Docket No. 17-55504

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GUILLERMO ROBLES,

PLAINTIFF-APPELLANT,

V.

DOMINO'S PIZZA LLC,

DEFENDANT-APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

DISTRICT COURT CASE NO.: 2:16-CV-06599-SJO-FFM

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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I. DOMINO'S CONTINUES TO MISCHARACTERIZE RELIEF SOUGHT BY ROBLES

Domino's continues to mischaracterize relief sought by Robles as WCAG 2.0, ostensibly because Domino's claims Robles pleaded it is as the legal standard. As explained in the Opening Brief, Domino's misstated the premise of the Complaint, and again misstates it here, in an effort to mischaracterize the objectives of the Complaint and to then argue that Robles seeks to enforce a particular standard for website accessibility when the DOJ has not promulgated such a regulation and that this violates due process and implicates the primary jurisdiction doctrine.

Unfortunately, the Domino's district court accepted Domino's mischaracterization that the relief Robles sought was compliance with WCAG 2.0, without considering the well pled allegations and clear premise of the Complaint, such as that set forth below and throughout the Complaint (E.R. 408-426):

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

Complaint, Paragraph 2 (E.R. 409) (emphasis added).[1]

The same mischaracterization of pleadings and relief sought by Robles proved unsuccessful in the context of a motion for summary judgment (authored by the same counsel as Domino's) decided in *Robles v. Yum! Brands, Inc. d/b/a Pizza Hut*, No. *Pizza Hut*, No. 2:16-cv-08211-ODW (SS), 2018 WL 566781, (C.D. Cal. Jan. 25, 2018) (Wright) (denying a motion for summary judgment sought against ADA and California's Unruh Civil Rights Act claims). It is important to note that **the pleadings as to the relief sought** in Robles Complaint against Domino's are **identical** to Robles First Amended Complaint against Pizza Hut (because the website and mobile app offered by Pizza Hut suffer from the same defects as those offered by Domino's). (Compare pleadings E.R. 408-426 with the First Amended Complaint in Pizza Hut (Request for Judicial Notice, Exh. A). Both Domino's and Pizza Hut also submitted identical primary jurisdiction doctrine arguments. However, unlike the court in Domino's, the court in *Pizza Hut* identified and directly addressed the mischaracterization:

> "Pizza Hut argues that Plaintiff's case must fail because it is 'exclusively premised' upon Pizza Hut's failure to comply with version 2.0 of the WCAG

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[1] *See also* the Complaint, alleging barriers to accessibility and effective communication generally and without reference to a particular standard, at paragraphs 3, 4, 5, 10, 11, 12, 14, 17, 20, 23, 26, 27, 28, 29, 30, 31, 32, 34, 35, 37, 43, 50, 51, 52, 53, 56, 57, 60, 61, 62. (E.R. 425-426). *See also* the Prayer found in the Complaint at page 18, praying for judgment, including an injunction to enjoin inaccessibility without reference to a particular standard, at paragraphs 1, 2, 3, 4, and 5. (E.R. 425-426). *See also* Appellant's Opening Brief at Part IV.A.

> and Apple iOS accessibility guidelines—standards that have not been promulgated by the DOJ. ([Def. MSJ 7]) As such, Pizza Hut argues that it is entitled to summary judgment because the DOJ has not required private businesses to comply with a specific accessibility standard within the WCAG. (Id.) **However, Pizza Hut mischaracterizes Plaintiff's allegations**. ***Plaintiff is not seeking to force Pizza Hut to comply with any particular set of guidelines within the WCAG, but rather, is challenging Pizza Hut's compliance with the ADA "generally and without reference to a particular standard."*** (Opp'n 2 n.3.) While the DOJ has consistently relied upon the WCAG guidelines to provide a roadmap of what would constitute an appropriate measure for website accessibility, Plaintiff is not required to show that Pizza Hut complied with any *specific guidelines.*"

Pizza Hut, 2018 WL 566781 at *11 (emphasis added).

Although the district court saw through Pizza Hut's mischaracterization that Robles sought to impose particular set of guidelines within the WCAG in his allegations, Domino's has succeeded with the same disingenuous argument until now. This Court should not perpetuate this incorrect result and its damaging consequences to persons with disabilities.

II. THE FAIR NOTICE ARGUMENTS THAT ARE THE BASIS FOR DOMINO'S DUE PROCESS CONCERNS WERE FULLY BRIEFED IN THE DISTRICT COURT;[2]

Domino's due process argument is wholly premised on concerns that Domino's lacked fair notice that its website and mobile app must be maintained in an accessible state. This is made clear in Part VI.E. of Domino's Answering Brief

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[2] The Answering Brief omits addressing the fact that the district court's due process analysis is dicta. In fact, in the Answering Brief's issues presented, the due process issue is omitted entirely. Tellingly, the sole issue presented is the application of the primary jurisdiction doctrine.

entitled "Due Process Demands That the Law Give Fair Notice of Conduct That Is Required" where Domino's repeatedly refers to due process guaranteeing the ***right to fair notice of whether conduct is prohibited***. (Answering Br. at 35-37) Robles addressed these arguments directly in the district court, although he couched them in terms of "fair notice" and not "due process". Opposition to MSJ, *Robles v. Dominos Pizza LLC*, No. CV16-06599 SJO (SPx), (C.D. Cal. Mar. 3, 2017) (Dkt. 33) ("Robles Opp") (Part IV.E "Defendant Should Be Estopped From "Fair Notice" And Stay Arguments Because Defendant's Website Has Communication Barriers Relating To Plaintiff's Disability That Violate the ADA.") (E.R. 169). This section of Robles Opp discussed how Domino's had fair notice from: (1) Plaintiff, (2) a prior case in 2016 in which Domino's was sued on the same inaccessible website grounds, *Del Orden v. Domino's Pizza LLC*, Case No. 1:16-CV-03281 (S.D.N.Y.) (filed May 3, 2016), (3) the DOJ that recognized the applicability of the ADA to website accessibility, (4) cases in the 9th Circuit where lack of specific standards did not impede website-related cases, and (5) several DOJ briefs. (E.R. 169-172). Plaintiff discussed that Domino's had fair notice that the ADA applies to its website and mobile app, and therefore Domino's due process argument did not apply. There was no waiver as claimed by Domino's simply because Robles did not use the words "due process" but still thoroughly discussed its subject matter. In fact, the district court purported to respond to

Robles' arguments on the issue of due process, spending nearly four pages of its opinion addressing the authorities Robles' cited. (E.R. 007-009).

In any event, the "waiver" of an argument on appeal is a "discretionary, not jurisdictional, determination." *In re Mercury Interactive Corp. Secs. Litig.*, 618 F.3d 988, 992 (9th Cir. 2010). The Ninth Circuit "may consider issues not presented to the district court." Id. Such discretion is exercised in favor of reaching such "waived" issues in four circumstances: "(1) there are exceptional circumstances why the issue was not raised in the trial court; (2) new issues have become relevant while the appeal was pending because of [a] change in the law; (3) the issue presented is purely one of law and the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court; or (4) plain error has occurred and injustice might otherwise result." *Kaass Law v. Wells Fargo Bank, N.A.*, 799 F.3d 1290, 1293 (9th Cir. 2015) (citations omitted).

Moreover, the third and fourth exceptions are both applicable here.[3] *Thompson v. Runnels*, 705 F.3d 1089, 1098 (9th Cir. 2013) ("Because the legal issue has been fully addressed by both parties, and because it is a simple and straightforward question of law, we do not abuse our discretion in addressing it."). Furthermore, "Although 'no 'bright line rule' exists to determine whether a matter

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[3] By citing *In re Mercury*, instead of this Court's more recent decision in *Kaass Law*, Domino's Answering Brief conveniently ignores the fourth exception, which is applicable here.

[h]as been properly raised below,' an issue will generally be deemed waived on appeal if the argument was not ''raised sufficiently for the trial court to rule on it.''" *In re Mercury*, 618 F.3d at 992. (citations omitted); *Thompson,* 705 F.3d at 1098 ("we may consider new legal arguments raised by the parties relating to claims previously raised in the litigation.").

Even if this Court were to find that Robles conceded the issue of due process, this Court has discretion to reach the issue because it is necessary to prevent injustice and because the question of due process is purely an issue of law, does not depend on the factual record and will not result in prejudice to Domino's. As shown by the Amicus briefs filed in support of both Appellant (13 *amici*) and Appellee (14 *amici*), this is an important issue to a broad range of persons and associations. This is also a civil rights case where a district court's dismissal sets a dangerous precedent that the equal rights of individuals with disabilities are unenforceable unless and until the federal government decides to issue specific regulations for each possible type of communication or physical barrier in the world. This conclusion is starkly contrary to the bulk of authority on the issue. (Opening Br. footnotes 7-8.) Robles did not waive the due process argument in his opposition brief and, even if he had, this Court should use its discretion to reach this issue.

III. DOMINO'S HAD SUFFICIENT NOTICE OF ITS WEBSITE ACCESSIBILITY OBLIGATIONS TO SATISFY DUE PROCESS

Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Title III of the ADA provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). Section 12181 of the ADA defines a "public accommodation" as an entity whose operations affect commerce and falls within one of twelve enumerated categories. 42 U.S.C. § 12181(7) (listing twelve categories of physical, brick-and-mortar establishments open to the public at a specific location). The Ninth Circuit has held that to successfully assert a Title III claim, "some connection between the good or service complained of and an actual physical place is required." *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000). However, "[t]he requirement that a place of public accommodation … refer to a physical place does not preclude a plaintiff from challenging a business' online offerings" under the ADA. *Reed v. CVS Pharmacy, Inc.*, 2017 WL 4457508, at *3 (C.D. Cal. Oct. 3, 2017). As long as there is a "nexus"—some connection between the good or service complained of and an actual physical place, a plaintiff may challenge the

digital offerings of an otherwise physical business. Id. at *3 (*citing Weyer*, 198 F.3d at 1114). Such a nexus clearly exists here.

A. The ADA's General Mandate And Relevant Regulations Require Accessibility

Domino's Answering Brief argues on page 43 that "there are no regulations." Not so. As an initial matter, the statutory language of the ADA covers commercial websites either via its general non-discrimination provision (42 U.S.C. § 12182(a)), its reasonable modifications provision, (42 U.S.C. § 12182(b)(2)(A)(ii)), and its auxiliary aid provision (42 U.S.C. § 12182(b)(2)(A)(iii)). As for the DOJ's implementing regulations, Robles is relying upon unambiguous regulations promulgated by the U.S. Department of Justice ("DOJ") decades ago when it issued its original ADA implementing regulations on July 26, 1991 (effective January 26, 1992), *Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities*, 56 Fed. Reg. 35544, 35555, 35565-35566, 1991 WL 304374 (July 26, 1991), s*ee* 28 C.F.R. §§ 36.201(a), 36.303(a) & (c)(1), and updated September 15, 2010, to add the terms "screen reader software," "magnification software," and "accessible electronic and information technology" as examples of required auxiliary aids or services. 28 C.F.R. § 36.303(b)(2), and to add the "privacy and independence" requirements to 28 C.F.R. § 36.303(c)(1)(ii). Thus, regardless of whether a court analyzes Robles' claim under the ADA's general nondiscrimination statute, 42 U.S.C. § 12182(a),

and its general implementing regulation, 28 C.F.R. § 36.201(a), or based on the ADA's specific "auxiliary aids and services" provisions set forth in 42 U.S.C. § 12182(b)(2)(A)(iii) and 28 C.F.R. § 36.303, the statutory and regulatory notice to commercial website owners and operators that their websites needed to comply with the ADA's "full and equal" enjoyment requirement is and has been plain for many years. Moreover, the implementing regulations have made clear since 1991 that public accommodations' communications must be effective for both people with and without disabilities, without any limitations on the types of communications covered. 28 C.F.R. § 36.303. Due process does not require more. *See Kirola v. City & Cty. of San Francisco*, 860 F.3d 1164 (9th Cir. 2017). The DOJ has "repeatedly affirmed that Title III [of the ADA] applies to websites that meet the definition of a public accommodation." *See Gorecki v. Hobby Lobby Stores, Inc.*, 2017 WL 2957736, at *4 (C.D. Cal. June 15, 2017). See also, Appendix B to Brief of *Amici Curiae* National Federation of the Blind, et. al.

As the DOJ's preamble to its 1991 Title III regulations explained, the ADA regulations should be interpreted to keep pace with "emerging technology." 56 Fed. Register 35544-01, 35566 (July 26, 1991). Thus, although the use of the Internet was not widespread in 1990 when the ADA was enacted into law, the ADA's legislative history and the case law interpreting the ADA clearly indicate that the ADA was intended to be broadly construed and to keep pace with changes

to technology. *Enyart v. National Conference of Bar Examiners, Inc.*, 630 F.3d 1153, 1163 (9th Cir. 2011) ("[A]ssistive technology is not frozen in time: as technology advances, ... accommodations should advance as well."); *Hason v. Med. Bd. of Cal.*, 279 F.3d 1167, 1172 (9th Cir. 2002) (citing the "remedial goals underlying the ADA" and holding that "Courts must construe the language of the ADA broadly in order to effectively implement the ADA's fundamental purpose of 'provid[ing] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.'") (citing cases); *National Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 200-01 (D. Mass. 2012) (quoting H.R. Rep. 101-485(II), at 108 (1990)) ("the Committee intends that the types of accommodation and services provided to individuals with disabilities, under all of the titles of this bill, should keep pace with the rapidly changing technology of the times."). *See also Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 395 (E.D.N.Y. Aug. 1, 2017) ("This broad interpretation [of ADA statutes] is proper because it is harmonious with the purpose of the ADA. . . . 'As a remedial statute, the ADA must be broadly construed to effectuate its purpose of providing a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.'"); 75 Fed. Reg. 43460, 43463 (July 26, 2010) ("the statute's broad and expansive nondiscrimination mandate

reaches goods and services provided by covered entities on Web sites over the Internet.").

B. The Lack of Specific Guidelines from the DOJ Does Not Excuse Dominos From Complying with the ADA's General Mandate

There is sufficient guidance with respect to ADA applicability to websites so that this litigation does not violate Domino's due-process rights. "Since 1996, the DOJ has not wavered from its view that the ADA applies to websites that meet the definition of a public accommodation." *Hobby Lobby Stores, Inc.*, 2017 WL 2957736, at *5. In *Hobby Lobby*, the district court denied defendant Hobby Lobby's motion to dismiss a legally blind plaintiff's complaint alleging that Hobby Lobby's website violated the ADA. Id. at *1. Similar to Domino's argument here, Hobby Lobby argued that the plaintiff's case violated its due process rights because it did not have "sufficient notice of the technical standards that would make its website fully compliant with the ADA." Id. at *4. The *Hobby Lobby* court rejected this argument, stating that "the DOJ's general website accessibility requirement is not ambiguous because the DOJ has not imposed any specific means by which entities must meet this requirement"—hence, places of public accommodation "are free to decide how to comply with the ADA." *See Id*. at *6.

The lack of specific guidelines from the DOJ does not excuse Domino's from complying with the ADA's general mandates of equal access and effective

communication. *See Fortyune v. City of Lomita*, 766 F.3d 1098, 1102 (9th Cir. 2014) (holding "[t]hat the lack of specific regulations cannot eliminate a statutory obligation" and rejecting the defendant's due process argument that it lacked notice of its obligation to comply with the general mandate of the ADA to provide certain accommodations). Given the DOJ's consistent position that the ADA applies to websites, there is no doubt that Domino's has had sufficient notice that its website must provide visually impaired individuals with full and equal access. See 42 U.S.C. § 12182(a). Whether Domino's website and mobile app must comply with the WCAG or any other set of noncompulsory guidelines, is a question of remedy, not liability. *See CVS Pharmacy*, 2017 WL 4457508, at *4; *Fortyune*, 766 F.3d at 1106 n.13 ("[F]urther consideration of the City's due process argument would be premature because due process constrains the remedies that may be imposed").

As explained by the Ninth Circuit, "A statute is vague not when it prohibits conduct according 'to an ***imprecise*** but comprehensible normative standard, but rather in the sense that ***no standard of conduct is specified at all***.'" *Botosan v. Paul McNally Realty*, 216 F.3d 827, 836 (9th Cir. 2000) (emphasis added). "Because the ADA is a statute that regulates commercial conduct, it is reviewed ***under a less stringent standard of specificity***." *Id.* (emphasis added). And, the Ninth Circuit has held that "***the lack of specific regulations cannot eliminate a statutory obligation***." *Fortyune*, 766 F.3d at 1102 (emphasis

added) (rejecting a defendant's due process argument that the defendant lacked notice that the ADA's general mandate to eliminate discrimination against disabled persons applied even absent technical specifications); *Id.* at 1100-06 (holding that the plaintiff stated claims under the ADA and CDPA based on the City's alleged failure to provide accessible on-street diagonal stall parking irrespective of whether the DOJ has adopted technical specifications for on-street parking).

C. A VIOLATION OF THE GENERAL MANDATE WAS ADEQUATELY PLED BY APPELLANT BECAUSE ROBLES PLED HE CANNOT ORDER A PIZZA IN ADVANCE AND PICK IT UP USING DOMINO'S WEBSITE OR MOBILE APP

The ADA's general equal access and effective communication mandate applies to websites and the lack of specific guidelines does not excuse Domino's from complying with this general mandate. (*See* Part III. *supra* and Opening Br. at Part IV.C.) Whether Domino's has complied with the ADA's general mandate that websites and mobile apps shall be equally accessible is a question of fact. As plead, Robles' Complaint does not violate due process.

Domino's continues beating the drum by posing the question: "What standard does a website have to meet to satisfy the ADA? This is a question of *liability* and not remedy." (Answering Br. at 51). Once again, the general mandate requires there to be no discrimination on the basis of disability in the full and equal enjoyment of goods and services, 42 U.S.C. § 12182(a), and requires public

accommodations to provide auxiliary aids and services as necessary to ensure equal access for people with disabilities.. 42 U.S.C. § 12182(b)(1)(A)(ii-iii).

No specific standard is required to determine liability when an *essential function* of the website is unusable for Robles because he is blind. To wit, a violation of the ADA's general equal access and effective communication mandate can be found simply because **Robles could not order a pizza using Domino's website or mobile app,** (obviously the MOST critical function of any pizza restaurant website or app) **and could not select a location where he could place an order** due to numerous barriers, identified in the Complaint ¶¶ 27-32 (E.R. 416-418), Robles Declaration (E.R. 368-372), and evidence otherwise submitted on the record (E.R. 147-373).

Other courts throughout the country have agreed that liability can be based on violation of the ADA's general mandate absent any specific standard or guidelines. "A determination of liability does not necessarily require the Court to master complicated web standards, but rather asks the Court to make exactly the same sort of accessibility determinations that it regularly makes when evaluating the accessibility of physical locations." *CVS Pharmacy*, 2017 WL 4457508, at *10.

Indeed, most recently in December 2017, the court in *Andrews v. Blick Art Materials, LLC*, No. 17-CV-767 (E.D.N.Y. Dec. 21, 2017) issued a Memorandum and Order (not to be confused with the August 1, 2017 Order) approving

settlement of a website accessibility case in the form of judgment. This 36-page order with multiple declarations describes in great detail the website remediation process and how a court can craft a sensible remedy for web access cases that all parties find fair and agreeable. (Request for Judicial Notice, Exh. B). See also Settlement Agreement Between *United States of America and Chariot Transit Inc.*, DJ No. 202-11-362 (Nov. 7, 2017), https://www.ada.gov/chariot_trans_sa.html (settlement agreement requiring a mobile app to work in the same manner for disabled persons as others).

D. THE DOJ'S INTERPRETATION OF THE ADA AS APPLYING TO THE WEBSITE OF PUBLIC ACCOMMODATIONS IS ENTITLED TO DEFERENCE

Domino's Answering Brief makes no attempt to distinguish the Opening Brief's citation of *M.R. v. Dreyfus*, 697 F.3d 706, 735 (9th Cir. 2012) and *Fortyune*, 766 F.3d at 1102, regarding the deference owed to an agency's interpretation of its own regulations. (Opening Br. at 38-39 & n.9.) At best, Domino's cites *Arizona ex rel. Goddard v. Harkins Amusement Enter., Inc.*, 603 F.3d 666, 674 (9th Cir. 2010), which is distinguishable as it involved neither a Statement of Interest nor an Amicus Brief authored by the DOJ. In contrast, the DOJ has publicly announced its position regarding the applicability of the ADA to commercial websites via amicus briefs or statements of interest for many years. At minimum, *Arizona ex rel. Goddard* must be reconciled with *M.R.* and

Fortyune. The district court erred by failing to defer to the DOJ's interpretation of the ADA.

Domino's Answering Brief also ignores the existence of the testimony of Principal Deputy Assistant Attorney General for Civil Rights, Samuel R. Bagenstos, before the House Subcommittee on the Constitution, Civil Rights and Civil Liberties on April 22, 2010, News Release, 2010 WL 1634981 (Apr. 22, 2010) (Opening Brief cites to such testimony on page 12 and it is attached as RJN 2), which states in relevant part:

> "***The Department of Justice has long taken the position that*** both state and local government websites and ***the websites of private entities that are public accommodations are covered by the ADA. In other words, the websites of entities covered by*** both Title II and ***Title III of the statute are required by law to ensure that their sites are fully accessible to individuals with disabilities*** … ***[T]he position of the Department of Justice has been clear: Title III applies to the Internet sites and services of private entities that meet the definition of 'public accommodations' set forth in the statute and implementing regulations.***

Id. (emphasis added).

Notably, the DOJ recognized: "Ensuring that people with disabilities have a full and equal opportunity to access the benefits of emerging technologies is an essential part of our disability rights enforcement at the Department of Justice. Because the Internet was not in general public use when Congress enacted the ADA and the Attorney General promulgated regulations to implement it, neither the statute nor the regulations expressly mention it[,] ***[b]ut the statute and***

regulations create general rules designed to guarantee people with disabilities equal access to all of the important areas of American civic and economic life, [a]nd the Department made clear, in the preamble to the original 1992 ADA regulations, that the regulations should be interpreted to keep pace with developing technologies." *Id.* (emphasis added).

Domino's Answering Brief contends that the DOJ's Amicus Brief in *Magee v. Coca-Cola Refreshments USA, Inc.*, No. 16-668, *cert. denied*, (U.S. Oct. 2, 2017), "appears to conflict with its prior statements regarding website accessibility." (Answering Br. at 47) Not so. Domino's ignores that the DOJ's amicus brief states on page 10 as follows: "The term "sales or rental establishment" likewise is not categorically limited to businesses that are staffed by human proprietors or employees. Congress's inclusion of a catch-all provision serves in part to facilitate the ADA's application to new businesses that utilize technologies or methods of operation that were unknown when the statute was enacted in 1990." Surely, this is applicable to Internet commercial websites. Indeed, the petition for certiorari concerned an appellate decision that had nothing to do with the accessibility of a commercial website under the ADA. *Magee v. Coca-Cola Refreshments USA, Inc.*, 833 F.3d 530 (5th Cir. 2016), *cert. denied*, 138 S. Ct. 55 (2017), is readily distinguishable and should be construed as limited to its rather unique facts. *Magee* simply held that vending

machines are not "sales establishments" and not "places of public accommodations" under the ADA. The Fifth Circuit had no occasion to decide therein whether the owner or operator of a commercial website is subject to liability under Title III of the ADA for ADA violations, *see* 42 U.S.C. §§ 12182(a), 12182(b)(2)(A)(ii), 12182(b)(2)(A)(iii), including violations of the DOJ's existing implementing regulations requiring effective communication via auxiliary aids and services. 28 C.F.R. §§ 36.201(a), 36.303(a), (b)(2) & (c)(1)(ii).

Given that it is beyond dispute that *Magee* does not address the viability of website ADA claims, it is inconceivable that the DOJ sought to opine as to the viability of such claims via its Amicus Brief on the *Magee* Petition for Certiorari.

IV. THE DISTRICT COURT ERRED BY APPLYING THE PRIMARY JURISDICTION DOCTRINE

A. REFERRAL TO THE DOJ PURSUANT TO THE PRIMARY JURISDICTION DOCTRINE WOULD NOT PROMOTE EFFICIENCY AND WOULD PREJUDICE INDIVIDUALS WITH DISABILITIES

As discussed in the Opening Brief, the *Domino's* court did not apply or make any findings as to whether the primary jurisdiction factors to determine whether a stay or referral of the issue to the DOJ was appropriate, or even feasible. Efficiency, the "deciding factor in determining whether the primary jurisdiction doctrine should apply," *Reid v. Johnson & Johnson*, 780 F.3d 952, 967 (9th Cir. 2015), weighs heavily against dismissal on primary jurisdiction grounds. The district court incorrectly applied the primary jurisdiction doctrine.

The *Domino's* district court dismissal of this case pursuant to primary jurisdiction must be reversed because: (1) this issue is not a complicated question of first impression; (2) Courts routinely decide cases like this one, involving accommodations, auxiliary aids, and undue burden; (3) DOJ expertise is not needed;[4] (4) There is no available proceeding to which the Court can refer the parties, the parties cannot directly participate in DOJ's rulemaking, and DOJ is incapable of resolving the parties' dispute. Individuals with disabilities can only seek a remedial order from the courts. See *Arizona ex rel. Goddard*, 2011 WL 13202686, at *3 (reasoning that because "DOJ does not have an administrative process in which these parties can directly participate to resolve their dispute," dismissal under the primary jurisdiction doctrine would be inappropriate); (5) As of July 20, 2017, DOJ effectively abandoned rulemaking on the issue of technical standards for website accessibility by placing the rulemaking for Title III of the ADA for websites on the 2017 Inactive Actions list; and (6) As of December 15, 2017, DOJ has now officially withdrawn from rulemaking on access to websites and mobile apps. See DOJ's *Notice of Withdrawal*, 82 FR 60932 (December 15, 2017).

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[4] Courts are fully capable of facilitating a functional remedy for web access cases agreeable by all parties. See Memorandum and Order, *Andrews v. Blick Art Materials, LLC*, No. 17-CV-767 (E.D.N.Y. Dec. 21, 2017), discussed in Part III.C. *supra*. As also discussed in Mr. Robles' Opening Brief, through many consent decrees and settlement agreements, DOJ has already made clear its position that a covered entity can ensure that its website provides equal access to individuals with disabilities by adhering to WCAG 2.0 level AA.

Also significant, in *Robles v. Yum! Brands, Inc. d/b/a Pizza Hut*, defendant made the same primary jurisdiction doctrine argument in a motion for summary judgment as *Domino's*. In response, on August 22, 2017, the *Pizza Hut* court certified this constitutional challenge of the ADA to the United States Attorney General so "the United States may intervene in the action within 60 days of this Order" *Robles v. Yum! Brands, Inc. d/b/a Pizza Hut*, No. 2:16-cv-08211-ODW (SS), (C.D. Cal. Aug. 22, 2017) (Dkt. 47) (Request for Judicial Notice, Exh. C). The DOJ failed to intervene in 60 days or at all (Request for Judicial Notice, Exh. D) and the district court eventually denied Pizza Hut's motion for summary judgment. *Pizza Hut*, 2018 WL 566781.

B. PRIMARY JURISDICTION SHOULD NOT BE APPLIED WHEN THE DOJ IS AWARE OF, BUT HAS EXPRESSED NO INTEREST IN THE SUBJECT MATTER OF THE LITIGATION

In 2010, the DOJ announced that it was "considering revising the regulations implementing Title III of the ADA in order to establish requirements for making the goods, services, … accommodations, or advantages offered by public accommodations via the Internet, specifically sites on the World Wide Web [] accessible to individuals with disabilities." *Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations*, 75 FR 43460-01 (July 26, 2010) ("ANPR"). In December of 2017, the DOJ formally announced that it was withdrawing the ANPR, effective December 26, 2017, and

no longer pursuing rulemaking for website accessibility under Title III of the ADA. *See Notice of Withdrawal*, 82 FR 60932 (December 15, 2017).

The DOJ's recent Notice of Withdrawal is a strong indication that the DOJ currently lacks an interest in specific requirements for website accessibility under the ADA and that the legal obligations are sufficiently clear without further regulatory action. Additionally, given the significant amount of time that has already elapsed since 2010's ANPR, a referral to the DOJ would significantly postpone a ruling that the Court is competent to make. "Not every case that implicates the expertise of federal agencies warrants invocation of primary jurisdiction." *Astiana v. Hain Celestial Group, Inc.*, 783 F.3d 753, 760 (9th Cir. 2015). "Common sense tells us that even when agency expertise would be helpful, a court should not invoke primary jurisdiction when the agency is aware of but has expressed no interest in the subject matter of the litigation." *Id.* As noted in Part IV.A above, even when explicitly invited to intervene on this issue the DOJ chose not to. *Robles v. Pizza Hut*, No. 2:16-cv-08211, (C.D. Cal. Aug. 22, 2017).

Moreover, Domino's primary jurisdiction argument has been rejected by other courts in the same District and in other jurisdictions. *See, e.g., Hobby Lobby*, 2017 WL 2957736, at *7 (refusing to invoke the primary jurisdiction doctrine pending further guidance from the DOJ regarding minimum accessibility standards for websites); se*e also CVS Pharmacy*, 2017 WL 4457508, at *7 (declining to

apply the primary jurisdiction doctrine, and holding that "[a] determination of liability does not necessarily require the [c]ourt to master complicated web standards, but rather asks the [c]ourt to make exactly the same sort of accessibility determinations that it regularly makes when evaluating the accessibility of physical locations.").

This case is not unique, "as federal courts have resolved effective communication claims under the ADA in a variety of contexts—including cases involving allegations of unequal access to goods, benefits and services provided through websites." *See Hobby Lobby*, 2017 WL 2957736, at *7 (*citing Netflix*, 869 F. Supp. 2d. 196). In line with other courts in this circuit and elsewhere, the Court should decline to adopt here the district court's position on the primary jurisdiction doctrine.

V. DOMINO'S OWN BRIEF DEMONSTRATES THE EXISTENCE OF DISPUTED FACTUAL QUESTIONS THE COURT FAILED TO ADDRESS

A. Domino's Answering Brief Speculates As To Cost Of Remediation Without Any Support On The Record

Domino's Answering Brief speculates as to the cost of remediation as $500,000 without ***any*** support in the record. (Answering Br. at 51-52) To the contrary, Principal Deputy Assistant Attorney General for Civil Rights, Samuel R. Bagenstos, testifying before the House Subcommittee on the Constitution, Civil

Rights and Civil Liberties on April 22, 2010, News Release, 2010 WL 1634981 (Apr. 22, 2010), stated in relevant part:

> "The most common barriers on websites are posed by images or photographs that do not provide identifying text. A screen reader or similar assistive technology cannot "read" an image. When images appear on websites without identifying text, therefore, there is no way for the individual who is blind or who has low vision to know what is on the screen. The simple addition of a tag or other description of the image or picture will keep an individual using a screen reader oriented and allow him or her to gain access to the information the image depicts. Similarly, complex websites often lack navigational headings or links that would make them easy to navigate using a screen reader. ***Web designers can easily add those headings.*** They may also add cues to ensure the proper functioning of keyboard commands. They can also set up their programs to respond to voice interface technology. ***Making websites accessible is neither difficult nor especially costly, and in most cases providing accessibility will not result in changes to the format or appearance of a site.***"

Id. (emphasis added). Obviously, this is a factual issue unresolvable at this stage of the litigation.

B. DOMINO'S DID NOT MEET ITS HEAVY BURDEN THAT ITS TELEPHONE LINE SATISFIES THE "EFFECTIVE COMMUNICATION" MANDATE OF THE ADA SUCH THAT IT PROVIDES AN EQUAL DEGREE OF ACCESS TO INFORMATION, OPTIONS, AND SERVICES AVAILABLE ON THE WEBSITE OR MOBILE APP

Domino's argues its website and mobile app do not violate the ADA because they satisfy the ADA's effective communication mandate. Domino's Motion for Summary Judgment at 17. ("Mot.")[5] Under the "effective communication"

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[5] The recent withdrawal of the ANPR necessarily means that the DOJ's reference to a "staffed telephone line," (Answering Br. at 16-17), is also withdrawn as a potential "accessible alternative".

provision of the ADA, a public accommodation is required to "furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities." 28 C.F.R. § 36.303.

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

Id.

Domino's argues that the district court correctly held that Domino's complies with this provision because it allows visually impaired customers to call a phone number where "customer service can provide assistance with Defendant's websites" and that, with this phone number, a visually impaired customer can "call their local Domino's Pizza restaurant to order food, purchase goods, and/or ask questions." (Mot. 7) (E.R. 25). Domino's contends that the DOJ has "endorsed" this approach in the ANPR, which states that "covered entities with inaccessible Web sites may comply with the ADA's requirement for access by providing an accessible alternative, such as a staffed telephone line, for individuals to access the information, goods, and services of their Web site." (Mot. 7) (citing *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations*, 75

FR 43460-01 (July 26, 2010).) (E.R. 25). Conspicuously, Domino's motion for summary judgment and its Answering Brief here omitted the fact that the ANPR states that "[i]n order for an entity to meet its legal obligation under the ADA, an entity's alternative must provide an **equal degree of access** in terms of hours of operations and range of information, options and services available." *Id*. (emphasis added). As stated above, while no specific auxiliary aid or service is required in any given situation, whatever auxiliary aid or service public accommodation choses to provide must be effective. *CVS Pharmacy*, 2017 WL 4457508 at *3.

As recognized by the court in *Robles v. Pizza Hut* (January 2018), "Pizza Hut cannot simply post a customer service phone number on its website and claim that it is in compliance with the ADA unless it shows that a visually impaired customer 'will not be excluded, denied services, segregated or otherwise treated differently' from non-visually impaired customers who are able to enjoy full access to Pizza Hut's website. *See* [*CVS Pharmacy*, 2017 WL 4457508 at *3]; *see also Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1135 (9th Cir. 2012) ("The ADA guarantees the disabled more than mere access to public facilities; it guarantees them 'full and equal enjoyment.'")." *Pizza Hut*, 2018 WL 566781 at *15.

The district court erred because a genuine dispute of material fact exists as to whether the Domino's telephone number provides an *equal degree* of access to its

website and mobile app.[6] Robles argued that Domino's provides exclusive coupons and special offers only through the website and mobile app. (Robles Opp. 9.) (E.R. 161 and 165). Robles introduced evidence that he was not able to use the phone number with any success because he was placed on hold and repeatedly told he would be "connected to a representative shortly" for 10 minutes. (Robles Decl. ¶19.) (E.R. 372). Robles also argued that Domino's had not demonstrated that use of the phone number "protects the privacy and independence of the individual with a disability." (Robles Opp. 9) (E.R. 161). Therefore, the district court erred because these arguments reflected the presence of genuine issues of material fact as to whether Domino's telephone number complies with the "effective communication" provision of the ADA. *See also Pizza Hut*, 2018 WL 566781 at *15.

VI. DOMINO'S ATTACK AGAINST SERIAL LITIGATION IGNORES THIS COURT'S BINDING PRECEDENT

Failing in its attempt to defeat Robles' legal arguments, Domino's attacks and demonizes all serial litigation (Answering Br. at 1, 19). Its arguments about serial litigators in general and Robles in particular are unsupported by any evidence in this case and ignore this Court's binding precedent in *Civil Rights*

[6] This is notwithstanding the fact that Domino's had not also first met its burden of showing that providing an accessible website would result in an "undue burden" for Defendant prior to asserting a telephone number as an alternative, under 42 U.S.C. § 12182(a)(2)(A)(iii).

Educ. and Enforcement Center v. Hospitality Props. Trust, 867 F.3d 1093, 1096 (9th Cir. 2017) (holding that "a plaintiff has constitutional standing" even if "her only motivation for visiting a facility is to test it for ADA compliance"); *Id.* at 1102 ("We . . . conclude that motivation is irrelevant to the question of standing under Title III of the ADA. The Named Plaintiffs' status as ADA testers thus does not deprive them of standing."); *id.* at 1101-02 (noting that 42 U.S.C. § 12182(a) states that "*[n]o individual* shall be discriminated against on the basis of disability" and noting that Title III provides remedies for "any person" subjected to illegal disability discrimination as stated in 42 U.S.C. § 12188(a)(1)) (emphasis in original); *Gordon v. Virtumundo, Inc*., 575 F.3d 1040, 1069 (9th Cir. 2009) ("we accord standing to individuals who sue defendants that fail to provide access to the disabled in public accommodation as required by the Americans with Disabilities Act ("ADA"), ***even if we suspect that such plaintiffs are hunting for violations just to file lawsuits***.") (Gould, J., concurring) (emphasis added);

Indeed, multiple federal circuit courts besides the Ninth Circuit have recognized that serial ADA litigation is not improper and that disabled ADA plaintiffs can sue under Title III of the ADA as a "tester". *See Nanni v. Aberdeen Marketplace, Inc.*, 878 F.3d 447, 457 (4th Cir. 2017) ("neither [plaintiff's] status as an 'ADA tester' nor his litigation history strips him of standing to sue [defendant]"); *Native American Arts, Inc. v. Peter Stone Co., U.S.A., Inc.*, 222 F.

Supp. 3d 643, 647 (N.D. Ill. 2016), *appeal docketed*, No. 16-4278 (7th Cir. Dec. 30, 2016). "[W]ith damages far outstripping the actual loss, it is not surprising that suits like this are filed; private-attorney-general statutes are meant to encourage this." *Id.* "The fact that statutes . . . give rise to 'cottage industries' can't be laid at the feet of attorneys who take advantage of them." *Id.*

ADA plaintiffs play an important role, intentionally established by Congress, in the enforcement of the ADA.

VII. CONCLUSION

The district court's order should be reversed, because 1) The district court mischaracterized the relief sought by Mr. Robles; 2) The invocation of the primary jurisdiction doctrine is not appropriate in this case because the issue requires no specialized agency expertise, will not serve efficiency, there is no administrative proceeding to which to refer the parties' dispute, and the DOJ, while aware of the issue, has no current intention to resolve it; 3) The district court failed to respect and defer to interpretation of the DOJ regarding the requirements of the ADA; 4) Due process is not at stake in this case; 5) Numerous disputed factual questions remain at issue; and 6) The Causes of Action directed at the Domino's Mobile App must be allowed to proceed as they were not addressed anywhere in the Motion and, therefore, were never properly at issue.

Dated: February 9, 2018

Respectfully Submitted

MANNING LAW, APC

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JOSEPH R. MANNING, JR., ESQ.
ATTORNEYS FOR APPELLANT

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1

I certify pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1 that the attached Reply Brief of Appellant complies with the type-volume limitation of Fed. R. App. P. 32(a)(5) and (6) as it is proportionately spaced, has a typeface of 14 points, and contains 6,980 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: February 9, 2018

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing REPLY BRIEF FOR PLAINTIFF-APPELLANT with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 9, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: February 9, 2018

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