No. 18-1539

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

BRIEF OF RETAIL LITIGATION CENTER, INC. AND NATIONAL RETAIL FEDERATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Deborah R. White
Kathleen McGuigan
RETAIL LITIGATION CENTER, INC.
99 M Street S.E.
Suite 700
Washington, DC 20003

Stephanie Martz
NATIONAL RETAIL FEDERATION
1101 New York Ave N.W.
Washington DC 20005

Pratik A. Shah
Counsel of Record
James E. Tysse
AKIN GUMP STRAUSS HAUER & FELD LLP
2001 K Street N.W.
Washington, DC 20006
(202) 887-4000
pshah@akingump.com

Meredith C. Slawe
Kathryn E. Deal
AKIN GUMP STRAUSS HAUER & FELD LLP
Two Commerce Square
2001 Market Street
Suite 4100
Philadelphia, PA 7013

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

OTHER AUTHORITIES:

INTEREST OF *AMICI CURIAE*[1]

The Retail Litigation Center, Inc. ("RLC") is a public policy organization whose members include many of the country's largest and most innovative retailers. Those retailers employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of pending cases. Since its founding in 2010, the RLC has participated as *amicus curiae* in nearly 150 cases.

The National Retail Federation ("NRF") is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and internet retailers from the United States and more than 45 countries. Retail is the largest private-sector employer in the United States, supporting one in four U.S. jobs—approximately 42 million American workers—and contributing $2.6 trillion to the annual GDP. NRF periodically submits *amicus curiae* briefs

---

[1] This brief is filed with the written consent of all parties. No counsel for either party authored this brief in whole or in part, nor did any party or other person make a monetary contribution to the brief's preparation or submission. Counsel of record for all parties received timely notice of the intention of *amici* to file this brief.

in cases raising significant legal issues impacting the retail community.

Amici RLC and NRF, along with their members, have a significant interest in the outcome of this case. The Ninth Circuit determined that a website or web application, though itself not a "public accommodation," must nevertheless comply with Title III of the Americans with Disabilities Act ("ADA") if it serves as a gateway to a brick-and-mortar facility. That decision aggravates confusion among the circuits and invites mass action litigation against retailers, which are already challenged to meet vague and shifting standards for online accessibility in the absence of clear judicial or regulatory guidance.

Amici's members are national, regional, and small retailers that endeavor to reach all customers, including those with disabilities, through all sales channels. But the Ninth Circuit's decision, and the pressure of "gotcha" lawsuits that are certain to proliferate, force retailers to attempt to comply with an uncertain "moving target" that will undermine continuing efforts at true accessibility. Accordingly, *amici* have a strong interest in the Court's intervention in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Technology enables more customers to enjoy access to more products and services today than at any other time in history. The retail industry is at the vanguard of those increased accessibility efforts. Retailers have an obvious commercial interest in using technology and any other available means to ensure

that *all* of their customers—regardless of disability—enjoy full access to their stores, products, and services. Unfortunately, the Ninth Circuit's decision makes it harder for retailers and other businesses to serve those customers. By holding that the ADA imposes independent accessibility requirements on websites and mobile applications, the Ninth Circuit has broken with decisions of other circuits in a manner that exacerbates confusion and imposes a *de facto* national rule on retailers. Making matters worse, that rule—apparently predicated on conformity with easily manipulated private-party guidelines—is not a meaningful compliance standard.

Amici join the arguments made by Petitioner regarding the Ninth Circuit's flawed decision and the urgency of this Court's review. *Amici* submit this brief to emphasize that, despite the retail industry's good-faith efforts, the confusion over the scope of Title III of the ADA creates serious workability problems for retailers and consumers alike. Some circuits properly take a holistic approach to ADA accessibility, focusing on whether disabled individuals have full and equal access to a place of public accommodation using the various alternative avenues offered by the accommodation.

But now, in the country's largest circuit, retailers must satisfy an uncertain rule imposing Title III obligations on all websites and mobile applications they offer—as long as there is some ill-defined "nexus" to the physical location—regardless of the *overall* accessibility of their public accommodations. And because that rule does not actually specify what compliance entails in practice, retailers are exposed to

significant private-party liability—oftentimes manufactured through unscrupulous tactics and allegations of technical noncompliance that are far removed from the ADA's original salutary purpose.

Only this Court's intervention can establish a true nationwide standard establishing the proper scope of Title III. It is time for this Court to bring order to a chaotic legal landscape marked by unpredictable and unworkable accessibility standards that run counter to the goals of the ADA, consumers, and the retailers who serve them.

ARGUMENT

A. The Retail Industry Is Constantly Seeking New Ways To Serve *All* Its Customers And Potential Customers

The retail industry strives to sell its goods and services to hundreds of millions of Americans each year, including the approximately 60 million Americans living with disabilities. *See* Centers for Disease Control, *CDC: 1 in 4 US Adults Live with a Disability* (Aug. 16, 2018).[2] For retailers, the business case for serving customers with disabilities is obvious: "The total after-tax disposable income for working-age people with disabilities is about $490 billion, which is similar to that of other significant market segments, such as African Americans ($501 billion) and Hispanics ($582 billion)." MICHELLE YIN ET AL, AMERICAN INSTITUTES FOR RESEARCH, A HIDDEN

[2] *Available at* https://www.cdc.gov/media/releases/2018/p0816-disability.html.

MARKET: PURCHASING POWER OF WORKING AGE ADULTS WITH DISABILITIES (Apr. 2018); *see also* Bruce Y. Lee, *An Overlooked & Growing Market: People with Disabilities*, FORBES (Nov. 2, 2018).[3]

In today's ultracompetitive retail environment, customers have an overwhelming number of available purchasing options. Not only is ensuring that disabled guests are fully accommodated "the right thing to do," doing so just makes business sense given the tens of millions of people in the United States with disabilities.[4]

Retail companies are continually striving to find ways to engage with customers with disabilities and to develop new products and services, including enhancing online and mobile communications, that meet their needs. Toward that end, the Retail Industry Leaders Association ("RILA"), an industry organization affiliated with the RLC, convenes a Website Accessibility Working Group to share best practices and allow retailers to collaborate on improving the accessibility of their online presence. *See* RILA – Committees (2019).[5] Similarly, NRF

---

[3] *Available at* https://www.forbes.com/sites/brucelee/2016/11/02/an-overlooked-and-growing-market-people-with-disabilities/#10e853242ab0.

[4] *See e.g.*, Press Release, Target Execs on Making Online, Mobile More Accessible to Everyone (Sept. 14, 2016), *available at* https://corporate.target.com/article/2016/09/accessibility-team (Statement of Target's Chief Digital Officer regarding opportunities for retailers to digitally engage with visually impaired customers).

[5] *Available at* https://www.rila.org/committees.

convenes an ADA Task Force every two weeks to discuss ADA best practices and strategies for complying with court decisions.[6]

Many of *amici*'s members have begun company-wide web-accessibility efforts in recent years, investing the time and resources needed to achieve web accessibility for all.[7] In collaboration with web developers, designers, and others, retailers have found innovative ways to reach and accommodate customers with disabilities. Indeed, the National Federation of the Blind recently commended one of *amici*'s members for the "excellent quality of its website's accessibility and on its continued efforts to make its site and services fully usable and accessible for all users, both now and in the future." National Federation of the Blind, Resolution 2016-13 (July 4, 2016).[8]

---

[6] *Available at* https://nrf.com/blog/ada-website-lawsuits-growing-problem-retailers.

[7] *See e.g.,* Walmart Accessibility Policy, https://help.walmart.com/app/answers/detail/a_id/3621/~/walmart-accessibility-policy (describing steps it has taken to "enhance [its] website and increase its usability" for customers with color blindness, mobility impairments, and vision issues who access the web using assistive technology, guided by the private-party Web Content Accessibility Guidelines); Press Release, Target Execs on Making Online, Mobile More Accessible to Everyone (Sept. 14, 2016), *available at* https://corporate.target.com/article/2016/09/accessibility-team (describing efforts to "consider accessibility at every stage of development to create digital experiences that are inclusive to all guests").

[8] *Available at* https://nfb.org/resources/speeches-and-reports/resolutions/2016-resolutions.

Retailers' other accessibility efforts in recent years underscore their interest in serving customers with disabilities. Last year, grocery chain Wegmans debuted an app that harnesses smartphone technology to guide visually impaired supermarket shoppers through the store, as a supplement to the existing "live staff on site available to assist blind and visually impaired shoppers." Michael Mroziak, *Blind Grocery Shoppers Access 'Second Set of Eyes' Through App at Wegmans*, NPR (Sept. 12, 2018).[9] Other retailers like Walgreens and AT&T Retail are offering or piloting the same program.[10]

Additional examples abound. Starbucks recently opened a sign language store in Washington, D.C., to better serve deaf customers and employees. Jennifer Warnick, *Starbucks Opens Sign Language Store in Washington, D.C.* (Nov. 30, 2018).[11] Zappos.com and Target both launched their own lines of "adaptive apparel," with features such as magnetic buttons and Velcro closures designed specifically for people living with disabilities, and other retailers (like Kohl's, Sears,

---

[9] *Available at* https://www.npr.org/sections/thesalt/2018/09/12/645221590/blind-grocery-shoppers-access-second-set-of-eyes-through-app-at-wegmans.

[10] Mark Hogan, Walgreens Joins the Aira Access Network to Provide Free Aira Service in Stores Nationwide, *available at* https://www.closingthegap.com/walgreens-joins-the-aira-access-network-to-provide-free-aira-service-in-stores-nationwide/; AT&T Announces Largest Deployment of Free Aira Service, *available at* https://about.att.com/story/2018/aira_added_to_retail_stores.html.

[11] *Available at* https://stories.starbucks.com/stories/2018/all-signs-point-to-washington-dc/.

Bon-Ton, and J.C. Penney) are marketing adaptive apparel as well.[12] And earlier this year, Comcast announced a remote control that can pair with assistive technologies, thus allowing consumers to control devices using only their eyes. *See* Danielle Haynes, *Comcast Unveils Eye-Tracking Remote Software for Those with Disabilities*, UPI (June 17, 2019).[13]

These are just a few of the many innovative approaches retailers have taken to reach customers with disabilities, and to improve their services. Such efforts are driven by the simple fact that retailers and their customers with disabilities share a common goal: better accessibility both on the web and in brick-and-mortar stores. Retailers know better than anyone that, when their products and services are available to all customers who want to purchase them, everyone benefits.

B. Confusion Among The Circuits Over Title III's Scope Is Harming The Retail Industry's Ability To Serve Customers

The recent spike in Title III litigation has complicated retailers' efforts to serve customers with disabilities. As Petitioner describes (Pet. 15-25), courts are divided on the proper application of the

---

[12] *Available at* https://www.usatoday.com/story/life/2018/04/04/what-adaptive-apparel-everything-disability-friendly-clothes-mainstream-inclusive/1044712001/.

[13] *Available at* https://www.upi.com/Top_News/US/2019/06/17/comcast-unveils-eye-tracking-remote-software-for-those-with-disabilities/4531560795986/.

ADA to websites and web-based businesses. This division creates serious challenges for retailers. Faced with inconsistent jurisprudence, along with a lack of regulatory guidance, retailers are compelled to comply with the most exacting rule—without any functional standard by which to measure compliance—in order to avoid liability. Unfortunately, those efforts sometimes come at the expense of initiatives that might better meet the needs of customers with disabilities.

1. a. The confusion in the circuits has been long-developing. Beginning in the mid-1990s, and before the ubiquity of the online world, some courts of appeals determined that Title III's prohibition on discrimination in places of "public accommodation" was not limited to physical structures, but also included businesses (like insurance carriers) that "conduct business by telephone or correspondence." *Carparts Dist. Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994); *see, e.g.*, *id.* (medical reimbursement plan); *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28 (2d Cir. 1999) (life insurance company); *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999) (health insurance company).

Since then, a number of district courts within the First, Second, and Seventh Circuits—applying those circuits' expansive interpretation of Title III—have imposed liability on businesses that operate only online. For example, in *National Association of the Deaf v. Netflix, Inc.*, the court relied on First Circuit precedent to hold that Netflix's "web site is a place of public accommodation and Defendant may not discriminate in the provision of the services of that

public accommodation—streaming video—even if those services are accessed exclusively in the home." 869 F. Supp. 2d 196, 201-202 (D. Mass. 2012). In *Andrews v. Blick Art Materials, LLC*, the court "adopt[ed]" the Second Circuit's approach to the ADA to find that Blick's website "is a place of public accommodation [and] Blick is prohibited from discriminating against the blind by failing to take the steps necessary to ensure that the blind have 'full and equal enjoyment' of the goods, services, privileges, advantages, facilities, or accommodations of its website." 268 F. Supp. 3d 381, 393 (E.D.N.Y. 2017). And in *Access Living of Metropolitan Chicago v. Uber Technologies, Inc.*, the court held that a "'place of public accommodation' does not have to be a physical space, and plaintiffs have plausibly alleged that Uber"—a ridesharing service that operates exclusively online—"operates a place of public accommodation." 351 F. Supp. 3d 1141, 1155-1156 (N.D. Ill. 2018).

In contrast, the Third, Sixth, and Eleventh Circuits hold that only a physical structure can constitute a "public accommodation" triggering Title III's protections. The statute, those courts have reasoned, connects its accessibility requirements only to physical "places" of public accommodation. *See Ford v. Schering-Plough Corp.,* 145 F.3d 601, 612 (3d Cir. 1998) ("The plain meaning of Title III is that a public accommodation is a place[.]"). As the Sixth Circuit explained, the statute enumerates a list of categories—including, clothing stores, grocery stores, restaurants, and motels—each of which is "a physical place open to public access." *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1010 (6th Cir. 1997) (en banc). Title III does not "provid[e] protection from

discrimination unrelated to [such] places." *Ford*, 145 F.3d at 613; *see Stoutenborough v. National Football League, Inc.*, 59 F.3d 580, 582 (6th Cir. 1995) (Title III not implicated because television broadcast neither a "place of public accommodation" nor a service of a "place of public accommodation"); *Rendon v. Valleycrest Prods.*, 294 F.3d 1279, 1284 (11th Cir. 2002) (plaintiffs stated a claim under Title III because they "seek the privilege of competing in a contest held in a concrete space," which is a public accommodation).

b. Based on that line of precedent, the Third, Sixth, and Eleventh Circuits additionally hold that in order to state a claim under the ADA, a plaintiff must allege that she was denied full and equal access to a physical place of public accommodation. *See, e.g.*, *Menkowitz v. Pottstown Mem'l Med. Ctr.*, 154 F.3d 113, 122 (3d Cir. 1998); *Parker*, 121 F.3d at 1010-1011 & n.3; *Rendon*, 294 F.3d at 1282-1286. The focus is on overall accessibility of the public accommodation in light of all the alternative means of accessing its goods, services, and facilities. *See id.*; *see also* Pet. 18-21.

Courts in those circuits, in turn, have refused to find Title III violations in website-accessibility cases where the plaintiff failed to allege that the inaccessibility "impeded his own personal enjoyment of the goods and services offered at its retail locations." *Gomez v. Bang & Olufsen of America, Inc.*, No. 1:16-cv-23801, 2017 WL 1957182, at *4 (S.D. Fla. Feb. 2, 2017). As one court found, "in order to prevail, the plaintiff must allege that the injury he suffered on defendant's website prevented him from availing himself of the restaurant's goods and services." *Walker v. Sam's Oyster House, LLC*, No. 18-193, 2018

WL 4466076, at * 2 (E.D. Penn. Sept. 18, 2018); *see also Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312, 1321 (S.D. Fla. 2002) (finding no violation where plaintiffs had not shown "that Southwest's website impedes their access to a specific, physical, concrete space such as a particular airline ticket counter or travel agency").

2. The Ninth Circuit has joined the Third, Sixth, and Eleventh Circuits in limiting the definition of "public accommodations" to physical spaces. App. 8a (citing *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000)). But the Ninth Circuit now breaks from those circuits in a critical respect: holding that a website and mobile app with a nexus to a physical location must satisfy Title III and therefore provide full access in and of themselves, regardless of whether the goods and services are still available through other means.

In the Ninth Circuit's view, "[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." App. 8a. And because the website and application "connect[]" customers to Domino's restaurants and "facilitate access" to those locations, they must comply with Title III, separate and apart from how otherwise-accessible those brick-and-mortar stores might be. *Id.* at 9a. The upshot is that, despite acknowledging that "public accommodations" must be physical locations, the Ninth Circuit effectively transformed websites and mobile applications that are connected to such physical locations into standalone public accommodations that must each independently

comply with Title III. In other words, the court evaluated the websites and apps in a vacuum without examining the accessibility of the physical public accommodation *in toto*.

Had Domino's been sued in the Third, Sixth, or Eleventh Circuit, Respondent would almost certainly have been unable to state a claim. That is because the service of Domino's physical locations—made-to-order pizza—is also widely accessible to him in store, by phone, by text, by Twitter, by Amazon Alexa, by Slack, by Facebook Messenger, and by a half-dozen additional ways. *See* Compl. ¶¶ 24-33 (alleging that plaintiff "encountered barriers" to ordering pizza on dominos.com and the mobile app, without reference to any other pizza-ordering methods).

3. The resulting confusion in the circuits is untenable. By focusing on whether a plaintiff is able to access the goods and services of a physical location overall, the rule in the Third, Sixth, and Eleventh Circuits affords businesses the flexibility to determine how best to serve customers with disabilities. By contrast, the Ninth Circuit's rule (as well as the rule followed in the First, Second, and Seventh Circuits) requires businesses to ensure total accessibility of websites and web applications—an ill-defined if not unattainable standard, as described below—regardless of whether customers remain fully able to enjoy the goods and services provided by the brick-and-mortar store through other means.

Most of *amici*'s members have a nationwide presence and use uniform website and web applications across various localities. That

uniformity, coupled with the lenient venue requirements of the ADA,[14] means that retailers are compelled to follow the strictest rule in the country—*i.e.*, the one the Ninth Circuit has now adopted. That is true even though the Third, Sixth, and Eleventh Circuits would all apply a holistic approach that is not only more consistent with Title III's language, but that also affords retailers and other entities appropriate flexibility to run their businesses and serve their customers. This Court should grant certiorari now to prevent the Ninth Circuit's faulty interpretation of Title III from becoming the nationwide rule by default.

C. The Precarious Legal Landscape Encourages "Gotcha" Lawsuits Seeking Monetary Relief, Not True Accessibility

Due to the confusion described above, and despite their best efforts, retailers around the country are buffeted by "gotcha" lawsuits alleging technical noncompliance with vague private-party standards and seeking quick monetary settlements.

1. The ADA confers power on the U.S. Attorney General to promulgate regulations to enforce the Act. 42 U.S.C. § 12186. Currently, Title III regulations define a "place of public accommodation" as a "facility" in one of 12 categories—"buildings, structures, sites,

---

[14] The ADA adopts the venue rules of Title VII, s*ee* 42 U.S.C. § 12117(a), which provide that an action "may be brought," among other places, "in any judicial district in the State in which the unlawful employment practice is alleged to have been committed," 42 U.S.C. § 2000e-5(f)(3).

complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located." 28 C.F.R. § 36.104.[15]

Because Congress understood that defining "accessibility" would be highly technical, the ADA required the Attorney General, in coordination with the Architectural and Transportation Barriers Compliance Board ("ATBCB"), to issue building and architectural standards known as the ADA Accessibility Guidelines. *See* 42 U.S.C. § 12186(b)-(c). Failure to meet the Guidelines typically results in a violation of the ADA's accessibility mandate. *See, e.g.*, *Wilson v. Haria and Gogri Corp.*, 479 F. Supp. 2d 1127, 1133-1135 (E.D. Cal. 2007) (concluding that failure to comply with Guidelines rendered restaurant inaccessible). Conversely, retailers that meet the Guidelines face no liability. *See, e.g.*, *Harris v. Costco Wholesale Corp.*, 389 F. Supp. 2d 1244, 1250 (S.D. Cal. 2005) (wholesale retailer did not violate ADA because it met the Guidelines for accessible parking). Courts'

---

[15] As discussed above, the Third, Sixth, and Eleventh Circuits have all held that the definition of "public accommodation" in Title III of the ADA is restricted to access to "physical place[s]." *E.g., Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1014 (6th Cir. 1997) ("To interpret these terms as permitting a place of accommodation to constitute something other than a physical place is to ignore the text of the statute and the principle of *noscitur a sociis*."). The RLC agrees with those circuits, as Title III simply does not address how the ADA's accessibility mandates could apply to virtual spaces—or even whether they should. That is why all of DOJ's existing regulations apply only to physical spaces—and why it is for Congress, not the courts, to extend Title III to the Internet.

recognition that compliance with the Guidelines promulgated by ATBCB suffices for ADA purposes provides retailers a measure of certainty and predictability for their accessibility efforts in physical spaces.

No such certainty or predictability exists in cyberspace. Websites, web applications, and other non-physical locations are entirely absent from the list of categories used to define a "place of public accommodation" in DOJ regulations. As Petitioner notes (Pet. 9-10), DOJ attempted to draft standards for web accessibility beginning in 2010 with an initial advance notice of proposed rulemaking, followed by a supplemental advance notice of proposed rulemaking in 2016, before finally abandoning the effort in 2017. *See* 75 Fed. Reg. 43460, 43464 (July 26, 2010) (publishing notice); 81 Fed. Reg. 28658 (May 9, 2016) (soliciting additional comments); 82 Fed. Reg. 60932 (Dec. 26, 2017) (withdrawing notice); *see also* Letter from Office of Legislative Affairs, U.S. Dept. of Justice to Cong. Ted Budd (Sept. 25, 2018) (acknowledging DOJ has yet to adopt any "specific technical requirements" for websites).[16]

2. In the absence of clear DOJ compliance guidance, many litigants and courts have turned to a private-party effort—the Web Content Accessibility Guidelines ("WCAG")—to fill the void. Developed by a non-governmental entity known as the Worldwide Web Consortium ("W3C"), the WCAG technical guidelines have been utilized by courts around the

---

[16] *Available at* https://www.adatitleiii.com/wp-content/uploads/sites/121/2018/10/DOJ-letter-to-congress.pdf.

country as a baseline for measuring ADA legal compliance. *See, e.g.*, *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340, 1350-1351 (S.D. Fla. 2017) (granting plaintiff injunctive relief in the form of "[r]emediation measures in conformity with the WCAG 2.0 Guidelines"); *Andrews v. Blick Art Materials, LLC*, 286 F. Supp. 3d 365, 370 (E.D.N.Y. 2017) (ordering defendant, as part of settlement approval, to comply with WCAG 2.0 Level AA, "which are hereby determined by the court to be an appropriate standard to judge whether defendant is in compliance with any accessibility requirements of the ADA"); *United States v. Hilton Worldwide Inc.*, No. 10-1924 ¶ 26 (D.D.C. Nov. 9, 2010)[17] (consent agreement between the DOJ and Hilton Hotels noting that Hilton websites "shall comply with" WCAG 2.0 Level A within nine months). Indeed, Domino's alleged technical non-compliance with WCAG guidelines served as the basis for Respondent's lawsuit. *See* Compl. ¶ 33 ("These barriers to blind and visually-impaired people can and must be removed, by simple compliance with WCAG 2.0.").

To be sure, in the absence of any governmental guidance or regulatory standards, many retailers (motivated not only by altruism but an eye toward an important customer segment) voluntarily strive to meet WCAG technical guidelines. But those guidelines—which do not incorporate basic regulatory compliance concepts, such as "substantial compliance" and "alternative access," like a regulatory standard would—are simply not workable as an ADA legal

[17] *Available at* https://www.ada.gov/hilton/hilton.htm.

compliance standard for retailers and other businesses.

Far from allowing "simple compliance," Compl. ¶ 33, WCAG 2.0 encompasses four principles, 13 guidelines, over 60 testable success criteria, and a guidance document (called "Techniques for WCAG 2.0") that spans nearly 1,000 pages to evaluate whether a website is accessible. *See* W3C, *Web Content Accessibility Guidelines (WCAG) Overview* (2019).[18] Each of the 60+ success criteria provides three levels of conformance: A (lowest), AA, and AAA (highest). *Id.* Different screen readers and accessibility testing tools may offer different compliance results, especially under different settings. *See* Domino's C.A. Br. 18-19. A website deemed not to meet even *one* of those criteria, at any level, opens the door to lawsuits for noncompliance. *See* W3C, *Failures for WCAG 2.0* (2019).[19]

To take one example, WCAG guidelines for web audio content at Level A require captions for all prerecorded audio content; Level AA additionally requires captions for all *live* audio content, plus audio description of prerecorded video content; and Level

---

[18] *Available at* https://www.w3.org/WAI/standards-guidelines/wcag/.

[19] *Available at* https://www.w3.org/TR/WCAG20-TECHS/failures/. As noted in the discussion above, courts have to date required compliance with WCAG Level AA standards and have not yet required compliance with Level AAA standards. Absent guidance from this Court, however, there is nothing to prevent a court from doing so in the future.

AAA requires displaying sign language as well. *See* WCAG (2.0) Guideline 1.2 ("Time-based Media").[20]

Interpretive issues aside, implementation entails an exceptionally high degree of specialized expertise. A "web development team typically requires two years to become proficient in website accessibility." Kimberly Reindl & Amisha Manek, *DOJ Creates Web Accessibility Minefield*, BUS. L. TODAY 1-2 (March 2016). Notably, even W3C acknowledges that "it is not possible to satisfy all Level AAA Success Criteria for some content." *Id.* The fact that W3C itself recognizes that its own standards may not be attainable speaks volumes about the complexities and difficulties involved in web accessibility implementation.

Compliance with the WCAG guidelines is also costly. "[M]erely reviewing a website's code and metadata to determine its compatibility with a blind user's screen-reading software can cost $50,000." Mark Pulliam, *Is Your Company's Website Accessible to the Disabled? You'd Better Hope So*, LOS ANGELES TIMES (June 11, 2017).[21] And that is just the beginning. For major retailer websites selling a constantly changing array of products numbering in the hundreds of thousands or more, the ongoing costs of compliance with the guidelines run millions of dollars.

Even for a business that can afford to hire and train a web development team, its website will

---

[20] *Available at* https://www.w3.org/TR/WCAG20/#media-equiv-real-time-captions.

[21] *Available at* https://www.latimes.com/opinion/op-ed/la-oe-pulliam-ada-websites-20170611-story.html.

inevitably contain technical errors that make it vulnerable to lawsuits. A 2019 survey of one million website homepages found that a staggering 97.8% of all homepages contained detectable WCAG 2.0 failures. *See* WEBAIM, *The WebAIM Million* (Feb. 27, 2019).[22] The *average* homepage contained nearly 60 errors. *Id.* Indeed, a test of the Supreme Court's own website (www.supremecourt.gov) using a free online WCAG 2.0 (Level AA) testing resource reveals 19 "known problems" and 411 "potential problems."[23]

Because these errors can serve as the basis for web-accessibility lawsuits, nearly every retailer with a website (which is virtually every retailer) is potentially liable under the current regime of *ad hoc*, shifting-standard enforcement. *See, e.g.*, *Griffin v. Department of Labor Fed. Credit Union*, 912 F.3d 649, 652 (4th Cir. 2019) (summarizing the screen reader errors on a bank website that spurred a Title III web accessibility lawsuit). While businesses have an interest in correcting technical errors, such remedial activity is an extremely resource-intensive endeavor. And those resources cannot then be expended on other, more efficient and effective accessibility measures.

On top of those steep compliance challenges, uncertainty persists over the specific standard that companies should meet: WCAG or some other private standard? WCAG 2.0 (published in 2008) or 2.1

---

[22] *Available at* https://webaim.org/projects/million/.

[23] *See* AChecker, *available at* https://achecker.ca/ (evaluating www.supremecourt.gov) (last checked July 15, 2019).

(published in 2018)? WCAG level A, AA, or AAA?[24] There is no consensus as to which of these standards a retailer must meet, or who ultimately evaluates compliance. In fact, different website evaluation software often yields different compliance results. With screen-reader software that makes technical website violations so easy to allege, businesses are forced to contend with murky and evolving standards that make compliance a moving target. That reality "frustrates the notice and predictability purposes of rulemaking and promotes arbitrary government." *Talk America, Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring).

3. The absence of clear judicial (or regulatory) standards, coupled with the fact that the ADA provides for payment of attorney fees, 42 U.S.C. § 12205, has generated a flood of Title III lawsuits. Such litigation does not further the goal of web accessibility.

The availability of attorney fees creates a perverse incentive for plaintiffs' lawyers to target businesses with Title III lawsuits. *See, e.g.*, Mark Pulliam, *Is Your Company's Website Accessible to the*

---

[24] WCAG 2.1, published in June 2018, also contains Levels A, AA, and AAA. *See* W3C, W3C Recommendation: Web Content Accessibility Guidelines 2.1 (June 5, 2018), https://www.w3.org/TR/WCAG21/. WCAG 2.1 supersedes WCAG 2.0, and provides 17 additional success criteria (to the already existing 61 success criteria) that websites must address to conform to its standards. *Id.* The W3C is now recommending WCAG 2.1, rather than 2.0, "to maximize future applicability of accessibility efforts." *Id.*

Disabled? You'd Better Hope So, LOS ANGELES TIMES (June 11, 2017) (noting, for example, the $4 million paid by a major retailer after a Title III lawsuit "to cover the plaintiffs' attorney fees and other costs").[25] The number of cases has exploded in recent years, topping 2,250 in 2018. Pet. 4. "[L]awyers have filed identical lawsuits against multiple businesses . . . in the hopes of reaching a settlement with one or more of them." Vivian Wang, *College Websites Must Accommodate Disabled Students, Lawsuits Say*, N.Y. TIMES (Oct. 11, 2017); *see also id.* ("According to court records, [counsel] was ordered to refile one of the complaints because the wrong party was selected as the defendant"). Indeed, in 2018, a single law firm with a single lead plaintiff filed Title III suits against 50 colleges over the accessibility of their websites. *See* Lindsay McKenzie, *50 Colleges Hit With ADA Lawsuits*, InsideHigherEd.com (Dec. 10, 2018). Those reported examples, moreover, are just the tip of the iceberg. *See* Pet. 4-5, 25-26 (describing lawsuits against New York art galleries, healthcare companies, Burt's Bees, hotels, and Beyoncé).

Needless to say, these suspect tactics indicate that the flood of litigation over web accessibility is not about true ADA accessibility. They reflect "gotcha" lawsuits at the expense of businesses and customers alike. The Ninth Circuit's decision will turbocharge such filings and their deleterious consequences.

---

[25] *Available at* https://www.latimes.com/opinion/op-ed/la-oe-pulliam-ada-websites-20170611-story.html.

CONCLUSION

The petition for certiorari should be granted and the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

Deborah R. White
Kathleen McGuigan
RETAIL LITIGATION CENTER, INC.

Stephanie Martz
NATIONAL RETAIL FEDERATION

Pratik A. Shah
Counsel of Record
James E. Tysse
Meredith C. Slawe
Kathryn E. Deal
AKIN GUMP STRAUSS HAUER & FELD LLP

Counsel for Amici Curiae

July 15, 2019