS accessibility guidelines for its mobile devices like the iPhone, which assist iOS developers to make mobile applications accessible to blind and visually-impaired individuals. Apple's guidelines are available online at: https://developer.apple.com/library/ios/documentation/UserExperience/Conceptual/iPhoneAccessibility/Introduction/Introduction.html.

23. Non-compliant websites and apps pose common access barriers to blind and visually-impaired persons. Common barriers encountered by blind and visually

impaired persons include, but are not limited to, the following:

a. A text equivalent for every non-text element is not provided;

b. Title frames with text are not provided for identification and navigation;

c. Equivalent text is not provided when using scripts;

d. Forms with the same information and functionality as for sighted persons are not provided;

e. Information about the meaning and structure of content is not conveyed by more than the visual presentation of content;

f. Text cannot be resized without assistive technology up to 200 percent without loss of content or functionality;

g. If the content enforces a time limit, the user is not able to extend, adjust or disable it;

h. Web pages do not have titles that describe the topic or purpose;

i. The purpose of each link cannot be determined from the link text alone or from the link text and its programmatically determined link context;

j. One or more keyboard operable user interface lacks a mode of operation where the keyboard focus indicator is discernible;

k. The default human language of each web page cannot be programmatically determined;

l. When a component receives focus, it may initiate a change in context;

m. Changing the setting of a user interface component may automatically cause a change of context where the user has not been advised before using the component;

n. Labels or instructions are not provided when content requires user input;

o. In content which is implemented by using markup languages, elements do not have complete start and end tags, elements are not nested according to their specifications, elements may contain duplicate attributes and/or any IDs are not unique; and,

p. The name and role of all User Interface elements cannot be programmatically determined; items that can be set by the user cannot be programmatically set; and/or notification of changes to these items is not available to user agents, including assistive technology.

FACTUAL BACKGROUND

24. Defendant offers the commercial website, Dominos.com, to the public. The website offers a feature which should allow all consumers to customize their pizzas, order other food and finalize their orders for home delivery or pick-up at Defendant's pizzerias. Dominos.com offers access to a variety of goods and services which are offered and available to the public, including special pricing options, store locator tools, and other services.

25. Defendant also operates an online ordering portal through its iPhone Mobile App which, like Dominos.com, offers a feature that should allow all consumers to create accounts, login to their accounts, customize pizzas, order food, and finalize orders for home delivery or pick-up at Defendant's pizzerias. Similar to Dominos.com, Defendant's Mobile App offers access [to] goods and services offered and available to the public.

26. Based on information and belief, it is Defendant's policy and practice to deny Plaintiff, along with other blind or visually-impaired users, access to Defendant's Dominos.com and Mobile App, and to therefore specifically deny the goods and services that are offered and integrated with Defendant's restaurants. Due to Defendant's failure and refusal to remove access barriers to Dominos.com and the Domino's Mobile App, Plaintiff and visually-impaired persons have been and are still being denied equal access to Domino's pizzerias and the

numerous goods, services, and benefits offered to the public through Dominos.com and the Domino's Mobile App.

Defendant's Barriers on Dominos.com Deny Plaintiff Access

27. Plaintiff, as a blind person, cannot use a computer without the assistance of screen-reading software. However, Plaintiff is a proficient user of the JAWS screen-reader to access the internet. Plaintiff has visited Dominos.com several times using the JAWS screen-reader to try to order a customized pizza. But due to the widespread accessibility barriers on Dominos.com, Plaintiff has been denied the full enjoyment of the facilities, goods, and services of Dominos.com, as well as to the facilities, goods, and services of Domino's locations in California.

28. While attempting to navigate Dominos.com, Plaintiff encountered multiple accessibility barriers for blind or visually-impaired people that include, but are not limited to, the following:

a. *Lack of Alternative Text* ("alt-text"), or a text equivalent. Alt-text is invisible code embedded beneath a graphical image on a website. Web accessibility requires that alt-text be coded with each picture so that screen-reading software can speak the alt-text where a sighted user sees pictures. Alt-text does not change the visual presentation, but instead a text box shows when

the mouse moves over the picture. The lack of alt-text on these graphics prevents screen readers from accurately vocalizing a description of the graphics. As a result, visually-impaired Domino's customers are unable to determine what is on the website, browse, look for store locations, check out Defendant's programs and specials, or make any purchases (including but not limited to, customizing their own pizza using the "Pizza Builder" feature);

b. *Empty Links That Contain No Text* causing the function or purpose of the link to not be presented to the user. This can introduce confusion for keyboard and screen-reader users;

c. *Redundant Links* where adjacent links go to the same URL address which results in additional navigation and repetition for keyboard and screen-reader users; and

d. *Linked Images Missing Alt-text*, which causes problems if an image within a link contains no text and that image does not provide alt-text. A screen reader then has no content to present the user as to the function of the link.

29. Most recently, in 2016, Plaintiff again attempted to do business with Domino's on Dominos.com. Plaintiff again encountered barriers to access on Dominos.com when it came to choosing, adding, or removing the toppings on the pizza he wanted to order. He was unable

to add the pizza to checkout and complete a transaction due to the inaccessibility of Domino's website.

Defendant's Barriers on Its Mobile App Deny Plaintiff Access

30. Plaintiff has also experienced accessibility problems when he attempted to use Domino's Mobile App on his iPhone with VoiceOver, Apple's talking software program that allows Plaintiff to access the menus and applications on his iPhone.

31. As early as 2015, Plaintiff attempted to access, do business with, and place a customized pizza order from Domino's using the Domino's iOS Mobile App. Plaintiff was unable to place his order due to accessibility barriers of unlabeled buttons that do not conform to Apple's iOS accessibility guidelines. While trying to navigate Defendant's Mobile App, Plaintiff encountered similar access barriers as Defendant's website, similar to the lack of alt-text on graphics, inaccessible forms, inaccessible image maps, and the lack of adequate prompting and labeling.

32. Plaintiff alleges on information and belief that Defendant updated its Mobile Application in 2016. Thereafter, Plaintiff again attempted to place an order using the most updated version of Defendant's Mobile App to order a pizza with customized toppings. Again due to barriers to access, Plaintiff was unable to place any order for a customized pizza using Defendant's Mobile App.

33. Defendant denies visually-impaired people access to its goods, services, and information because it prevents free navigation with screen-reading software to Dominos.com and the Mobile App. These barriers to blind and visually-impaired people can and must be removed, by simple compliance with WCAG 2.0.

Defendant Must Remove Barriers To Its Website And Mobile App

34. Due to the inaccessibility of Dominos.com and its Mobile App, blind and visually-impaired customers such as Plaintiff, who need screen-readers, cannot customize the toppings on their pizzas, browse, shop, or complete a purchase online. As a result, Plaintiff is deterred altogether from placing any sort of order for delivery or visiting the physical location to pick up his order. If Dominos.com and the Dominos Mobile App were equally accessible to all, Plaintiff could independently choose the toppings on his customized pizza, investigate other products available for purchase, and complete his transaction as sighted individuals do.

35. Through his many attempts to use Defendant's website and Mobile App, Plaintiff has actual knowledge of the access barriers that make these services inaccessible and independently unusable by blind and visually-impaired people.

36. Because simple compliance with the WCAG 2.0 Guidelines would provide Plaintiff and other visually-impaired consumers with equal access to Dominos.com

and the Domino's Mobile App, Plaintiff alleges that Domino's has engaged in acts of intentional discrimination, including but not limited to the following policies or practices:

a. Construction and maintenance of a website and mobile applications that are inaccessible to visually-impaired individuals, including Plaintiff;

b. Failure to construct and maintain a website and mobile applications that are sufficiently intuitive so as to be equally accessible to visually-impaired individuals, including Plaintiff; and,

c. Failure to take actions to correct these access barriers in the face of substantial harm and discrimination to blind and visually-impaired consumers, such as Plaintiff, as a member of a protected class.

37. Domino's therefore uses standards, criteria or methods of administration that have the effect of discriminating or perpetuating the discrimination of others, as alleged herein.

38. The ADA expressly contemplates the type of injunctive relief that Plaintiff seeks in this action. In relevant part, the ADA requires:

> "In the case of violations of . . . this title, injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with

> disabilities….Where appropriate, injunctive relief shall also include requiring the . . . modification of a policy. . .”

42 [U].S.C. § 12188(a)(2).

43 Because Defendant’s website has never been equally accessible, and because Defendant lacks a corporate policy that is reasonably calculated to cause its website and Mobile App to become and remain accessible, Plaintiff invokes the provisions of 42 U.S.C. § 12188(a)(2), and seeks a permanent injunction requiring Defendant to retain a qualified consultant acceptable to Plaintiff (“Agreed Upon Consultant”) to assist Defendant to comply with WCAG 2.0 guidelines for its website and Mobile App. Plaintiff seeks that this permanent injunction requires Defendant to cooperate with the Agreed Upon Consultant to:

a. Train Defendant’s employees and agents who develop the Dominos.com website and Mobile App on accessibility compliance under the WCAG 2.0 guidelines;

b. Regularly check the accessibility of Defendant’s website and Mobile App under the WCAG 2.0 guidelines;

c. Regularly test user accessibility by blind or vision-impaired persons to ensure that Defendant’s website and Mobile App complies under the WCAG 2.0 guidelines; and

d. Develop an accessibility policy that is clearly disclosed on its websites and Mobile Apps, with contact information for users to report accessibility-related problems.

44 If Dominos.com and the Mobile App were accessible, Plaintiff and similarly situated blind and visually-impaired people could independently view menu items, customize menu items for purchase, shop for and otherwise research related products available via Defendant's website and Mobile App.

45 Although Defendant may currently have centralized policies regarding the maintenance and operation of its website and Mobile App, Defendant lacks a plan and policy reasonably calculated to make its websites fully and equally accessible to, and independently usable by, blind and other visually-impaired consumers.

46 Without injunctive relief, Plaintiff and other visually-impaired consumers will continue to be unable to independently use the Defendant's websites in violation of their rights.

FIRST CAUSE OF ACTION
VIOLATIONS OF THE AMERICANS WITH DISABILITIES ACT OF 1990, 42 U.S.C. § 12181 *et seq*.
[DOMINOS.COM]

47 Plaintiff re-alleges and incorporates by reference all paragraphs alleged above and each and every other

paragraph in this Complaint necessary or helpful to state this cause of action as though fully set forth herein.

48 Section 302(a) of Title III of the ADA, 42 U.S.C. § 12101 *et seq*., provides:

> "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."

42 U.S.C. § 12182(a).

49 Domino's pizzerias are public accommodations within the definition of Title III of the ADA, 42 U.S.C. § 12181(7). Dominos.com is a service, privilege, or advantage of Domino's pizzerias. Dominos.com is a service that is integrated with these locations.

50 Under Section 302(b)(1) of Title III of the ADA, it is unlawful discrimination to deny individuals with disabilities the opportunity to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity. (42 U.S.C. § 12182(b)(1)(A)(i).)

51 Under Section 302(b)(1) of Title III of the ADA, it is unlawful discrimination to deny individuals with disabilities an opportunity to participate in or benefit from

the goods, services, facilities, privileges, advantages, or accommodation[s], which is equal to the opportunities afforded to other individuals. (42 U.S.C. § 12182(b)(1)(A)(ii).)

52 Under Section 302(b)(2) of Title III of the ADA, unlawful discrimination also includes, among other things:

> "[A] failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages or accommodations; and a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden."

42 U.S.C. § 12182(b)(2)(A)(ii)-(iii).

53 The acts alleged herein constitute violations of Title III of the ADA, and the regulations promulgated thereunder. Plaintiff, who is a member of a protected class of persons under the ADA, has a physical disability that substantially limits the major life activity of sight within the meaning of 42 U.S.C. §§ 12102(1)(A)-(2)(A). Furthermore, Plaintiff has been denied full and equal access to Dominos.com, has not been provided services which are provided to other patrons who are not disabled, and has been provided services that are inferior to the services provided to non-disabled persons. Defendant has failed to take any prompt and equitable steps to remedy its discriminatory conduct. These violations are ongoing.

54 Pursuant to 42 U.S.C. § 12188 and the remedies, procedures, and rights set forth and incorporated therein, Plaintiff, requests relief as set forth below.

SECOND CAUSE OF ACTION
VIOLATIONS OF THE AMERICANS WITH DISABILITIES ACT OF 1990, 42 U.S.C. § 12181 *et seq*.
[DOMINO'S MOBILE APP]

55 Plaintiff re-alleges and incorporates by reference all paragraphs alleged above and each and every other paragraph in this Complaint necessary or helpful to state this cause of action as though fully set forth herein.

56 Domino's Mobile App is a service, privilege, or advantage of Domino's pizzerias. Domino's Mobile App is a service that is integrated with these locations.

57 The acts alleged herein constitute violations of Title III of the ADA, and the regulations promulgated thereunder. Plaintiff, who is a member of a protected class of persons under the ADA, has a physical disability that substantially limits the major life activity of sight within the meaning of 42 U.S.C. §§ 12102(1)(A)-(2)(A). Plaintiff has been denied full and equal access to Domino's Mobile App, has not been provided services which are provided to other patrons who are not disabled, and has been provided services that are inferior to the services provided to non-disabled persons. Defendant has failed to take any prompt and equitable steps to remedy its discriminatory conduct. These violations are ongoing.

58 Pursuant to 42 U.S.C. § 12188 and the remedies, procedures, and rights set forth and incorporated therein, Plaintiff, requests relief as set forth below.

THIRD CAUSE OF ACTION
VIOLATION OF THE UNRUH CIVIL RIGHTS ACT, CALIFORNIA CIVIL CODE § 51 *et seq.*
[DOMINOS.COM]

59 Plaintiff re-alleges and incorporates by reference all paragraphs alleged above and each and every other paragraph in this Complaint necessary or helpful to state this cause of action as though fully set forth herein.

60 California Civil Code § 51 *et seq*. guarantees equal access for people with disabilities to the accommodations, advantages, facilities, privileges, and services of all business establishments of any kind

whatsoever. Defendant is systematically violating the UCRA, Civil Code § 51 *et seq*.

61 Defendant's pizzerias are "business establishments" within the meaning of the Civil Code § 51 *et seq*. Defendant generates millions of dollars in revenue from the sale of goods through its Dominos.com website. Defendant's website is a service provided by Defendant that is inaccessible to patrons who are blind or visually-impaired like Plaintiff. This inaccessibility denies blind and visually- impaired patrons full and equal access to the facilities, goods, and services that Defendant makes available to the non-disabled public. Defendant is violating the UCRA, Civil Code § 51 *et seq*., by denying visually-impaired customers the goods and services provided on its website. These violations are ongoing.

62 Defendant's actions constitute intentional discrimination against Plaintiff on the basis of a disability, in violation of the UCRA, Civil Code § 51 *et seq*., because Defendant has constructed a website that is inaccessible to Plaintiff, Defendant maintains the website in an inaccessible form, and Defendant has failed to take actions to correct these barriers.

63 Defendant is also violating the UCRA, Civil Code § 51 *et seq*. because the conduct alleged herein violates various provisions of the ADA, 42 U.S.C. § 12101 *et seq*., as set forth above. Section 51(f) of the Civil Code provides that a violation of the right of any individual under the ADA also constitutes a violation of the UCRA.

64 The actions of Defendants violate UCRA, Civil Code § 51 *et seq*., and Plaintiff is therefore entitled to injunctive relief remedying the discrimination.

65 Plaintiff is entitled to statutory minimum damages pursuant to Civil Code § 52 for each and every offense.

66 Plaintiff is also entitled to reasonable attorneys' fees and costs.

FOURTH CAUSE OF ACTION
VIOLATION OF THE UNRUH CIVIL RIGHTS ACT, CALIFORNIA CIVIL CODE § 51 *et seq*. [DOMINO'S MOBILE APP]

42 Plaintiff re-alleges and incorporates by reference all paragraphs alleged above and each and every other paragraph in this Complaint necessary or helpful to state this cause of action as though fully set forth herein.

43 Defendant generates millions of dollars in revenue from the sale of goods through its Mobile App. Defendant's Mobile App is a service provided by Defendant that is inaccessible to patrons who are blind or visually-impaired like Plaintiff. This inaccessibility denies blind and visually-impaired patrons full and equal access to the facilities, goods, and services that Defendant makes available to the non-disabled public. Defendant is violating the UCRA, Civil Code § 51 *et seq*., by denying visually-impaired customers the goods and services provided on its Mobile App. These violations are ongoing.

44 Defendant's actions constitute intentional discrimination against Plaintiff on the basis of a disability, in violation of the UCRA, Civil Code § 51 *et seq*., because Defendant has constructed a Mobile App that is inaccessible to Plaintiff, Defendant maintains the Mobile App [in] an inaccessible form, and Defendant has failed to take actions to correct these barriers.

45 Defendant is also violating the UCRA, Civil Code § 51 *et seq*. because the conduct alleged herein violates various provisions of the ADA, 42 U.S.C. § 12101 *et seq*., as set forth above. Section 51(f) of the Civil Code provides that a violation of the right of any individual under the ADA also constitutes a violation of the UCRA.

46 The actions of Defendants violate UCRA, Civil Code § 51 *et seq*., and Plaintiff is therefore entitled to injunctive relief remedying the discrimination.

47 Plaintiff is entitled to statutory minimum damages pursuant to Civil Code § 52 for each and every offense.

48 Plaintiff is also entitled to reasonable attorneys' fees and costs.

PRAYER

WHEREFORE, Plaintiff prays for judgment against Defendant, as follows:

1. A Declaratory Judgment that at the commencement of this action Defendant was in violation of the specific requirements of Title III of the ADA 42

U.S.C. § 12181 *et seq*., and the relevant implementing regulations of the ADA, for Defendant's failure to take action that was reasonably calculated to ensure that its websites and mobile applications are fully accessible to, and independently usable by, blind and visually-impaired individuals;

2. A preliminary and permanent injunction enjoining Defendant from violating the ADA, 42 U.S.C. § 12181 *et seq*., and/or the UCRA, Civil Code § 51 *et seq*. with respect to its website Dominos.com;

3. A preliminary and permanent injunction enjoining Defendant from violating the ADA, 42 U.S.C. § 12181 *et seq*., and/or the UCRA, Civil Code § 51 *et seq*. with respect to its Mobile Application;

4. A preliminary and permanent injunction requiring Defendant to take the steps necessary to make Dominos.com readily accessible to and usable by blind and visually-impaired individuals;

5. A preliminary and permanent injunction requiring Defendant to take the steps necessary to make Domino's Mobile Application readily accessible to and usable by blind and visually-impaired individuals;

6. An award of statutory minimum damages of $4,000 per violation pursuant to § 52(a) of the California Civil Code;

7. For attorneys' fees and expenses pursuant to all applicable laws including, without limitation, pursuant to 42 U.S.C. § 12188(a)(1), and California Civil Code § 52(a);

8. For pre-judgment interest to the extent permitted by law;

9. For costs of suit; and

10. For such other and further relief as this Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiff hereby respectfully requests a trial by jury on all appropriate issues raised in this Complaint.

Dated: September 1, 2016

MANNING LAW, APC

By: /s/ Joseph R. Manning Jr., Esq.
Joseph R. Manning Jr., Esq.
Caitlin J. Scott, Esq.
Attorneys for Plaintiff

Appendix D

42 U.S.C. § 12101

§ 12101. Findings and purpose

Effective: January 1, 2009

(a) Findings

The Congress finds that--

(1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of

disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(8) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter--

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12181

§ 12181. Definitions

As used in this subchapter:

(1) Commerce

The term "commerce" means travel, trade, traffic, commerce, transportation, or communication--

(A) among the several States;

(B) between any foreign country or any territory or possession and any State; or

(C) between points in the same State but through another State or foreign country.

(2) Commercial facilities

The term "commercial facilities" means facilities--

(A) that are intended for nonresidential use; and

(B) whose operations will affect commerce.

Such term shall not include railroad locomotives, railroad freight cars, railroad cabooses, railroad cars described in section 12162 of this title or covered under this subchapter, railroad rights-of-way, or facilities that are covered or expressly exempted from coverage under the Fair Housing Act of 1968 (42 U.S.C. 3601 *et seq.*).

(3) Demand responsive system

The term "demand responsive system" means any system of providing transportation of individuals by a vehicle, other than a system which is a fixed route system.

(4) Fixed route system

The term "fixed route system" means a system of providing transportation of individuals (other than by aircraft) on which a vehicle is operated along a prescribed route according to a fixed schedule.

(5) Over-the-road bus

The term "over-the-road bus" means a bus characterized by an elevated passenger deck located over a baggage compartment.

(6) Private entity

The term "private entity" means any entity other than a public entity (as defined in section 12131(1) of this title).

(7) Public accommodation

The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce--

(A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the

proprietor of such establishment as the residence of such proprietor;

(B) a restaurant, bar, or other establishment serving food or drink;

(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;

(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

(8) Rail and railroad

The terms "rail" and "railroad" have the meaning given the term "railroad" in section 20102(1) of Title 49.

(9) Readily achievable

The term "readily achievable" means easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable, factors to be considered include--

(A) the nature and cost of the action needed under this chapter;

(B) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;

(C) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(D) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness,

administrative or fiscal relationship of the facility or facilities in question to the covered entity.

(10) Specified public transportation

The term "specified public transportation" means transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

(11) Vehicle

The term "vehicle" does not include a rail passenger car, railroad locomotive, railroad freight car, railroad caboose, or a railroad car described in section 12162 of this title or covered under this subchapter.

42 U.S.C. § 12182

§ 12182. Prohibition of discrimination by public accommodations

(a) General rule

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.

(b) Construction

(1) General prohibition

(A) Activities

(i) Denial of participation

It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

(ii) Participation in unequal benefit

It shall be discriminatory to afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals.

(iii) Separate benefit

It shall be discriminatory to provide an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.

(iv) Individual or class of individuals

For purposes of clauses (i) through (iii) of this subparagraph, the term "individual or class of individuals" refers to the clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement.

(B) Integrated settings

Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.

(C) Opportunity to participate

Notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different.

(D) Administrative methods

An individual or entity shall not, directly or through contractual or other arrangements, utilize standards or criteria or methods of administration--

(i) that have the effect of discriminating on the basis of disability; or

(ii) that perpetuate the discrimination of others who are subject to common administrative control.

(E) Association

It shall be discriminatory to exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

(2) Specific prohibitions

(A) Discrimination

For purposes of subsection (a) of this section, discrimination includes--

(i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered;

(ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals

with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations;

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden;

(iv) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), where such removal is readily achievable; and

(v) where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable.

(B) Fixed route system

(i) Accessibility

It shall be considered discrimination for a private entity which operates a fixed route system and which is not subject to section 12184 of this title to purchase or lease a vehicle with a seating capacity in excess of 16 passengers (including the driver) for use on such system, for which a solicitation is made after the 30th day following the effective date of this subparagraph, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(ii) Equivalent service

If a private entity which operates a fixed route system and which is not subject to section 12184 of this title purchases or leases a vehicle with a seating capacity of 16 passengers or less (including the driver) for use on such system after the effective date of this subparagraph that is not readily accessible to or usable by individuals with disabilities, it shall be considered discrimination for such entity to fail to operate such system so that, when viewed in its entirety, such system ensures a level of service to individuals with disabilities, including individuals who use wheelchairs,

equivalent to the level of service provided to individuals without disabilities.

(C) Demand responsive system

For purposes of subsection (a) of this section, discrimination includes--

(i) a failure of a private entity which operates a demand responsive system and which is not subject to section 12184 of this title to operate such system so that, when viewed in its entirety, such system ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service provided to individuals without disabilities; and

(ii) the purchase or lease by such entity for use on such system of a vehicle with a seating capacity in excess of 16 passengers (including the driver), for which solicitations are made after the 30th day following the effective date of this subparagraph, that is not readily accessible to and usable by individuals with disabilities (including individuals who use wheelchairs) unless such entity can demonstrate that such system, when viewed in its entirety, provides a level of service to individuals with disabilities equivalent to that provided to individuals without disabilities.

(D) Over-the-road buses

(i) Limitation on applicability

Subparagraphs (B) and (C) do not apply to over-the-road buses.

(ii) Accessibility requirements

For purposes of subsection (a) of this section, discrimination includes (I) the purchase or lease of an over-the-road bus which does not comply with the regulations issued under section 12186(a)(2) of this title by a private entity which provides transportation of individuals and which is not primarily engaged in the business of transporting people, and (II) any other failure of such entity to comply with such regulations.

(3) Specific construction

Nothing in this subchapter shall 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. The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.

28 C.F.R. § 36.303

§ 36.303 Auxiliary aids and services.

Effective: January 17, 2017

(a) General. A public accommodation shall take those steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the public accommodation can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden, i.e., significant difficulty or expense.

(b) Examples. The term "auxiliary aids and services" includes—

(1) Qualified interpreters on-site or through video remote interpreting (VRI) services; notetakers; real- time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video- based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones,

or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing;

(2) Qualified readers; taped texts; audio recordings; Brailled materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs (SAP); large print materials; accessible electronic and information technology; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision;

(3) Acquisition or modification of equipment or devices; and

(4) Other similar services and actions.

(c) Effective communication.

(1) A public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities. This includes an obligation to provide effective communication to companions who are individuals with disabilities.

(i) For purposes of this section, "companion" means a family member, friend, or associate of an individual seeking access to, or participating in,

the goods, services, facilities, privileges, advantages, or accommodations of a public accommodation, who, along with such individual, is an appropriate person with whom the public accommodation should communicate.

(ii) The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. A public accommodation should consult with individuals with disabilities whenever possible to determine what type of auxiliary aid is needed to ensure effective communication, but the ultimate decision as to what measures to take rests with the public accommodation, provided that the method chosen results in effective communication. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.

(2) A public accommodation shall not require an individual with a disability to bring another individual to interpret for him or her.

(3) A public accommodation shall not rely on an adult accompanying an individual with a

disability to interpret or facilitate communication, except—

(i) In an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available; or

(ii) Where the individual with a disability specifically requests that the accompanying adult interpret or facilitate communication, the accompanying adult agrees to provide such assistance, and reliance on that adult for such assistance is appropriate under the circumstances.

(4) A public accommodation shall not rely on a minor child to interpret or facilitate communication, except in an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available.

(d) Telecommunications.

(1) When a public accommodation uses an automated-attendant system, including, but not limited to, voicemail and messaging, or an interactive voice response system, for receiving and directing incoming telephone calls, that system must provide effective real-time communication with individuals using auxiliary aids and services, including text telephones (TTYs) and all forms of FCC–approved

telecommunications relay systems, including Internet-based relay systems.

(2) A public accommodation that offers a customer, client, patient, or participant the opportunity to make outgoing telephone calls using the public accommodation's equipment on more than an incidental convenience basis shall make available accessible public telephones, TTYs, or other telecommunications products and systems for use by an individual who is deaf or hard of hearing, or has a speech impairment.

(3) A public accommodation may use relay services in place of direct telephone communication for receiving or making telephone calls incident to its operations.

(4) A public accommodation shall respond to telephone calls from a telecommunications relay service established under title IV of the ADA in the same manner that it responds to other telephone calls.

(5) This part does not require a public accommodation to use a TTY for receiving or making telephone calls incident to its operations.

(e) Closed caption decoders. Places of lodging that provide televisions in five or more guest rooms and hospitals that provide televisions for patient use shall provide, upon request, a means for decoding captions for use by an individual with impaired hearing.

(f) Video remote interpreting (VRI) services. A public accommodation that chooses to provide qualified interpreters via VRI service shall ensure that it provides—

(1) Real-time, full-motion video and audio over a dedicated high-speed, wide-bandwidth video connection or wireless connection that delivers high-quality video images that do not produce lags, choppy, blurry, or grainy images, or irregular pauses in communication;

(2) A sharply delineated image that is large enough to display the interpreter's face, arms, hands, and fingers, and the participating individual's face, arms, hands, and fingers, regardless of his or her body position;

(3) A clear, audible transmission of voices; and

(4) Adequate training to users of the technology and other involved individuals so that they may quickly and efficiently set up and operate the VRI.

(g) Movie theater captioning and audio description—

(1) Definitions. For the purposes of this paragraph (g)—

(i) Analog movie means a movie exhibited in analog film format.

(ii) Audio description means the spoken narration of a movie's key visual elements, such as

the action, settings, facial expressions, costumes, and scene changes. Audio description generally requires the use of an audio description device for delivery to a patron.

(iii) Audio description device means the individual device that a patron may use at any seat to hear audio description.

(iv) Captioning device means the individual device that a patron may use at any seat to view closed movie captioning.

(v) Closed movie captioning means the written display of a movie's dialogue and non-speech information, such as music, the identity of the character who is speaking, and other sounds or sound effects. Closed movie captioning generally requires the use of a captioning device for delivery of the captions to the patron.

(vi) Digital movie means a movie exhibited in digital cinema format.

(vii) Movie theater means a facility, other than a drive-in theater, that is owned, leased by, leased to, or operated by a public accommodation and that contains one or more auditoriums that are used primarily for the purpose of showing movies to the public for a fee.

(viii) Open movie captioning means the written on-screen display of a movie's dialogue and non-speech information, such as music, the identity of the character who is speaking, and other sounds and sound effects.

(2) General. A public accommodation shall ensure that its movie theater auditoriums provide closed movie captioning and audio description whenever they exhibit a digital movie that is distributed with such features. Application of the requirements of paragraph (g) of this section is deferred for any movie theater auditorium that exhibits analog movies exclusively, but may be addressed in a future rulemaking.

(3) Minimum requirements for captioning devices. A public accommodation shall provide a minimum number of fully operational captioning devices at its movie theaters in accordance with the following Table:

Number of movie theater auditoriums exhibiting digital movies	**Minimum required number of captioning devices**
1.....	4

2-7.....	6
8-15.....	8
16 +.....	12

(4) Minimum requirements for audio description devices.

(i) A public accommodation shall provide at its movie theaters a minimum of one fully operational audio description device for every two movie theater auditoriums exhibiting digital movies and no less than two devices per movie theater. When calculation of the required number of devices results in a fraction, the next greater whole number of devices shall be provided.

(ii) A public accommodation may comply with the requirements in paragraph (g)(4)(i) of this section by using the existing assistive listening receivers that the public accommodation is already required to provide at its movie theaters in accordance with Table 219.3 of the 2010 Standards, if those receivers have a minimum of two channels available for sound transmission to patrons.

(5) Performance requirements for captioning devices and audio description devices. Each captioning device and each audio description device must be properly maintained by the movie theater to ensure that each device is fully

operational, available to patrons in a timely manner, and easily usable by patrons. Captioning devices must be adjustable so that the captions can be viewed as if they are on or near the movie screen, and must provide clear, sharp images in order to ensure readability of captions.

(6) Alternative technologies.

(i) A public accommodation may meet its obligation to provide captioning and audio description in its movie theaters to persons with disabilities through any technology so long as that technology provides communication as effective as that provided to movie patrons without disabilities.

(ii) A public accommodation may use open movie captioning as an alternative to complying with the requirements specified in paragraph (g)(3) of this section, either by providing open movie captioning at all showings of all movies available with captioning, or whenever requested by or for an individual who is deaf or hard of hearing prior to the start of the movie.

(7) Compliance date for providing captioning and audio description.

(i) A public accommodation must comply with the requirements in paragraphs (g)(2)-(6) of this section in its movie theaters that exhibit digital movies by June 2, 2018.

(ii) If a public accommodation converts a movie theater auditorium from an analog projection system to a system that allows it to exhibit digital movies after December 2, 2016, then that auditorium must comply with the requirements in paragraph (g) of this section by December 2, 2018, or within 6 months of that auditorium's complete installation of a digital projection system, whichever is later.

(8) Notice. On or after January 17, 2017, whenever a public accommodation provides captioning and audio description in a movie theater auditorium exhibiting digital movies, it shall ensure that all notices of movie showings and times at the box office and other ticketing locations, on Web sites and mobile apps, in newspapers, and over the telephone, inform potential patrons of the movies or showings that are available with captioning and audio description. This paragraph does not impose any obligation on third parties that provide information about movie theater showings and times, so long as the third party is not part of or subject to the control of the public accommodation.

(9) Operational requirements. On or after January 17, 2017, whenever a public accommodation provides captioning and audio description in a movie theater auditorium

exhibiting digital movies, it shall ensure that at least one employee is available at the movie theater to assist patrons seeking or using captioning or audio description whenever a digital movie is exhibited with these features. Such assistance includes the ability to—

(i) Locate all necessary equipment that is stored and quickly activate the equipment and any other ancillary systems required for the use of the captioning devices and audio description devices;

(ii) Operate and address problems with all captioning and audio description equipment prior to and during the movie;

(iii) Turn on open movie captions if the movie theater is relying on open movie captioning to meet the requirements of paragraph (g)(3) of this section; and

(iv) Communicate effectively with individuals with disabilities, including those who are deaf or hard of hearing or who are blind or have low vision, about how to use, operate, and resolve problems with captioning devices and audio description devices.

(10) This section does not require the use of open movie captioning as a means of compliance with paragraph (g) of this section, even if providing closed movie captioning for digital movies would be an undue burden.

(h) Alternatives. If provision of a particular auxiliary aid or service by a public accommodation would result in a fundamental alteration in the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or in an undue burden, i.e., significant difficulty or expense, the public accommodation shall provide an alternative auxiliary aid or service, if one exists, that would not result in an alteration or such burden but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the goods, services, facilities, privileges, advantages, or accommodations offered by the public accommodation.