No. 18-1539

In The Supreme Court of the United States

DOMINO'S PIZZA LLC,

Petitioner,

v.

GUILLERMO ROBLES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOSEPH R. MANNING, JR.
Counsel of Record
MANNING LAW, APC
20062 S.W. Birch St.
Suite 200
Newport Beach, CA 92660
(949) 200-8755
disabilityrights@manninglawoffice.com

MICHAEL J. MANNING
MANNING LAW, APC
20062 S.W. Birch St.
Suite 200
Newport Beach, CA 92660

CRAIG G. COTE
MANNING LAW, APC
20062 S.W. Birch St.
Suite 200
Newport Beach, CA 92660

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181 *et seq.*, prohibits disability-based discrimination "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 question presented is:

Whether a business violates Title III by maintaining websites and mobile apps that are inaccessible to blind customers and thus deny them full and equal enjoyment of the goods and services offered by the business's physical locations.

RELATED CASES

Robles v. Dominos Pizza LLC, No. 2:16-cv-06599, U.S. District Court for the Central District of California. Judgment entered April 12, 2017.

Robles v. Dominos Pizza LLC, No. 17-55504, U.S. Court of Appeals for the Ninth Circuit. Judgment entered January 15, 2019.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTRODUCTION

The Petition for *Certiorari* elides one crucial point: The decision below represents the *first time* a federal court of appeals has *ever* decided the Title III coverage issue in a case in which a plaintiff sought access to a business's website or mobile apps. Far from there being a "long[standing] split" over the application of Title III to online services, Pet. 3, there is no circuit conflict at all. The issue was one of first impression in any circuit court.

Petitioner attempts to suggest that there is a conflict between the decision below and the *reasoning* employed by other courts of appeals in cases decided outside of the internet context. But that is not true either. Far from holding that websites are "standalone public accommodations that must themselves comply with Title III," Pet. 5, the court of appeals simply held that "[t]he 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." Pet. App. 8a. The court said that the "nexus between Domino's website and app and physical restaurants" was "critical to [its] analysis." *Id.* *Every* court of appeals to have discussed the question has appeared to agree that Title III applies *at least* in cases in which such a "nexus" exists. And that approach is fully consistent with the statutory text, which prohibits disability-based discrimination "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 court of appeals remanded to permit the district court to decide, after discovery, whether Petitioner's inaccessible website and app had denied respondent the opportunity for "full and equal enjoyment" of the public accommodation's goods and services that is required by the statute. Pet. App. 21a.

This, in short, is not a case that meets *any* of the standard criteria for *certiorari*. Petitioner argues that *certiorari* is nonetheless warranted because the number of web accessibility lawsuits has increased substantially in the last three years. Pet. 4, 26. But that just means that this Court will have plenty of opportunities to address these issues in the future, after the usual process of percolation in the courts of appeals. Such percolation will be particularly helpful in illuminating just what sorts of barriers to web access impede "full and equal enjoyment" of the goods and services of places of public accommodation, what sorts of online technologies or alternatives to web access might in particular cases overcome those barriers, and so forth. Particularly given the "rapidly evolving technology" in the world of websites and mobile apps, "this Court should proceed with caution" in this area. Cf. *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 806 (2011) (Alito, J., concurring in the judgment). It should not rush headlong to decide an issue that does not meet its normal standards for *certiorari*.

STATEMENT

Respondent Guillermo Robles, a blind man, brought this case under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, to challenge inaccessible aspects of the website and mobile app operated by Petitioner Domino's. Those aspects made it harder for Robles to enjoy the goods and services of Domino's physical pizzerias. The court of appeals allowed discovery and further proceedings to determine "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." Pet. App. 21a. Petitioner seeks to shut down the case at this interlocutory stage.

A. The Statutory Scheme

Congress enacted the Americans with Disabilities Act "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). "After thoroughly investigating the problem, Congress concluded that there was a 'compelling need'" for such a statute to integrate disabled persons "'into the economic and social mainstream of American life.'" *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001) (quoting S. Rep. No. 101-116 at 20 (1989); H.R. Rep. No. 101-485, pt. 2 at 50 (1990)). In findings appearing in the statutory text, Congress determined that "individuals with disabilities continually encounter various forms of discrimination," including "communication barriers" and

"relegation to lesser services, programs, activities, benefits, jobs, or other opportunities." 42 U.S.C. § 12101(a)(5). See also *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 487 (1999) (finding included in the text of the statute "gives content to the ADA's terms"). "To effectuate its sweeping purpose, the ADA forbids discrimination against disabled individuals in major areas of public life, among them employment (Title I of the Act), public services (Title II), and public accommodations (Title III)." *PGA Tour*, 532 U.S. at 675.

Title III begins with a "broad general rule," *PGA Tour*, 532 U.S. at 679:

> 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). It then sets forth a number of prohibitions encompassed within that general rule. The statute's "reasonable modifications" requirement provides that "discrimination" includes "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." 42 U.S.C. § 12182(b)(2)(A)(ii).

The statute also includes specific provisions designed to ensure that public accommodations provide effective means of communicating with disabled customers. The "auxiliary aids" requirement provides that "discrimination" includes "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)(iii). Throughout the ADA, "auxiliary aids and services" refers to techniques and devices to overcome barriers in communicating with people who have visual and hearing impairments, among other things. See 42 U.S.C. § 12103(1). Implementing these provisions, see 42 U.S.C. § 12186(b), the Attorney General's Title III regulations require public accommodations to "furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities." 28 C.F.R. § 36.303(c)(1). The regulations specifically list "screen reader software," "magnification software," and "accessible electronic and information technology" as among the auxiliary aids that the statute requires. 28 C.F.R. § 36.303(b)(2).

Congress defined "public accommodations" by providing a list including "12 extensive categories, which the legislative history indicates 'should be construed liberally' to afford people with disabilities 'equal access' to the wide variety of establishments available to the nondisabled." *PGA Tour*, 532 U.S. at 676-77 (footnotes omitted) (quoting S. Rep. No. 101-116 at 59; H.R. Rep. No. 101-485, pt. 2 at 100). One of these categories embraces "a restaurant, bar, or other establishment serving food or drink." 42 U.S.C. § 12181(7)(B).

Title III affords a right of action "to any person who is being subjected to discrimination on the basis of disability in violation of this subchapter." 42 U.S.C. § 12188(a)(1). But the statute limits private plaintiffs to preventive relief; they may not recover money damages. See *id.* (incorporating by reference 42 U.S.C. § 2000a-3(a)).

B. The Facts

Respondent Guillermo Robles is blind. Pet. App. 47a. He "cannot use a computer without the assistance of screen-reading software," but he "is a proficient user of the JAWS screen-reader to access the internet." Pet. App. 55a. JAWS, or "Job Access With Speech," is the most popular screen reading software for Windows-based computers. Pet. App. 50a. Robles also connects to the internet via his iPhone, which has Apple's Voice Over screen reading program built into its operating system. Pet. App. 50a-51a, 57a.

"For screen-reading software to function, the information on a website or on a mobile application must be capable of being rendered into text." Pet. App. 51a. Typically, this means that graphics and embedded hyperlinks must include alternative text (known as "alt-text")—a description of the image that appears when a cursor floats over it or screen-reading software detects it. See Pet. App. 55a-56a. The World Wide Web Consortium (the principal standards-setting body for the web) has issued a set of "Web Content Accessibility Guidelines" (WCAG) to assist developers in making their websites accessible to blind people and other individuals with disabilities. See Pet. App. 51a; W3C Web Accessibility Initiative, *Web Content Accessibility Guidelines (WCAG) Overview*, https://perma.cc/428Y-WAXE. "These guidelines are universally followed by most large business entities to ensure their websites and mobile apps are accessible." Pet. App. 51a. Apple also offers a set of accessibility guidelines for developers to use in designing apps for its iPhones. See Pet. App. 51a.

Petitioner Domino's sells pizza and other food at thousands of pizzerias across the country. Pet. App. 48a. The company maintains a website and a mobile app. Pet. App. 54a. Customers can use the website and app to "customize their pizzas, order other food and finalize their orders for home delivery or pick-up at Defendant's pizzerias." Pet. App. 54a. The website and

app also offer customers "special pricing options, store locator tools, and other services." Pet. App. 54a.[1]

Petitioner "has been at the forefront of app-based restaurant technology," because it recognizes that consumers value the convenience of online ordering options: "Even if it falls short in flavor, where Domino's has managed to beat both its national rivals and local favorites is convenience. The company has pioneered technology that makes it very easy to get your order, and in many eating situations, convenience trumps quality." Daniel B. Kline, *Domino's Success Shows That Convenience Really Matters*, THE MOTLEY FOOL, Jan. 31, 2017, https://perma.cc/E3HM-BQFY. According to a Domino's spokesperson, ordering online enables customers to "experience more of the menu" than they could if they ordered by phone, and it enables orders to be "more accurate" by avoiding the interference and distraction of noisy environments on either end of the phone line. Neal Ungerleider, *The Hidden Psychology of Ordering Food Online*, FAST CO., May 6, 2014,

---

[1] See, *e.g.*, Callie Tansill-Suddath, *Domino's Pizza Has a 50 Percent Off Deal for All Online Pizza Orders This Week—Here's How to Get It*, BUSTLE, July 9, 2018, https://perma.cc/MG5G-DB5N ("As long as a customer orders from the Domino's website, they qualify for the discount."); Bob Miller, *Domino's Offers 50% Off All Menu-Priced Pizzas Ordered Online Through March 24, 2019*, CHEW BOOM, Mar. 18, 2019, https://perma.cc/JWS7-A22U ("In order to net the deal, simply order any number of menu-priced pizzas through any one of Domino's online ordering channels, including dominos.com, Domino's mobile app, Google Home, Amazon Alexa, Facebook Messenger and voice ordering with Dom.").

https://perma.cc/7MLW-T3T2 (quoting Domino's spokesperson Chris Brandon).

Unfortunately, Guillermo Robles was not able to enjoy these benefits. Robles tried several times to order customized pizzas on the Domino's website, but he was stymied by the site's lack of alt-text, as well as other accessibility barriers. Pet. App. 55a-57a. He also tried multiple times to order customized pizzas on the company's mobile app, but he "was unable to place his order due to accessibility barriers of unlabeled buttons that do not conform to Apple's iOS accessibility guidelines." Pet. App. 57a.

"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." Pet. App. 4a n.4. Indeed, the "accessibility banner" containing the telephone number appears to have been added to the Domino's website no more than 24 days before Petitioner filed its motion for summary judgment in the district court. DCt. Dkt. No. 33 at 11-12. Robles did not have the opportunity to take discovery on the effectiveness of the phone number, Pet. App. 5a n.4, and, indeed, Petitioner's discovery responses submitted less than a month before the filing of the summary judgment motion did not discuss the "accessibility banner." DCt. Dkt. No. 33 at 12 n.3. But there are substantial reasons to believe that the phone number does not provide the same level of independence and convenience as does the website and the mobile app. In particular, as the district court noted, "callers may experience delays and be placed on hold."

Pet. App. 24a. Ambient noise may distract from and interfere with the accurate taking of orders. See p. 8, *supra*. And giving a credit card number to a live human being over the phone may create a greater risk to privacy than does submitting that information through a secure website. See DCt. Dkt. No. 33 at 15.

C. Proceedings Below

On September 1, 2016, Robles filed this suit in the District Court for the Central District of California. Pet. App. 43a. The complaint alleged that the barriers to accessing the Domino's website and mobile app violated Title III of the ADA, because Robles "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." Pet. App. 64a, 65a.[2] Robles sought declaratory and injunctive relief for the Title III claims. Pet. App. 68a-69a.

Petitioner filed an answer, and the district court set a discovery cutoff for May 29, 2017. Pet. App. 23a. Three months before that date, on February 22, 2017, Petitioner filed for summary judgment or in the alternative to dismiss or stay the action. DCt. Dkt. No. 32. The district court granted the alternative motion to dismiss. Pet. App. 22a.

---

[2] The complaint also alleged that Petitioner's conduct violated California law. Pet. App. 65a-68a. Because no state-law issue is before this Court, we do not discuss these claims further.

As an initial matter, the district court agreed with Robles that Title III applies to Domino's website and mobile app. Pet. App. 28a n.1. The court explained that "'[t]he 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.'" Pet. App. 27a-28a (quoting *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 953 (N.D. Cal. 2006) (emphasis in *Target*)). The court agreed that the Department of Justice's regulations implementing Title III require public accommodations "to communicate effectively with customers who have disabilities concerning hearing, vision, or speech," Pet. App. 28a (internal quotation marks omitted)—and that those 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,'" Pet. App. 28a (quoting 28 C.F.R. § 36.303(b)(2)). But the district court concluded that the Department of Justice's failure to adopt Title III regulations *specific to internet services* denied business owners due process. Pet. App. 29a-40a. As a result, the court dismissed the action without prejudice under the primary jurisdiction doctrine, to give the Attorney General an opportunity to issue regulations on web accessibility. Pet. App. 40a-41a.

The Court of Appeals for the Ninth Circuit reversed. Pet. App. 1a. The court "agree[d] with the

district court that the ADA applies to Domino's website and app." Pet. App. 6a. It noted that Title III "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.'" Pet. App. 6a (quoting 42 U.S.C. § 12182(b)(2)(A)(iii)). As a result, it held, Domino's must "provide auxiliary aids and services to make visual materials available to individuals who are blind." Pet. App. 7a. The statute gives public accommodations a defense where providing an auxiliary aid would be unduly burdensome or work a fundamental alteration. 42 U.S.C. § 12182(b)(2)(A)(iii). But the court noted that Petitioner had not asserted that defense. Pet. App. 6a-7a n.5.

The court of appeals emphasized that "[t]he alleged inaccessibility of Domino's website and app impedes access to the goods and services of its physical pizza franchises." Pet. App. 8a. And the court said that the "nexus between Domino's website and app and physical restaurants—which Domino's does not contest—is critical to our analysis." Pet. App. 8a. Because "Domino's website and app facilitate access to the goods and services of a place of public accommodation"—and, indeed, 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"—the court held that Title III applied "to

Domino's website and app, which connect customers to the goods and services of Domino's physical restaurants." Pet. App. 8a-9a. The court noted the new telephone hotline, but it concluded that "the mere presence of the phone number, without discovery on its effectiveness, is insufficient to grant summary judgment in favor of Domino's." Pet. App. 5a n.4.

The court went on to reject Petitioner's due process argument. The court concluded that the statute "articulates comprehensible standards to which Domino's conduct must conform," Pet. App. 11a, and that the lack of internet-specific regulations "cannot eliminate a statutory obligation," Pet. App. 15a-16a (internal quotation marks omitted). And it rejected the application of the primary jurisdiction doctrine, because dismissal under that doctrine would cause significant and needless delay in the resolution of the matters raised by the complaint. Pet. App. 18a-21a.[3]

The court of appeals thus reversed and remanded. Pet. App. 21a. It left the matter "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." Pet. App. 21a.

[3] The Petition for *Certiorari* does not raise the due process or primary jurisdiction issues, either in the Question Presented or in the body of the petition. Accordingly, Petitioner has abandoned those issues.

REASONS FOR DENYING THE PETITION

The decision under review represents the *first time* a federal appellate court has decided the Title III coverage issue in a case in which a plaintiff sought access to the online services of a public accommodation. And Petitioner and its *amici* incorrectly characterize the holding of that decision. The court of appeals did *not* hold that "Domino's website and app [are] standalone public accommodations that must themselves comply with Title III." Pet. 5. Nor did it hold that "each individual mode of access" must be fully accessible. Chamber Br. 15.

Rather, the court of appeals simply held, in accordance with the statutory text, that the ADA protects against disability-based discrimination "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 court concluded that "[t]he 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." Pet. App. 8a.

That holding does not conflict with the holding of any other court of appeals. Indeed, the court of appeals here was the first one to squarely address the question. Even in dicta, no circuit has so much as suggested that internet services that "facilitate access to the goods and services of a place of public accommodation," Pet. App. 8a-9a, fall outside of Title III. Because Domino's created the website and apps at issue here as a means

of obtaining the goods and services provided by its physical stores, the decision below is fully consistent with the law in every other circuit.

The holding of the court of appeals accords with the plain text of Title III. That court did not hold that the Domino's website and app must be addressed "in isolation." Pet. 22. Nor did it even hold that they violated Title III. Rather, the court of appeals "le[ft] 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." Pet. App. 21a. And far from holding that a telephone hotline is inherently an insufficient alternative to making the website and app accessible, cf. Pet. 33-34; Cato Br. 10; Chamber Br. 16, the court simply concluded that the mere existence of such a hotline was not enough, without further evidence, to justify shutting down the case at this interlocutory stage. See Pet. App. 5a n.4.

There is no conflict in the circuits, and the decision of the court of appeals was correct. This Court should deny the petition.

A. There Is No Conflict In The Circuits

This case represents the first time a court of appeals has ever addressed an ADA claim by a plaintiff seeking access to the online services of a place of public accommodation. Petitioner asserts that the decision here "exacerbates" a circuit split, with the First,

Second, and Seventh Circuits on one side, the Third, Sixth, and Eleventh on the other, and the Ninth Circuit now standing somewhere in between. Pet. 15-22. But *none* of the other appellate cases cited by Petitioner involved plaintiffs who sought access to online services. There can accordingly be no conflict between the decision below and the *holdings* of those cases. Nor is there even a conflict between the decision below and the *reasoning* of those cases.

1. Petitioner begins by asserting that the circuits are divided over whether Title III applies to "web-only businesses." Pet. 15-17. Domino's is not, of course, a web-only business, so this case could not implicate such a split even if it did exist. See Pet. App. 8a n.6 (declining to address whether Title III applies to web-only businesses). And when one actually examines the cases Petitioner cites, it is apparent that there is no such split —because *none* of those cases, on either side, involved a plaintiff who sought access to a company's online services.

Petitioner says that the Third, Sixth, and Ninth Circuits have "conclud[ed] that web-only enterprises cannot face Title III liability." Pet. 17. In support of that statement, Petitioner cites two cases from the Third Circuit and one each from the Sixth and Ninth Circuits. None involved web access at all, much less a web-only enterprise. In three of these cases, the plaintiffs sued insurance companies to challenge disability benefits plans provided through their employers. They alleged that policy terms granting greater benefits to those with physical disabilities than to those with

mental disabilities violated Title III. See *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612 (3d Cir. 1998); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1008 (6th Cir. 1997), cert. denied, 522 U.S. 1084 (1998); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1107 (9th Cir. 2000). In the other case, an unpublished decision from the Third Circuit, the plaintiff was a blind man who sued his credit card company for "supposedly insufficient investigation of [his] fraud claim" against a merchant. *Peoples v. Discover Fin. Servs., Inc.*, 387 F. App'x 179, 184 (3d Cir. 2010), cert. denied, 562 U.S. 1180 (2011).

The *holdings* in those cases thus have no bearing on this case. And the decision of the court of appeals here was fully consistent with the *reasoning* in those cases. In *Ford*, for example, the Third Circuit held that Title III did not apply because "Ford received her disability benefits via her employment at Schering," and thus "had no nexus to MetLife's 'insurance office.'" *Ford*, 145 F.3d at 612-13. Addressing virtually the identical facts in *Parker*, the Sixth Circuit said virtually the same thing: Because "[t]he public cannot enter the office of MetLife or Schering-Plough and obtain the long-term disability policy that plaintiff obtained," and Parker in fact obtained her policy from her employer rather than "from MetLife's insurance office," there was "no nexus between the disparity in benefits and the services which MetLife offers to the public from its insurance office." *Parker*, 121 F.3d at 1011. In *Weyer*—which again was essentially the same case—the Ninth Circuit relied on *Ford* and *Parker* to hold that a dispute

"over terms of a contract that the insurer markets through an employer[] is not what Congress addressed in the public accommodations provisions." *Weyer*, 198 F.3d at 1114.

Here, by contrast, Robles sought to use online services to "order[] Domino's products to be picked up at or delivered from Domino's restaurants." Pet. App. 9a. In the district court, Petitioner specifically conceded "the existence of a 'nexus' between its websites and its pizza franchises." Pet. App. 28a n.1. And the court of appeals found the "nexus between Domino's website and app and physical restaurants" to be "critical to [its] analysis." Pet. App. 8a. Such a "nexus" was the very thing that the Third Circuit found to be missing in *Ford* and the Sixth Circuit found to be missing in *Parker*. Precisely because it found such a nexus to be present here, the Ninth Circuit concluded that its earlier opinion in *Weyer* was inapplicable. Pet. App. 8a-9a. The decision below thus creates no conflict with earlier decisions of the Third, Sixth, and Ninth Circuits.

Petitioner argues that the First, Second, and Seventh Circuits have taken the opposite view and held that "websites offering goods or services to the public are standalone public accommodations." Pet. 16. Here, Petitioner cites one case each from the First and Second Circuits, and two cases from the Seventh Circuit. Once again, *none* of these cases was a web access case. To the contrary, each one involved a challenge to the sale or terms of an insurance policy or benefits plan. See *Carparts Distribution Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 14 (1st

Cir. 1994) (plaintiff sued administrator of self-insured plan to challenge "lifetime cap on health benefits for individuals with AIDS"); *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 30 (2d Cir. 1999) (plaintiffs sued insurance company for "refus[ing] to sell them life insurance because of their mental disabilities"), opinion amended on denial of reh'g, 204 F.3d 392 (2d Cir. 2000); *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 558 (7th Cir. 1999) (plaintiff sued insurance company to challenge "AIDS caps in two of its health insurance policies"), cert. denied, 528 U.S. 1106 (2000); *Morgan v. Joint Admin. Bd., Ret. Plan of Pillsbury Co. & Am. Fed'n of Grain Millers, AFL-CIO-CLC*, 268 F.3d 456, 457 (7th Cir. 2001) (plaintiffs sued retirement plan administrator for "grant[ing] a cost of living increase to early and normal retirees but not to disability retirees").

Once again, then, the *holdings* of the First, Second, and Seventh Circuits have nothing to do with this case. And the *reasoning* of their decisions does not at all conflict with the Ninth Circuit's decision here. In *Pallozzi*, the Second Circuit found that Title III applied because there was "no dispute" that the plaintiffs, who unlike the plaintiffs in *Ford* and *Parker* sought to purchase their insurance policies directly from the insurance company, had "a nexus to a place of public accommodation." *Pallozzi*, 198 F.3d at 32 n.3. See 42 U.S.C. § 12181(7)(F) (defining "public accommodation" to include "insurance office"). The Ninth Circuit found just such a "nexus" here.

In *Doe*, Judge Posner's majority opinion concluded that the AIDS caps at issue did not constitute the sort of discrimination that violates the ADA. See *Doe*, 179 F.3d at 561-63. Along the way to that conclusion, the opinion stated in dicta that Title III applied to "a store, hotel, restaurant, dentist's office, travel agency, theater, Web site, or other facility (whether in physical space or in electronic space)." *Id.* at 559 (citation omitted; citing *Carparts*, *supra*). Similarly, Judge Posner's opinion in *Morgan* found no violation of Title III but included dicta stating that "[a]n insurance company can no more refuse to sell a policy 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*, 268 F.3d at 459. The Seventh Circuit's dicta in *Doe* and *Morgan* obviously does not undermine the Ninth Circuit's decision here. To the contrary, it is fully consistent with that decision.

Finally, in *Carparts* the First Circuit did not conclusively resolve whether the plan administrator was covered by Title III. See *Carparts*, 37 F.3d at 20 ("We think that at this stage it is unwise to go beyond the *possibility* that the plaintiff may be able to develop some kind of claim under Title III even though this may be a less promising vehicle in the present case than Title I."). But it did state that the statutory phrase "public accommodation" is "not limited to actual physical structures." *Id.* at 19. Obviously that statement does not undermine the decision below, which held that Title III applies to websites and apps

that provide access to the goods and services offered by actual physical structures.

There is simply no circuit conflict regarding Title III's application to web-only businesses. Indeed, Petitioner does not point to a single appellate case involving a web-only business.

2. Petitioner asserts that there is "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." Pet. 17-18. Once again, though, *none* of the cases Petitioner cites on either side of that supposed divide involved plaintiffs seeking access to online services.

Petitioner says that "[i]n 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." Pet. 18. That is a curious statement. *Not one* of the three cases Petitioner cites in support of that statement—*Morgan*, *supra*; *Carparts*, *supra*; and *Pallozzi*, *supra*—involved any "online offerings." Nor, for that matter, did they involve the accessibility of "brick-and-mortar location[s]." They involved challenges to the terms of an employee benefits plan (*Morgan* and *Carparts*) and a refusal to sell an insurance policy to disabled plaintiffs (*Pallozzi*). It would be strange to think that these cases said anything about whether a website is "a standalone 'public accommodation.'" The Seventh Circuit's dicta that "[t]he site of the sale is irrelevant" to

whether Title III *applies*, *Morgan*, 268 F.3d at 459—which is the only passage Petitioner quotes—obviously tells us nothing about whether online offerings must be considered in isolation in determining whether a business has provided disabled customers "full and equal enjoyment" of its goods and services. 42 U.S.C. § 12182(a). And, as noted above, neither *Morgan* nor *Carparts* nor *Pallozzi* is at all in conflict with the decision here.

On the other side of the supposed divide, Petitioner says that the Third, Sixth, and Eleventh Circuits reject the "standalone" reading. Pet. 18-21. Not one of the five cases Petitioner cites in support of that statement involved a plaintiff seeking access to online services. See *Ford*, *supra* (challenge to discrimination in the terms of a disability insurance plan); *Peoples*, *supra* (allegation that credit card company discriminated by insufficiently investigating a blind customer's fraud claim); *Parker*, *supra* (challenge to discrimination in the terms of a disability insurance plan); *Stoutenborough v. Nat'l Football League, Inc.*, 59 F.3d 580, 582 (6th Cir. 1995) (claim that NFL's rule "blacking out" local television broadcasts of games for which tickets remained available discriminated against hard-of-hearing persons who could not listen to radio broadcasts), cert. denied, 516 U.S. 1028 (1995); *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279, 1281 (11th Cir. 2002) (claim that "the telephone contestant selection process for [Who Wants to Be a] Millionaire tended to screen out hearing-impaired or upper-body mobility-impaired persons").

Once again, then, the *holdings* of the Third, Sixth, and Eleventh Circuits have nothing to do with this case. Nor does their *reasoning* undermine the Ninth Circuit's holding. To the extent that the cases cited by Petitioner said anything at all relevant to this case, they endorsed the "nexus" approach applied by the court of appeals here. See *Ford*, 145 F.3d at 612-13; *Parker*, 121 F.3d at 1011 (interpreting *Stoutenborough* as applying the "nexus" approach as well); *Rendon*, 294 F.3d 1284 n.8. Indeed, *Rendon*, which is most closely analogous of these cases, provides strong support for the Ninth Circuit's ruling. There, the Eleventh Circuit held that Title III required the telephone-based contestant selection process for a television game show to be accessible, because that process was a gateway to accessing one of the privileges or advantages (participating in competition) of a public accommodation (the television studio). *Rendon*, 294 F.3d at 1283. So too here, the Ninth Circuit held that Title III applied to the website and app because they "connect customers to the goods and services of Domino's physical restaurants." Pet. App. 9a.[4] There is simply no conflict.

---

[4] Petitioner observes that in *Rendon* "the telephone selection process was the *only* means of accessing the studio game show." Pet. 21. At most, however, that observation suggests that *Rendon* did not *compel* the result here; it does not at all show that the two cases conflict. In any event, ordering via the website and app is the only way to obtain the convenience, accuracy, and other benefits that led Petitioner to offer those options to nondisabled customers. See p. 8, *supra*.

B. The Decision Of The Court Of Appeals Was Correct

1. Domino's operates places of public accommodation (pizzerias). It maintains its website and mobile app to enable people to obtain the goods (pizzas) and services (delivery) offered by those places of public accommodation. Although there are other ways of obtaining those goods and services (walking into the pizzeria, ordering on the phone), Domino's offers these online options because many customers find them more convenient and they ensure that orders are more accurate. See p. 8, *supra*. And Domino's provides some discounts exclusively online. *Id*. Nondisabled customers receive these benefits of ordering online. But Robles alleges that because the Domino's website and mobile app were not accessible to blind customers he did not receive the same benefits.

Under the plain text of Title III, that is a violation of the statute. Because of his disability, Robles was denied "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of [a] place of public accommodation." 42 U.S.C. § 12182(a). "[B]ecause of the absence of auxiliary aids and services"—notably, coding to make the website and mobile app accessible to a screen reader—Robles was "denied services, segregated or otherwise treated differently" than nondisabled customers. 42 U.S.C. § 12182(b)(2)(A)(iii). See 28 C.F.R. § 36.303(b)(2) ("auxiliary aids and services" include "screen reader software"; "accessible electronic and information technology"; and "other effective methods of making

visually delivered materials available to individuals who are blind or have low vision"). And Domino's did not argue below that the changes necessary to make the website or app accessible would work a "fundamental[] alter[ation]" or impose an "undue burden." 42 U.S.C. § 12182(b)(2)(A)(iii). See Pet. App. 6a-7a n.5.

To find a violation here does not require a conclusion that the website and app are "standalone public accommodations that must themselves comply with Title III." Pet. 5. Nor does it require that the website and app be "viewed in isolation." Pet. 22. Much less does it require a court to call into question the premise that "public accommodations" are "actual physical locations." Pet. 32. All it requires is that one look to all of the "goods, services, facilities, privileges, advantages, or accommodations" that Domino's pizzerias offer, and ask whether blind customers can obtain the same "full and equal enjoyment" of them as can nondisabled customers. 42 U.S.C. § 12132(a). That, of course, is precisely the inquiry the statute demands.

And that is precisely the inquiry in which the court of appeals engaged here. That court did not treat the website and app as standalone public accommodations, nor did it look to the accessibility of the website and app in isolation. Neither the word "standalone" nor the word "isolation" appears in the opinion of the court of appeals. (Nor does any similar phrase, like "standing alone," or the phrases used by *amici* such as "each individual mode of access" or "in a vacuum," Chamber Br. 15-16, appear there.) The court relied entirely on the connection between Domino's online offerings and the

goods and services of the company's physical facilities. It held that Title III reached Petitioner's website and app because they "facilitate access to the goods and services of a place of public accommodation—Domino's physical restaurants." Pet. App. 8a-9a. And it held that Respondent's claim could proceed because Robles alleged that the inaccessibility of the Domino's website and app "impedes access to the goods and services of its physical pizza franchises." Pet. App. 8a.[5]

But the court did not conclude that the inaccessibility of the website or app would necessarily resolve this case. Rather, it left matters "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"—that is, Domino's—"products and services as the ADA mandates." Pet. App. 21a. It made clear that while the "mere presence" of a telephone hotline could not defeat Robles's claim, evidence about the hotline's "effectiveness" would be relevant to that claim. Pet. App. 5a n.4. And it held that the proper standard of

[5] Because the court of appeals simply held that Title III applies to inaccessible online services that impede access to the goods and services of a physical facility, Petitioner is wrong to suggest that it follows that Title III applies to all of the online services—even those that have nothing to do with its physical stores—of a business that maintains a brick-and-mortar facility as a minor part of its operations. Cf. Pet. 34 (offering example of Amazon.com). We note as well that the briefing below never made the merits argument Petitioner makes here, that the statute requires nothing more than "adequate overall access" (whatever that means). *Id.* This case is thus a particularly poor vehicle for deciding the Question Presented in the Petition.

liability is provided by the ADA itself, rather than by private standards such as the World Wide Web Consortium's WCAG. See Pet. App. 13a.[6]

2. Petitioner states that "Title III says nothing about the accessibility of websites or applications on smartphones." Pet. 3. One of its *amici* argues that, because the ADA was adopted before the existence of the web as we know it and does not specifically refer to the internet, the courts lack the power to apply the law to online offerings. WLF Br. 6.

That argument contradicts the statute's text and legislative history, as well as this Court's cases. By its terms, Title III applies without limitation to all of the "goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a). As we have shown, this language plainly reaches online offerings that provide access to the goods and services of a place of public accommodation.

And from the beginning, Title III required public accommodations to provide "auxiliary aids and services," 42 U.S.C. § 12182(b)(2)(A)(iii), in the form of "qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments." 42 U.S.C. § 12103(1)(B). The legislative history specifically recognizes that "technological advances can be expected

---

[6] *Amici*'s argument that the WCAG are insufficiently certain to provide a standard of compliance, Retail Litig. Ctr. Br. 17-18, is thus misplaced.

to further enhance options for making meaningful and effective opportunities available to individuals with disabilities," and that those advances "may enable covered entities to provide auxiliary aids and services which today might be considered to impose undue burdens on such entities." S. Rep. No. 101-116 at 62 (1989).

The legislators who enacted the ADA in 1990 might not have been able to envision today's internet. But given the dynamic nature of American entrepreneurialism, they surely recognized that businesses in the future would offer goods and services that could not be known or predicted back then. The legislative history shows that they recognized that technology would change in ways that would affect accessibility. And in the face of that recognition, they enacted a law with broad and unqualified language. As this Court has twice explained in interpreting the ADA, " 'the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.' " *PGA Tour*, 532 U.S. at 689 (quoting *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998)). The courts lack the power to read a policy-based exception into the statute's unqualified text. See *Yeskey*, 524 U.S. at 208-12.

3. Petitioner and its *amici* argue that the holding of the court of appeals will lead to a number of unacceptable consequences. These arguments rest on the incorrect premise that the court of appeals treated websites as standalone public accommodations. They are unavailing.

Petitioner's *amici* argue that, under the lower court's analysis, "stairways violate federal law, since examined in and of themselves they cannot provide full and equal access to those in wheelchairs." Chamber Br. 15. Of course, if a restaurant with a stairway offers a ramp that provides the same access to customers with disabilities, the existence of the stairway does not violate Title III. But that is not the correct analogy. Rather, Robles alleges that this case resembles one in which nondisabled customers have ready access to the front door through a stairway that adjoins a sidewalk, while wheelchair users must enter the back door via a ramp surrounded by trash dumpsters in an alley. In such a circumstance, no one could maintain that the disabled customers received "the full and equal enjoyment" of the restaurant's "goods, services, privileges, advantages, and accommodations," 42 U.S.C. § 12182(a)—even if they could eventually enter the restaurant and order food. Cf. *Katzenbach v. McClung*, 379 U.S. 294, 296-98 (1964) (restaurant that offered sit-down service to white customers but only take-out service to black customers denied black customers "the full and equal enjoyment" of its goods and services under Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a(a)). And that is all the court of appeals held. Whether Robles is correct that this case resembles the trash dumpster case is, essentially, the question the court of appeals directed the district court to address on remand.

Amici assert that the decision of the court of appeals will have the perverse effect of discouraging

adoption of new techniques that can "increase accessibility for one group (for example, deaf individuals), but could not readily be made available to another group (for example, blind individuals)." Chamber Br. 3; accord *id.* at 13. But if a new mode of access expanded accessibility for people with some disabilities, without depriving people with other disabilities of the same opportunities for access that nondisabled people have, it would not constitute a disability-based denial of the "full and equal enjoyment" of a business's goods and services. And if a new mode of access could not be made available to people with particular disabilities, the statute's "undue burden" and "fundamental alteration" language would protect the business against liability. 42 U.S.C. § 12182(b)(2)(A)(iii). Here, however, Robles alleges that the failure to make the website and app accessible denied blind customers of Domino's brick-and-mortar stores important benefits that nondisabled customers receive. And Domino's has not argued that making these online offerings accessible would work a fundamental alteration or impose an undue burden. See Pet. App. 6a-7a n.5.

Finally, Petitioner asserts that the decision of the court of appeals would require "mail-order catalogues [to be] available in Braille," "door-to-door salesmen [to] kn[o]w American Sign Language," and "telephone hotlines [to be] equipped for the hearing-impaired." Pet. 34. This case, of course, does not involve mail-order catalogues, door-to-door salespeople, or telephone hotlines. Whether Petitioner's hypotheticals would deny disabled customers the "full and equal enjoyment" of

the goods and services of a public accommodation, 42 U.S.C. § 12182(a), would require an assessment of the particular facts. But Title III's requirement that public accommodations offer "auxiliary aids" that provide "effective communication," 42 U.S.C. § 12182(b)(2)(A)(iii); 28 C.F.R. § 36.303, has long required that businesses provide their customers Braille materials or sign-language interpretation in certain circumstances, so long as doing so does not work a fundamental alteration or impose an undue burden. A variety of techniques are available to provide effective communication, see 28 C.F.R. § 36.303(b), and the Department of Justice has recognized that the technique that is necessary "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." 28 C.F.R. § 36.303(c)(1)(ii). For example, it would almost certainly be an undue burden to require that door-to-door salespeople be prepared to speak sign language on the chance that they run across a sign-language-speaking deaf customer, and written materials might be a sufficient form of "effective communication" in that context. Nothing in the decision of the court of appeals contradicts the settled understandings of the law in this regard.[7]

---

[7] As for telephone hotlines, Title IV of the ADA, 47 U.S.C. § 255, requires telephone systems to provide "telecommunications relay services." Using these services, an individual who uses a telecommunications device for the deaf can, for example, place a call through a relay center, which places a voice call to the partner on the other side of the conversation and serves as an intermediary,

The interlocutory decision of the court of appeals simply applied the plain text of the law. Even if error correction were an appropriate basis for granting *certiorari*, there is no error to correct here.

C. There Is No Reason To Depart From This Court's Usual Certiorari Criteria

This case does not implicate a conflict in the circuits; to the contrary, it was a case of first impression in any circuit. The lower court's decision was correct. And that decision was interlocutory. In short, the Petition satisfies *none* of this Court's typical criterial for *certiorari*.

Petitioner and its *amici* nonetheless argue that this Court should take this case, for two principal reasons. First, they note that there is a large and growing amount of litigation in this area; they want this Court to step in to relieve businesses of the burden of responding to it. Pet. 4, 26. Second, they note that the Department of Justice has recently stated that it will not soon issue regulations specifying how Title III applies to online offerings of places of public

---

providing real-time interpretation, throughout the call. Department of Justice regulations specifically allow public accommodations to "use relay services in place of direct telephone communication for receiving or making telephone calls incident to its operations." 28 C.F.R. § 36.303(d)(3). In other words, a business generally need not maintain its own accessible phone line, but it cannot refuse to accept calls made through a relay service. Again, nothing in the opinion of the court of appeals changes that settled understanding.

accommodation; they want this Court to step in to provide the rules that the Department of Justice will not. Pet. 11; Chamber Br. 18. Neither of these reasons provides a basis for departing from this Court's usual *certiorari* criteria.

First, if plaintiffs are filing a large number of internet access cases under Title III, that will give the Court plenty of opportunities to consider these issues in the future. If the number of these cases has increased dramatically in the last three years, as Petitioner states (Pet. 26), then that is all the more reason to allow these issues to percolate. Indeed, the Eleventh Circuit heard oral argument just last year on a web-access case that remains pending. See *Gil v. Winn-Dixie Stores, Inc.*, No. 17-13467 (11th Cir., argued Oct. 4, 2018).

Petitioner and its *amici* say that this Court cannot wait for the issues to percolate, because the overwhelming majority of cases in this area settle. They assert that plaintiffs' lawyers are essentially extorting Title III web-access settlements from business owners by holding the threat of attorney's-fee liability over the heads of defendants who will not settle. Pet. 29; Chamber Br. 8. (Note that Title III does not authorize private plaintiffs to recover damages. See p. 6, *supra*.) But "most cases settle" in all areas of the civil docket. Thomas O. Main, *Our Passive-Aggressive Model of Civil Adjudication*, 50 U. PAC. L. REV. 605, 606 (2019). If the settlement rate is higher here, perhaps that is only because violations are widespread. And the

number of settlements tells us nothing about what precisely those settlements require.

Indeed, there is reason to believe that it is the defendant who has the stronger bargaining power in a Title III settlement negotiation. Because Title III authorizes private plaintiffs to recover only forward-looking relief, a defendant who has violated the law for years could still avoid attorney's-fee liability under *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598 (2001), if it acts quickly enough after being sued to moot the case against it. And large enterprises—like Petitioner here and many of the defendants in the suits cited in the Petition (at 23-24)—will have ample opportunity and incentive to litigate these questions.

Second, the Department of Justice's failure to issue internet-specific regulations offers no reason for this Court to rush headlong into the area. As we have shown, the general requirements of Title III are fully applicable to online offerings that facilitate or impede access to the goods of services of physical public accommodations. That is true whether or not the Department issues regulations specific to the internet. In this sense, Title III has the same structure as the Occupational Safety and Health Act, which authorizes the Secretary of Labor to issue regulations attacking specific hazards, but which also contains a "general duty" clause, 29 U.S.C. § 654(a)(1), that "plac[es] on employers a mandatory obligation independent of the specific health and safety standards to be promulgated by the Secretary." *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 13

(1980). In *PGA Tour*, *supra*, this Court applied Title III's general "full and equal enjoyment" rule, 42 U.S.C. § 12182(a), as well as its "reasonable modification" requirement, 42 U.S.C. § 12182(b)(2)(A)(ii), without relying on—or even referring to—the Department of Justice's Title III regulations.

And for this Court to rush in to "clarify" the rules in this area would be highly imprudent. Justices have repeatedly called for caution before this Court rules broadly in areas of advancing technology. See *City of Ontario v. Quon*, 560 U.S. 746, 759-60 (2010); *Entm't Merchants Ass'n*, 564 U.S. at 806 (Alito, J., concurring in the judgment). Title III's "full and equal enjoyment" and "auxiliary aids and services" standards are particularly appropriate candidates for development through the common-law process. Cf. Pierre de Vries, *The Resilience Principles: A Framework for New ICT Governance*, 9 J. TELECOMM. & HIGH TECH. L. 137, 173-74 (2011) (arguing that the common-law approach is an especially promising mode of regulation in areas of fast-developing technology like the internet); Mary L. Lyndon, *Tort Law and Technology*, 12 YALE J. ON REG. 137, 162-63 (1995) (arguing that the common-law method is particularly apt for generating knowledge in areas of technological change). The application of these standards to different fact settings may illuminate what sorts of barriers deny full and equal enjoyment, what sorts of alternatives to web access might be sufficient, and so forth. And different fact settings will present highly distinct questions. The sorts of textual description that are appropriate in a case like this,

which involves a pizzeria's website and apps, might be very different than what is appropriate when an art gallery is involved. Cf. Pet. 29 ("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?") (internal quotation marks omitted). This Court's typical reliance on the process of percolation is particularly apt here.

CONCLUSION

The petition for writ of *certiorari* should be denied.

Respectfully submitted,

JOSEPH R. MANNING, JR.
Counsel of Record
MANNING LAW, APC
20062 S.W. Birch St.
Suite 200
Newport Beach, CA 92660
(949) 200-8755
disabilityrights@manninglawoffice.com

MICHAEL J. MANNING
MANNING LAW, APC
20062 S.W. Birch St.
Suite 200
Newport Beach, CA 92660

CRAIG G. COTE
MANNING LAW, APC
20062 S.W. Birch St.
Suite 200
Newport Beach, CA 92660