**CASE NO. 17-55504**

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**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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GUILLERMO ROBLES,

PLAINTIFF – APPELLANT,

V.

DOMINO'S PIZZA LLC,

DEFENDANT – APPELLEE,

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

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

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# DEFENDANT-APPELLEE'S ANSWERING BRIEF

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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rules of Appellate Procedure 26.1, Appellee Domino's Pizza LLC hereby certifies it is wholly-owned subsidiary of Domino's Pizza, Inc., a publicly traded corporation. According to public records, no publicly held company owns more than 10% of the outstanding stock of Domino's Pizza, Inc.

Dated: December 20, 2017

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By /s/ *Gregory F. Hurley*
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## I. JURISDICTIONAL STATEMENT

Pursuant to Circuit Rule 28-2.2, Appellee Domino's Pizza LLC ("Domino's") agrees with Appellant Guillermo Robles' ("Robles") statement of the District Court's jurisdiction based on an alleged violation of Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq*. Domino's agrees with Robles' statement of the jurisdiction of this Court. Domino's agrees that Robles' Notice of Appeal was timely.

## II. STATEMENT OF ISSUES

Whether the District Court properly invoked the doctrine of primary jurisdiction doctrine where the United States Department of Justice ("DOJ") has yet to issue minimum standards or technical assistance to explain the obligations, if any, of covered entities to make their websites accessible to blind and/or visually impaired individuals pursuant to Title III of the ADA.

## III. STATEMENT OF THE CASE

### A. Factual Background

Robles is a serial litigant who, along with his counsel, have filed a number of form lawsuits against numerous businesses alleging that their websites are inaccessible. Robles alleges that he is a "blind" individual who uses screen-reading software to use the internet on his computer and mobile websites on his iPhone. (ER 409). Robles does not describe his visual impairment other than to say he meets the legal definition of blindness. (ER 409-410).

The premise of Robles' lawsuit is that Domino's website and mobile website fail to comply with version 2.0 of the Web Content Accessibility Guidelines ("WCAG"), created by a non-governmental organization called W3C, and iOS accessibility guidelines ("Apple Standards"), developed by Apple, Inc., a California corporation. (ER 155-56, 413, 418). Robles claims that, due to this purported failure, Domino's has violated the ADA and related California law. (ER 155-56, 413, 418).

As if to illustrate the form nature of his lawsuit, Robles' complaint does not identify with an iota of specificity how he was supposedly denied access or provide any date on which he claims he was unable to access Domino's website or mobile website.[1] With respect to the website, Robles simply lists categories of alleged "barriers" (as defined by WCAG 2.0) on the website but fails to identify any specific problems. (ER 413-418). For instance, Robles does not identify a single graphical image that supposedly lacks "alternative text," any redundant or empty links, or any linked image missing alternative text. (ER 416-417).

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[1] For the first time in his summary judgment opposition brief, Robles added a bit of detail to his claimed instance of denial. This violates the rule announced in *Oliver v. Ralphs Grocery Co.*, 654 F.3d 903, 909 (9th Cir. 2011) that requires Robles to identify all alleged barriers in his complaint to satisfy the "fair notice" requirements of the Federal Rules of Civil Procedure.

At best, Robles complains that he was unable to order a customized pizza online. (ER 417). Robles states that he "has visited Dominos.com several times", most recently "in 2016." (ER 416-417). Robles does not explain how the supposed "barriers" on Domino's website prevented him from ordering a pizza. Robles utterly fails to allege any nexus between the alleged barriers on Domino's website and the difficulty he claims to have alleged. No specific images, links, forms, or other issues are identified – effectively making it impossible for Domino's (or anyone else) to evaluate and address what alleged problems he is complaining about.

Robles' allegations concerning Domino's mobile website are even more vague. For instance, Robles states that he "experienced accessibility problems" when he used the mobile website on his iPhone with "VoiceOver" – a software program developed by Apple.[2] (ER 417-418). What "accessibility" problems Plaintiff supposedly experienced are not explained. Robles then claims that, in 2015, there were "unlabeled buttons" that did not comply with Apple Standards. (ER 417-418). Again, no buttons are identified and no explanation is provided as

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[2] Domino's uses the term "mobile website" to refer to all versions of its website that is available on mobile platforms. (ER 068) Robles misleadingly states that Domino's did not make this argument below and confusingly claims it was not addressed by the District Court. Of course, the District Court expressly found that it was "even more problematic" to his case that a mobile website must conform to Apple's iOS accessibility guidelines. (ER 011).

to how those alleged issues impeded Robles' ability to "place his order." Even worse, Robles then goes on to say he encountered "similar" access barriers on the mobile website in 2016, but utterly fails to explain what they were. (ER 417-418). It is equally likely that Robles' problems were caused by user error, Robles' failure to place his screen reading software on the correct settings, or the existence of a software bug on his computer or iPhone.

Robles concludes his allegations by stating that the alleged "barriers to blind and visually-impaired people can and must be removed, by simple compliance with WCAG 2.0." (ER 418).

### B. Procedural Background

On February 22, 2017, Domino's filed a motion for summary judgment, or in the alternative, dismissal or stay. (ER 013). The bases for the motion were that (1) its website and mobile website should not be regulated like a physical facility, but instead viewed as part of how Domino's communicates with its customers, (2) Robles' lawsuit should be dismissed on due process grounds because the DOJ and/or the ADA has not afforded "fair notice" to Domino's of what is specifically required to make a website accessible to blind and/or visually impaired individuals, (3) Robles' lawsuit must be dismissed because Domino's has not violated any regulatory standards, (4) Robles failed to provide fair notice of the alleged barriers on the websites, and (5) in the alternative, the primary jurisdiction doctrine applied

to Robles' claims and the case should be dismissed or stayed pending consideration by the DOJ in the first instance. (ER 019-043).

On March 20, 2017, the Court granted the alternative motion filed by Domino's, finding that Robles' attempt to impose technical standards on covered entities, absent their formal adoption by the DOJ and without meaningful guidance from the DOJ on this topic, "flies in the face of due process." (ER 008). In doing so, the District Court found that "regulations and technical assistance are necessary for the Court to determine what obligations a regulated individual or institution must abide by in order to comply with Title III." (ER 011). The District Court further found that "the issue of web accessibility obligations require[s] both expertise and uniformity in administration[.]" (ER 011-012). As a result, the District Court dismissed, without prejudice, Robles' claims and called on "Congress, the Attorney General, and the DOJ to take action to set minimum accessibility standards for websites for the benefit of the disabled community, those subject to Title III, and the judiciary." (ER 012).

Robles has appealed.

## IV. STANDARD OF REVIEW

This Court has stated, without analysis, that "we review the district court's ultimate decision to exercise or decline to exercise jurisdiction for abuse of discretion, but conduct de novo review of the court's application of the primary

jurisdiction doctrine." *Reid v. Johnson & Johnson*, 780 F.3d 952, 958 (9th Cir. 2015); *N. Cnty. Commc'ns Corp. v. Cal. Catalog & Tech.*, 594 F.3d 1149, 1154 (9th Cir. 2010).

However, this Court has also explicitly held that the decision to refer an issue to the appropriate agency "is a matter for the court's discretion" involving the application of several prudential factors discussed below. *Syntek Semiconductor Co., Ltd. v. Microchip Tech. Inc.*, 307 F.3d 775, 781 (9th Cir. 2002); *see also U.S. v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956) ("No fixed formula exists for applying the doctrine of primary jurisdiction. In every case, the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation."). In at least one opinion, this Court has understood *Syntek* to mean that it reviews "a district court's denial of a request to refer a case to an agency under the primary jurisdiction doctrine for abuse of discretion." *GCB Commc'ns. Inc. v. U.S. South Commc'ns, Inc.*, 650 F.3d 1257, 1262 (9th Cir. 2011).

It is manifest that when a district court is empowered to make a discretionary decision, the court of appeals should review that choice under the more deferential abuse of discretion standard. *E.g. Barapind v. Reno*, 225 F.3d 1100, 1109 (9th Cir. 2000) (district court's decision to dismiss under federal comity doctrine reviewed for abuse of discretion); *U.S. v. Saenz*, 179 F.3d 686, 689 (9th Cir. 1999) (the

standard for review of discretionary evidentiary rulings is abuse of discretion). The language of *Syntek* and the inherently discretionary nature of the application of the doctrine warrants application of the abuse of discretion standard.

Several other circuits review primary jurisdiction determinations under the abuse of discretion standard. *See Nat'l Tel. Co-op. Ass'n v. Exxon Mobil Corp.*, 244 F.3d 153, 156 (D.C. Cir. 2001); *Envtl. Tech. Council v. Sierra Club*, 98 F.3d 774, 789 (4th Cir. 1996); *Brumark Corp. v. Samson Resources Corp.*, 57 F.3d 941, 947-48 (10th Cir. 1995); *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1162 (3d. Cir. 1993).

Therefore, this Court should apply the abuse of discretion standard of review to the District Court's discretionary determination that application of the primary jurisdiction doctrine was proper. Of course, even under a *de novo* standard of review, the District's Court's determination should be upheld.

## V. SUMMARY OF ARGUMENT

The question presented in this case fundamentally impacts thousands of public facing businesses that operate a commercial website. If reversed, all covered entities would be required to immediately ensure that their website is "accessible" to persons with disabilities – without any official guidance of what that means.

To be clear, Domino's supports the goal of making its website accessible to everyone and has made efforts to program its website to be compatible with screen reader software. As business, Domino's gains nothing by denying some of their potential customers the ability to access its services.

However, the fundamental problem is that the DOJ, the agency specifically tasked by Congress with developing regulations and guidance for businesses in how to comply with the ADA, has issued conflicting statements regarding what may be required and has not issued formal regulations. As result, as the District Court recognized, businesses are in the untenable situation of having to *guess* what the law requires to website accessibility. Businesses across the country are being subjected to multiple lawsuits in varying jurisdictions concerning their alleged "non-compliance" with non-statutory accessibility "standards" – such as WCAG 2.0 or the Apple Standards.

This Court has repeatedly and consistently recognized that comprehensive regulatory schemes, such as the one prescribed by the ADA, are better suited for resolution in the first instance by a federal agency. Simply put, only a federal agency can gather input from multiple industry groups, the disability community, software engineers, and accessibility experts to develop a comprehensive regulatory scheme that appropriately balances technical feasibility and the needs of the disabled.

Leaving these broadly applicable policy decisions to be decided on a case-by-case basis by the judiciary is uniquely inappropriate. The District Court below recognized the due process issues and uniformity concerns inherent in letting this be sorted out in the judicial system. As a result, it properly invoked the primary jurisdiction doctrine to allow the DOJ, if it so chooses, to develop regulations in the first instance.

The concerns aptly recognized by the District Court are already being realized in the decisions relied upon by Robles. Already, inconsistent standards are emerging that impose shifting and unpredictable obligations on businesses. As result, it is impossible for businesses to know what actions they must take to ensure their websites meet their obligations – if any – under Title III of the ADA. Many businesses have tried in good faith to modify their websites, but the lack of definitive regulations means that there is no "safe haven" for compliance and no yardstick to prove that their website is accessible. As a result, this becomes a question for each individual district court – particularly given the varied nature of the websites of covered entities.

Such uncertainty violates basic principles of administrative law and contravenes fundamental principles of due process. Accordingly, Domino's respectfully urges this Court to affirm the district court's decision below that currently imposing liability for Domino's alleged failure to abide by certain

accessibility standards violates due process and dismissing the case, without prejudice, pending the DOJ's development of regulations for website accessibility.

## VI. ARGUMENT

### A. Robles Failed To Respond To The Due Process Concerns Raised By Domino's In His Opposition Brief In The District Court; Therefore, He Has Waived These Issues On Appeal.

In the District Court below, Domino's argued that the lack of standards violated its right to due process because it had not had fair notice of what it was required to do under the ADA to make its website accessible to blind and visually impaired individuals. In addition, Domino's argued that imposing WCAG 2.0 violated its right to due process because they had not been adopted as official regulations or standards.

Robles entirely failed to substantively respond to these concerns in his opposing papers and conceded the issue in the District Court. As explained by the District Court below: "The phrase 'due process' does not appear once in Plaintiff's Opposition, and Plaintiff's sole citation to *AMC* is couched in a footnote for an inapposite point of law. Whether inadvertent or purposeful, this omission is telling, and the Court is independently authorized to grant summary judgment on this conceded issue." (ER 007).

As a result, Robles has waived this "conceded issue" on appeal. *See In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 992 (9th Cir. 2010) ("We

apply a general rule against entertaining arguments on appeal that were not presented or developed before the district court."); *USA Petroleum Co. v. Atlantic Richfield Co.*, 13 F.3d 1276, 1283-84 (9th Cir. 1994)(collecting cases); *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 546 n.15 (9th Cir. 1991) ("It is well established that an appellate court will not reverse a district court on the basis of a theory that was not raised below.").

Therefore, this Court should exercise its discretion and decline to consider Robles' new arguments and theories raised for the first time on appeal because he conceded them in the District Court. Domino's responds substantively to Robles' arguments below.

**B. Website Accessibility Under the ADA.**

1. Statutory Framework.

Title III of the ADA provides: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a) (emphasis added). Title III defines the term "public accommodation" by listing twelve specific categories of private businesses that are covered. 42 U.S.C. § 12181(7). The implementing regulations issued by the DOJ combine these provisions and define the term

"public accommodation" to mean "a private entity that owns, leases (or leases to), or operates a place of public accommodation," and then, in turn define "place of public accommodation" to mean "a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the" categories specifically listed in § 12181(7). 28 C.F.R. § 36.104.

In other words, to constitute a "place of public accommodation" under Title III and its implementing regulations, it must be (1) a facility that (2) falls within at least one of the twelve specifically enumerated categories. 42 U.S.C. § 12181(7); 28 C.F.R. § 36.104; *see Jankey v. Twentieth Century Fox Film Corp.*, 14 F. Supp. 2d 1174, 1178 (C.D. Cal. 1998) (location that does not meet statutory definition not covered by Title III).

This Court has interpreted the term "place of public accommodation" to require "some connection between the good or service complained of and an actual physical place." *Earll v. eBay, Inc.*, 599 F. App'x. 695, 696 (9th Cir. Apr. 1, 2015); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000). However, it has not directly addressed how websites can or should be regulated under the ADA.

Title III also requires that new construction completed after January 26, 1993, and alterations to existing facilities after January 26, 1992, be designed and constructed such that they are "readily accessible to and usable by individuals with

disabilities." 42 U.S.C. § 12183(a); *see also, e.g., Gaylor v. Greenbriar of Dahlonega Shopping Ctr., Inc.*, 975 F. Supp. 2d 1374, 1391 (N.D. Ga. 2013) (explaining new construction and alteration requirements of Title III); *MacClymonds v. IMI Invs. Inc.*, 2007 WL 1306803, at *3 (S.D. Tex. Apr. 5, 2007) (same). Designing and constructing a facility in compliance with this section is understood to mean compliance with the Standards for Accessible Design, which consist of subpart D of DOJ's Title III regulations (located at 28 C.F.R. pt. 36) and the ADAAG (located at 36 C.F.R. pt. 1191, Apps. B & D), which is issued by the Architectural and Transportation Barriers Compliance Board (the "Access Board"). 28 C.F.R. § 36.104; 28 C.F.R. § 36.406(a); *see also, e.g., Gaylor*, 975 F. Supp. 2d at 1391; *MacClymonds*, 2007 WL 1306803, at *3 (same).

Congress expressly delegated to the DOJ the responsibility for issuing regulations to enforce Title III and directed the Access Board to promulgate construction and design guidelines to implement these requirements. 42 U.S.C. § 12186(b); *U.S. v. Hoyts Cinemas Corp.*, 380 F.3d 558, 562 (1st Cir. 2004); *Lara v. Cinemark USA, Inc.*, 207 F.3d 783, 786 (5th Cir. 2000).

While Domino's does not dispute that the websites connect its customers to Domino's restaurants, the ADA was simply not drafted with the specific regulation of virtual spaces in mind. As explained by the Southern District of Florida: "Here, to fall within the scope of the ADA as presently drafted, a public accommodation

must be a physical, concrete structure. To expand the ADA to cover 'virtual spaces' would be to create new rights without well-defined standards." *Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312, 1318-19 (S.D. Fla. 2002) (declining to construe "a place of public accommodation" to include Southwest's Internet website).

Websites are not virtual versions of brick and mortar stores; they are a method of communicating with customers, like the direct mail solicitations and catalogues that retailers used for 50 years before Congress adopted the ADA. When the ADA was adopted there were tens of millions of mail order catalogues for brick and mortar stores sent to homes each year, yet Congress in adopting the ADA, and the DOJ in adopting its regulations, chose not to require braille versions or phone support for retail catalogues.

Therefore, rather than understanding websites as "places of public accommodations" that should be regulated based on a yet to be developed standard, they should be evaluated based upon the ADA's "effective communication" provisions. The regulations implementing Title III of the ADA "require places of public accommodations to 'furnish appropriate auxiliary aids and services. . .to ensure effective communication with individuals with disabilities.'" *Alexander v. Kujok*, 158 F. Supp. 3d 1012, 1020 (E.D. Cal. 2016); 28 C.F.R. § 26.303(c)(1). Under the regulation, the type of alternative service will

vary in accordance with the length and complexity of the communication involved. The DOJ's Title III Assistance Manual provides acceptable examples, such as a sales clerk exchanging written notes with an individual who is deaf or using an usher to escort a blind patron of a theater to their seat rather than providing a Brailled ticket. *See* §III-4.3200 (Illustrations).[3]

In this case, Domino's communicates with its visually impaired customers through a phone number. (ER 068-069). Domino's website and mobile website contain accessibility banners that direct users who access the website or mobile website with a statement that "If you are using a screen reader and are having problems using this website, please call 800-252-4031 for assistance." (ER 068, 071, 073). That number provides 24/7 support. (ER 068). If a blind individual calls that number, the person can provide assistance with the websites. (ER 068). Alternatively, a customer can call their local Domino's restaurant to order food, purchase goods, and/or ask questions. (ER 069).

2. The DOJ Has Not Promulgated Standards.

The DOJ is the agency tasked with promulgating regulations to provide concrete guidance for businesses on how they should provide access to the disabled community. *Bragdon v. Abbott*, 524 U.S. 624, 646 (1998). In 2010, the

[3] Available at https://www.ada.gov/taman3.html.

DOJ issued a Notice of Proposed Rulemaking ("NOPR") wherein it announced it was "considering revising the regulations implementing Title III of the ADA in order to establish requirements for making the goods, services, facilities, privileges, accommodations, or advantages offered by public accommodations via the Internet, specifically at sites on the [web], accessible to individuals with disabilities." 75 Fed. Reg. 43460-01, 2010 WL 2888003.

In that same NOPR, the DOJ expressly noted that "**a clear requirement that provides** the disability community consistent access to Web sites and covered entities **clear guidance on what is required under the ADA does not exist**." *Id*. at *43464 (emphasis added). In that announcement, the DOJ stated that it would entertain answers to numerous difficult-to-answer questions, including (1) whether the DOJ should adopt WCAG 2.0's AA success criteria, (2) whether the DOJ should adopt section 508 standards instead, (3) how the DOJ should address the ongoing changes to the WCAG, and (4) how the DOJ should address the ever-changing nature of websites, including whether performance standards should be used and not specific technical standards. 75 Fed. Reg. at *43465. Answers to these questions have been left unresolved.

In that same NOPR, the DOJ also stated that: "The Department has taken the position that covered entities with inaccessible websites 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." *Id*. at *43466.

3. WCAG 2.0 Is Unworkable As A Regulatory Standard.

In the District Court below, Robles exclusively premised his case upon Domino's alleged failure to comply with WCAG 2.0 when it designed its website and the Apple Standards when it designed its mobile website.

These guidelines were never intended to be "regulations" and no public review or rulemaking procedure was undertaken for the WCAG. The consortium that publishes the WCAG is free to amend or change this guidance at any time, and has in fact, done so several times – and plans to issue version 2.1 in 2018. *See* https://www.w3.org/TR/WCAG21/. The WCAG standards were never intended as law and are intentionally and inherently vague. To see this the Court need only look at the WCAG 2.0 guidelines, for example: "3.1.6 **Pronunciation:** A mechanism is available for identifying specific pronunciation of words where meaning of the words, in context, is ambiguous without knowing the pronunciation." and 1.3.2 **Meaningful Sequence:** "When the sequence in which content is presented affects its meaning, a correct reading sequence can be programmatically determined." *See* https://www.w3.org/TR/UNDERSTANDING-WCAG20. The DOJ has never stated that the ADA requires that private businesses that operate a website for the public to use must comply with these

standards. There is even less support for treating the Apple Standards, developed by a private company, as legally enforceable regulations. (ER 011).

This vagueness is demonstrated by screen shots from different online web accessibility tools that "test" a website for compliance with WCAG 2.0. The lack of official standards leads to inconsistent automatic testing which creates false positives and determines different items to be "violations" – even if the website remains functional for a screen reader user. For instance, screenshots of the DOJ homepage using the Web Accessibility Evaluation ("WAVE") tool show 10 "errors," 19 "alerts," and 7 "contrast errors" (among other things).[4] (ER 075-076, 138-139). By contrast, a screenshot of the same website through the Google Chrome accessibility tool shows 28 "severe" errors and "20 "warnings." (ER 075-076, 141). As another example, Robles' counsel's website (which presumably has been offline now for months because of this precise issue) showed 3 "errors" and 2 "alerts" through the WAVE tool – even though it has very little text. (ER 075-076, 143-144). For comparison's sake, Google's accessibility audit shows 4 "warnings." (ER 075-076, 146).

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[4] WAVE is available at https://wave.webaim.org and is developed by an organization called WebAIM and purports to check for compliance issues. Despite the deceptive simplicity of the WAVE test, the site itself explains that "red" errors do not always mean a website is inaccessible and the absence of "errors" does not mean that a website is accessible. *See* https://wave.webaim.org/help.

This absence of regulations has, unfortunately, led to litigation abuse even where defendants have voluntarily agreed to make their websites more accessible. As an example, on June 3, 2016, Party City Corporation was sued in the U.S. District Court for the Southern District of Florida on the grounds that its website was inaccessible. (ER 110). On October 10, 2016, the action was dismissed with prejudice pursuant to a settlement agreement between the parties. (ER 110). In the settlement agreement, Party City agreed to pay certain attorneys' fees and costs and agreed to "injunctive relief" to make its website more accessible. (ER 122-123) On November 8, 2016, almost immediately after that lawsuit was dismissed, another Party City entity was sued on nearly identical grounds in the U.S. District Court for the Western District of Pennsylvania. (ER 125).

In the absence of clear and testable standards, covered entities are subject to the prospect of endless serial litigation over their websites.[5]

### C. Robles' Purported Abandonment of WCAG 2.0 On Appeal Highlights the Due Process Concerns Recognized By The District Court.

#### 1. The Lack of Standards Results In A "Subjective" Test That Creates A Moving Target For Covered Entities.

[5] Domino's has been sued three times for the alleged inaccessibility of its website. *See also Del-Orden v. Domino's Pizza LLC*, United States District Court for the Southern District of New York, Case No. 1:16-cv-03281-RA; *Haynes v. Domino's Pizza LLC*, United States District Court for the Southern District of Florida, Case No. 0:17-cv-61002-JEM.

The crux of the issue in Robles' appeal is demonstrated by his claimed abandonment of his position that Domino's website violates the ADA because it fails to "comply" with WCAG 2.0. In the District Court, Robles submitted an opposition to Plaintiff's motion for summary judgment, including a declaration from his expert, that laid out his theory that Domino's website was inaccessible because it allegedly fell short in complying with WCAG 2.0 AA Guidelines. (ER 155-56). Plaintiff's complaint also alleged that the Domino's mobile application was inaccessible because it did not comply with the Apple Standards. (ER 417-418). The District Court properly understood these allegations, combined with its reasoning in its opposition and the expert declaration it submitted on its behalf, that Robles was asking the Court to use WCAG 2.0 and the Apple Standards as a measuring point to determine compliance under the ADA. Now, Robles asks this Court to pretend that all he was asking for is "full and equal access" under the ADA.

This illustrates the fundamental questions underlying this lawsuit. What constitutes a minimally accessible website under the ADA and who should make that determination in the first instance? The District Court below properly recognized, as this Court has on many occasions, that these kind of comprehensive regulatory questions should be answered in the first instance by the administrative agency tasked by Congress given the multitude of policy questions this presents

and proven need for uniformity in administration. The District Court further recognized that the lawsuit violated fundamental principles of due process because the absence of standards meant that covered entities spending hundreds of thousands of dollars (if not more) to create, design, and maintain websites had no direction on what accessibility features should be included.[6]

Without established guidelines, there is no minimum standard for accessibility that Domino's can instruct its software engineers to follow when building, designing, and maintaining its website. As a result, there is simply no official yardstick for courts to use in evaluating whether a website is sufficiently accessible to the visually impaired. The District Court properly recognized that it violated due process principles for it to adopt wholesale, non-binding guidelines promulgated by non-governmental entity that were not intended to be formal regulations.

2. This Court Requires Application Of An "Objective" Standard When Administering A Comprehensive Regulatory Scheme,

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[6] The absence of official guidance has led to covered entities taking multiple approaches to accessibility. For instance, some covered entities have designed separate "accessible" websites, some have contracted with a third party services, some build to a technical standard, some build to a performance standard, and some provide accessible alternatives, like phone service. The absence of standards means that a plaintiff can always allege that this is not "good enough." Covered then entities face the prospect of an expensive trial, without clear guidance on what is required, or are forced settle. Indeed, many covered entities, including Domino's, have already been sued multiple times in varying jurisdictions.

Such As The ADA's Design And Construct Requirements; Only The DOJ Can Announce Broadly Applicable Standards.

Robles' new position, that all he is seeking is full and equal access, begs the question of what constitutes a minimally accessible website under the ADA? The answer could be anything. In the architectural barrier context, the question of what constitutes an accessible facility is answered by the Americans with Disabilities Act Accessibility Guidelines ("ADAAG"). This Court has praised the ADAAG standards for being "as precise as they are is thorough." *Chapman v. Pier 1 Imports (U.S.), Inc.*, 631 F.3d 939, 945-46 (9th Cir. 2011).

The ADAAG answers the question for covered entities on how they must design their stores, restaurants, banks, hotels, supermarkets, recreational facilities, or other place of public accommodation. In doing so, the ADAAG sets a national standard that architects, engineers, and government officials can look to in designing their physical structures. *Chapman*, 631 F.3d at 945 ("Promulgated by the Attorney General to 'carry out the provisions' of the ADA, 42 U.S.C. § 12186(b), these guidelines lay out the technical structural requirements of places of public accommodation" and "provides the objective contours of the standard that architectural features must not impede disabled individuals' full and equal enjoyment of accommodations."); *Long v. Coast Resorts, Inc.*, 267 F.3d 918, 923 (9th Cir. 2001); *see also Indep. Living Res. v. Or. Arena Corp.*, 982 F. Supp. 698, 714 (D. Or. 1997) ("The regulations establish a national standard for minimum

levels of accessibility in all new facilities."). This Court has recognized that a federal agency is the appropriate forum setting accessibility standards – and not the courts. As it recently explained, if it left application of broadly applicable access concerns to a case-by-case determination:

> "[E]xposition of this general standard would no longer come from experts at the DOJ and the Access Board, but from the courts. In many areas of law, this is a permissible arrangement. Giving content to general standards is foundational to the judicial function. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803). But when the content involves many precise dimensions such as inches of knee clearance underneath a sink, *see* ADAAG § 4.24.3, courts do not have the institutional competence to put together a coherent body of regulation. By contrast, a federal administrative agency can hire personnel with the specific skills needed to devise and implement the regulatory scheme. And as for the regulated entities, an architect putting thousands of measurements into his or her blueprint needs a holistic collection of design rules, not the incremental product of courts deciding cases and controversies one at a time."

*Kirola v. Cty. and Cnty. of San Francisco*, 860 F.3d 1164, 1180-81 (9th Cir. 2017); *see also George v. Bay Area Rapid Transit*, 577 F.3d 1005, 1012-13 (9th Cir.

2009) ("The courts are ill-equipped to evaluate such claims and make what amounts to engineering, architectural, and policy determinations as to whether a particular design feature is feasible and desirable."); *see also Marsh v. Edwards Theatres Circuit, Inc.*, 64 Cal. App. 3d 881, 888 (1975) ("The varied and distinctive nature of the numerous handicaps from which so many people suffer suggests, however, that the problem is one which the legislative branch of government is uniquely equipped to solve. It is in the legislative halls where the numerous factors involved can be weighed and where the needs can properly be balanced against the economic burdens which of necessity will have to be borne by the private sector of the economy in providing a proper and equitable solution to the problem.").

Were it otherwise, litigants could embroil the judicial system into endless policy debates about what constituted a sufficiently accessible facility. For instance, while all may agree that ramps should be provided where necessary to accommodate persons in wheelchairs, there are policy and technical questions embedded in this deceptively simple question. For instance, how sloped is a ramp permitted to be? How wide? Are level landings necessary to allow for rest breaks in long ramps? How long may a ramp be? Do handrails need to be provided? If so, how high and in what instance? Is a single ramp sufficient, or should there be two? Are ramps required at each entrance? There is no limit to these questions

and, if left to judicial determination on a case-by-case basis, would inevitably lead to a patchwork of inconsistent decisions leaving businesses and the disabled community in an endless state of uncertainty.

These precise policy concerns are similarly present in the website arena. Questions about what would constitute an "accessible" website are similarly unlimited: Do certain color combinations violate the ADA because they confound the color blind? Are certain layouts inaccessible because they are confusing to persons with low vision? Must all portions of a website be accessible? Do images require alternative text and, if so, which ones? How detailed must the alternative text be? What about background images? How must public accommodations accommodate blind and visually impaired individuals who cannot use screen reading software? Will website hosts be responsible for third party content? Do technical bugs constitute a violation? Is there an obligation to update archived content to be accessible? What about automatic timeouts? What about online games and/or three dimensional models? Should a performance standard be used or a technical standard? And equally as important, how can an entity readily demonstrate compliance?

Allowing judicial determination of these questions on a case-by-case basis would create an almost impossible task for a covered entity attempting to maintain a website (particularly a global website) that complies with the accessibility

requirements fashioned by a morass of potentially incongruous court decisions. The District Court below properly understood that all of these questions are better left for the DOJ to resolve in the first instance. Once that guidance is provided, courts will then be left with standards and rules it can refer to in order to test a website's compliance. However, until that time comes, there are significant due process concerns with allowing claims such this one to proceed.

3. Courts Regularly Dismiss ADA Lawsuits When There Are No Official Design Standards.

One of the bedrock principles of disability access litigation is that, where a plaintiff contends that a covered entity has failed to "design and construct" a facility in violation of the ADA or other applicable standard, a party must establish the existence of a standard, its applicability, and a violation. Courts repeatedly and consistently dismiss claims where a plaintiff cannot make this showing.

In *White v. Divine Investments, Inc.*, the Ninth Circuit addressed a claim by a plaintiff that she "may maintain a discrimination claim under Title III of the ADA for a violation of her 'full and equal enjoyment' of River Mart, irrespective of the ADAAG." 286 F. App'x. 344, 346 (9th Cir. 2007). Plaintiff argued that the ADA contained an independent cause of action that turned on "whether she subjectively enjoyed her visit" to the store. The Ninth Circuit disagreed. It reasoned:

> "No court has ever held that a Title III discrimination action based on the design of a public accommodation may be maintained in the

> absence of an ADAAG violation, nor does the text of the statute support such a reading. In Title III design cases, the ADAAG defines the discrimination, and absent an ADAAG violation, no discrimination has occurred."

*Id*. at 346. Case law is uniform in requiring a plaintiff to establish a design standard that the defendant has failed to meet in order to succeed on such a claim. *See, e.g., Wilson v. Pier 1 Imports (US), Inc.*, 439 F. Supp. 2d 1054, 1066 (E.D. Cal. 2006) (holding that "the ADAAG constitutes the exclusive standards under Title III of the ADA"); *Norkunas v. Seahorse NB, LLC*, 444 F. App'x. 412, 416 (11th Cir. 2011) ("[I]t is not necessary for Seahorse to bring the dune walkover into compliance with the ADA, for regulations governing beach walkways do not exist."); *Resnick v. Magical Cruise Co.*, 148 F. Supp. 2d 1298, 1305 (M.D. Fla. 2001) (granting defendant's motion for summary judgment because there was "no basis under the current ADA scheme for a plaintiff to bring a claim that a cruise ship has failed to adhere to guidelines which have been declared inapplicable to cruise ships by the departments charged with promulgation of such guidelines;" as a result, "builders, owners, and proprietors of cruise ships have not been afforded notice of the standards with which they are required to comply, and absent such standards may not be subjected to abstract suits"); *Marsh*, 64 Cal. App. 3d at 888-89 (no cause of action under Unruh Act unless alleged barrier to access also

violates a structural access standard); *Coronado v. Cobblestone Village Community Rentals*, 163 Cal. App. 4th 831, 841, 844 (2008), *overruled on other grounds by Munson v. Del Taco, Inc.*, 46 Cal. 4th 661 (2009) (cause of action for disability access based on existence of structural barrier dependent on whether violation constituted a violation of access standard).

Indeed, even when a specific access standard does exist, courts still require plaintiffs to show that the access standard actually applies to the subject property. *See, e.g. Blackwell v. Cty. and Cnty. of San Francisco*, 506 F. App'x. 585, 587 (9th Cir. 2013) ("The metal elevator cover, which was installed sometime before the late 1970's, predates the adoption in 1981 of new regulations concerning requirements for handicapped accessibility…For that reason, it is not required to comply with the accessibility standards in that title.").

Robles cannot show that Domino's violated any standard or regulation – and therefore the District Court properly recognized he could not maintain his claim until the DOJ announced a design standard that the websites could be measured against.

### D. The District Court Recognized That DOJ Guidance Is Necessary and Properly Applied The Primary Jurisdiction Doctrine.

Robles contends that the District Court mistakenly applied the doctrine of primary jurisdiction because he only "asked the Court to make exactly the same sort of accessibility determinations that courts regularly make when evaluating the

accessibility of physical locations." (AOB at 20, 28). The glaring flaw in this argument, and that of the authority he relies upon, is that it is an incorrect statement of the current state of the law.

As explained above, when a court evaluates the accessibility of physical locations, the court is guided by the objective standards found in the ADAAG. For instance, if a disabled plaintiff asserts that a countertop is inaccessible to him, the court simply reviews the applicable ADA standard and, if the countertop meets those standards, declines to find liability and, if it does not, will order injunctive relief to meet it. From time to time, the court may be asked to interpret the precise language of a regulation or make a factual determination about whether a given fix of particular feature is readily achievable. However, the court and litigants are largely guided by the significant technical and regulatory assistance provided by the DOJ and the Access Board.

In the website context, by contrast, there are no official standards and no official guidance. As a result, there are no regulations for the court to interpret and no advance technical guidelines that places of public accommodation can follow. Therefore, assuming Robles may maintain his claim, the first thing a court must do is determine what constitutes a minimum level of accessibility to satisfy the ADA. In essence, the court would be undertaking a policy-making analysis about what is technically feasible given the current level of technology and desirable when

balancing the needs of the disabled community along with a proper understanding of cost and business realities. Of course, this is precisely the type of analysis this Court has announced that the judiciary is uniquely unsuited to make. *Kirola*, 860 F.3d at 1180-81.

In such situations, application of the primary jurisdiction doctrine is entirely appropriate and well within the discretion of the District Court. "The primary jurisdiction doctrine allows courts to stay proceedings or dismiss a complaint without prejudice pending the resolution of an issue within the special competence of an administrative agency." *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008) (affirming dismissal of case referring issue of "slamming" – a novel and technical question of federal telecommunications policy – to Federal Communications Commission for consideration in the first instance). "The doctrine is a 'prudential' one, under which a court determines that an otherwise cognizable claim implicates technical and policy questions that should be addressed in the first instance by the agency with regulatory authority over the relevant industry rather than by the judicial branch." *Id*; *see also Rilling v. Burlington N. R. Co.*, 909 F.2d 399, 401 (9th Cir. 1990) ("Primary jurisdiction is a doctrine of common law, wholly court-made, that is designed to guide a court in determining whether and when it should refrain from or postpone the exercise of its own jurisdiction so that an agency may first answer some question presented.").

Primary jurisdiction is appropriately used when a claim "requires regulation of an issue of first impression, or of a particularly complicated issue that Congress has committed to a regulatory agency" and "if protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme." *Clark*, 523 F.3d at 1114 citing *Brown v. MCI WorldCom Network Servs.*, 277 F.3d 1166 (9th Cir. 2002); *see also Syntek*, 307 F.3d at 782 (referral to Copyright Office to determine extent of available remedy where no detailed rules by office had been created for copyright cancellation); *MCI Comm. Corp. v. American Tel. & Tel. Co.*, 496 F.2d 214, 222 (3d Cir. 1974) (granting stay because deferral to the agency under primary jurisdiction doctrine because determining the issues involved "the comparative evaluation of complex technical, economic, and policy factors, as well as consideration of the public interest" that should be made by the agency); *Ferrare v. IDT Energy, Inc.*, 2015 WL 3622883, at *3-4 (E.D. Pa. Jun. 10, 2015) (granting stay under primary jurisdiction doctrine because the agency promulgated the controlling regulations and had the relevant technical expertise, and the issues pending before the agency overlapped with the claims in the lawsuit).

While there is no fixed formula for applying the doctrine, the Ninth Circuit traditionally applies the doctrine when four factors are met: "(1) [a] need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an

administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration." *Clark*, 523 F.3d at 1115.

Robles argues that the District Court erred in applying the doctrine because, he contends, that to decide liability the Court would not need to master complicated web standards. However, this begs the question: what standard does Domino's website have to fail to meet in order to be judged inaccessible under the ADA? At the District Court level, Robles suggested the Court apply WCAG 2.0 and the Apple Standards. However, on appeal, Robles does not even pretend to suggest a uniform, objective measure. Therefore, it is not clear to anyone what would constitute a website that would violate the ADA. This is a problem.

In the facilities context, this Court and others have repeatedly emphasized the importance of objective standards to decide liability in design cases under the ADA. Indeed, Congress specifically charged the DOJ with the task of promulgating regulations clarifying how public accommodations must meet its statutory obligations of providing access to the public. *U.S. v. AMC Enter., Inc.*, 549 F.3d 760, 763 (9th Cir. 2008); *Hoyts*, 380 F.3d at 562; *Lara*, 207 F.3d at 786; 42 U.S.C. § 12186(b). This Court has refused to find that a discrimination action based on an individual plaintiff's subjective enjoyment is permitted. *White*, 286 F. App'x. at 346.

To impose a design requirement not specifically announced in official standards, "would require district courts to interpret the ADA based upon the subjective and undoubtedly diverse preferences of disabled [patrons]." *Lara*, 207 F.3d at 789. Application of subjective standards requiring businesses to redesign, modify, or rebuild their websites based upon the varying needs of specific individuals would only lead to a chaotic environment with no guarantee that access would be improved for all individuals. *See Indep. Living Res.*, 982 F. Supp. at 746 ("The interpretation of the ADA proposed by DOJ and plaintiffs is very problematic. It would allow any person to file an action contending that, in the opinion of this particular plaintiff, a design feature ought to have been included in . . . some new structure. . .The courts often would have no way of knowing whether the Access Board had considered enacting such a requirement, but decided against it. It would also be difficult for anyone to design a new arena or other structure if the design requirements are subject to being changed retroactively.").

This would discourage businesses from making their websites accessible before a lawsuit was filed because compliance would always remain elusive. *E.g. Colorado Cross Disability Coalition v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1220-21 (10th Cir. 2014) (ADA "claim must be evaluated through the lens of the Design Standards; were it otherwise, an entity's decision to follow the standards and build an 'accessible' facility would have little meaning" and finding district

court erred by imposing liability based on "overarching aims" of the ADA.); *see also U.S. v. Nat'l Amusements, Inc.*, 180 F. Supp. 2d 251, 258 (D. Mass. 2001) (to hold compliance with standards not sufficient under ADA "would render compliance with these regulations meaningless, because a fully compliant structure would always be subject to a claim.").[7] Courts have been reluctant to expand the ADA to cover websites because it would "create new rights without well-defined standards." *Southwest Airlines*, 227 F. Supp. 2d at 1318-19 (declining to construe "a place of public accommodation" to include Southwest's Internet website).

Without any analysis, Robles asserts that website access does not require sophisticated expertise. However, as the District Court below correctly observed, that process is belied by the numerous policy questions posed by the DOJ over seven years ago and for which it was unable to come up with a satisfactory answer. (ER 011).

Robles does not dispute that the DOJ is the agency tasked with promulgating regulations to provide concrete guidance for businesses on how they should

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[7] Domino's further notes that Robles has also alleged a violation of California's Unruh Act, premised upon his alleged violation of the ADA, whereby he seeks damages. If this matter were to proceed to trial, the Court would have to instruct the jury on what constituted an accessible website and the jury, not the Court, would be making a finding on whether Domino's website met that standard. Left unexplained is what instruction Robles would have the District Court provide. In the absence of standards, the District Court would have to make that determination before the jury could find liability.

provide access to the disabled community. *Bragdon*, 524 U.S. at 646. Robles further concedes that the DOJ has failed to comply with this mandate for websites.

The District Court below correctly applied the primary jurisdiction doctrine because it understood that uniform application of clear and consistent standards, which would only be possible through agency regulation, is consistent with the policy of the ADA. Congress expressly stated that one of the purposes of the ADA was to "provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(2).

This is further demonstrated by the fact Title III applies equally to all places of public accommodation – from large global pizza chains like Domino's to neighborhood pizza parlors. It is of absolute critical importance that official guidance be provided so that businesses know what is required of them *before* they construct and design their websites.

### E. Due Process Demands That The Law Give Fair Notice Of Conduct That Is Required.

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) ("[R]egulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way."). "Due process requires that the government

provide citizens and other actors with sufficient notice as to what behavior complies with the law. Liberty depends on no less." *AMC*, 549 F.3d at 768; *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."); *Forbes v. Napolitano*, 236 F.3d 1009, 1011 (9th Cir. 2000) ("The due process clause . . . guarantees individuals the right to fair notice of whether their conduct is prohibited by law."); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) ("agencies should provide regulated parties fair warning of the conduct a regulation prohibits or requires.").

This Court's decision in *AMC* is instructive. 549 F.3d at 768. In *AMC*, the Court was confronted with the question of whether the ADA required theater owners to retroactively incorporate a comparable viewing angle requirement in movies theaters. At issue was the interpretation of a regulation that required "lines of sight comparable to those for members of the general public." That regulation was unclear whether "lines of sight" simply referenced an unobstructed view of the screen or whether that similarly required comparable viewing angles. This issue was litigated in courts throughout the country. However, the first time that the DOJ announced its position on the issue was in an amicus brief in the District Court for the Western District of Texas in a matter entitled *Lara v. Cinemark USA, Inc.*, 1998 WL 1048497, at *2 (W.D. Tex. Aug. 21, 1998), *rev'd*, 207 F.3d 783

(5th Cir. 2000). Ultimately, this Court, in another opinion, announced that the regulation did require comparable viewing angles for disabled patrons (the Fifth Circuit in *Lara* disagreed). As the courts grappled with the issue, the DOJ brought a lawsuit against AMC arguing that AMC was required to retrofit several theaters, including those built before the DOJ announced its interpretation of the regulation in the *Lara* amicus brief. This Court reversed the District Court's injunction on due process grounds observing: "In other words, the capacity of in-house counsel or others to read correctly legislative tea leaves does not alleviate the government from its obligation to fashion coherent regulations that put citizens of 'ordinary intelligence' on notice as to what the law requires of them." *Id*. at 770; *see also Botosan v. Paul McNally Realty*, 216 F.3d 827, 836 (9th Cir. 2000) ("The ADA would be vague only if it is so indefinite in its terms that it fails to articulate comprehensible standards to which a person's conduct must conform.").

1. Courts Have Already Announced Inconsistent And Conflicting Obligations With Respect To Websites Of Covered Entities.

The contrary authority relied upon by Robles only serves to reinforce the uniformity concerns correctly identified by the District Court below. The absence

of website regulations has already resulted in conflicting directives and a lack of uniformity in remediation requirements.[8]

For instance, a district court in the Southern District of New York has held that a business' ongoing efforts to enhance its website, even in the absence of regulations, will not shield it from an ADA claim. *See Markett v. Five Guys Enterprises, LLC*, 2017 WL 5054568, *1-3 (S.D.N.Y. July 21, 2017). By contrast, two courts in the Southern District of Florida (both on appeal to the Eleventh Circuit) have held that private settlements to improve access to their website have "mooted" ADA claims. *See Haynes v. Brinker Int'l., Inc.*, 2017 WL 4347204, *2 (S.D. Fla. Sept. 29, 2017); *Haynes v. Hooters of Am., LLC*, 2017 WL 2579044, at *1 (S.D. Fla. June 14, 2017). A third district court in the Southern District of Florida (also currently before the Eleventh Circuit), issued an injunction ordering

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[8] This problem is only compounded by the current Circuit split on whether the ADA even covers websites. This Court, along with the Third, Fifth, and Sixth Circuits, have interpreted the term "place of public accommodation" (which limits the applicability of Title III), to require a nexus between the alleged discrimination and a physical, concrete place. *Earll*, 599 F. App'x. at 696; *Weyer*, 198 F.3d at 1114; *Magee v. Coca-Cola Refreshments USA, Inc.*, 833 F.3d 530, 534-35 (5th Cir. 2016); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 613-14 (3d Cir. 1998); *Parker v. Met. Life Ins. Co.*, 121 F.3d 1006, 1014 (6th Cir. 1997). In contrast, the First, Second, and Seventh Circuits have suggested that a place of public accommodation may not be limited to a physical, concrete place. *Carparts Distribution Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 18-20 (1st Cir. 1994); *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 31-33 (2d Cir. 1999); *Morgan v. Joint Admin. Bd., Ret. Plan of Pillsbury Co. & Am. Fed. Of Grain Millers, AFL-CIO-CLC*, 268 F.3d 456, 459 (7th Cir. 2001).

compliance with WCAG 2.0 Guidelines without specifying a level of success criteria or clear instructions on how that might be accomplished. *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340, 1350 (S.D. Fla. June 12, 2017).

Another district court in the Eastern District of New York indicated that it will determine what features a website must include by inviting experts (retained by the parties) to a "Science Day" to demonstrate web access technology to the court "to explore the technology available to enable the 'blind to see' websites [and] how burdensome it would be for the defendant to make its website compatible with available technology." *Andrews v. Blick Art Materials, LLC*, 2017 WL 3278898, *1, 17 (E.D.N.Y. Aug. 1, 2017).

In the District of New Hampshire, the court has announced that it will determine what standards would make a website accessible. *Access Now, Inc. v. Blue Apron, LLC*, 2017 WL 5186354, *9 (D.N.H. Nov. 8, 2017).

Courts in the Central District of California that have declined to follow the District Court below have already announced conflicting statements concerning what a public accommodation must do in order to make its website accessible. In *Reed v. CVS Pharmacy, Inc.*, 2017 WL 4457508, *4 (C.D. Cal. Oct. 3, 2017) (finding allegations that website was "not compatible with two of the most common screen reading software programs available" was sufficient to state a claim for a violation of the ADA.). Yet another court in the Central District has

stated 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 and facilities such as Hobby Lobby are free to decide how to comply with the ADA." *Gorecki v. Hobby Lobby Stores, Inc.*, 2017 WL 2957736, *6 (C.D. Cal. June 15, 2017). Left entirely unexamined is what would possibly constitute "compliance" with the ADA and how the plaintiff would show the defendant did not comply or how the defendant would show that it did. The absence of any specificity whatsoever is what makes this requirement impermissibly vague.

Even putting aside what standards apply, courts across the country are split concerning what portions of a website must be accessible. For instance, in *Gomez v. Bang & Olufsen Am., Inc.*, 2017 WL 1957182, *4 (S.D. Fla. Feb. 2, 2017), a court in the Southern District of Florida found that "the ADA does not require places of public accommodations to create full service websites for disabled persons. . . . All the ADA requires is that, if a retailer chooses to have a website, the website cannot impede a disabled person's full use and enjoyment of the brick-and-mortar store." *See also Kidwell v. Florida Comm'n on Human Relations*, 2017 WL 176897, *5 (M.D. Fla. Jan. 17, 2017) ("Plaintiff is unable to demonstrate that either Busch Gardens' or SeaWorld's online website prevents his access to a specific, physical, concrete space. . ."); *see also Nat'l Fed. of the Blind v. Target*

*Corp.*, 452 F. Supp. 2d 946, 956 (N.D. Cal. 2006) ("To the extent that Target.com offers information and services unconnected to Target stores, which do not affect the enjoyment of goods and services offered in Target stores, the plaintiffs fail to state a claim under Title III of the ADA.").

By contrast, other courts have suggested that the ADA mandates public accommodations with a website to make the entirety of all goods, benefits, and services provided through a website accessible. *E.g. Nat'l Fed. of the Blind v. Scribd, Inc.*, 97 F.Supp.3d 565, 575-76 (D. Vt. 2015); *Blue Apron, LLC*, 2017 WL 5186354 at *9. Indeed, when Congress heard testimony on whether the ADA applies to private websites, several lawyers, professors, and other educated commentators reached different conclusions about how far Title III extends. *See generally Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearing before the H. Subcomm. on the Constitution of the House Comm. on the Judiciary,* 106th Cong., 2d Sess. 65–010 (2000).

Faced with this confusing backdrop – which is only sure to expand as more claims are brought – covered entities face conflicting directives. The opinions do not rely on a single standard for website accessibility. Worse, the opinions discourage covered entities from implementing accessibility upgrades to their websites. Cases such as *Access Now*, *Hobby Lobby*, and *Blick Art* suggest that a covered entity might as well wait until it is sued so the court, based upon the

subjective preferences of a particular plaintiff or a group of retained experts, can determine what accessibility features their websites must contain. The rule in *Five Guys* suggests that ongoing remedial efforts cannot shield an entity from liability. Further, *Brinker* and *Hooters* suggest that a covered entity should settle with an individual plaintiff to avoid future suits – but leave unanswered the question if other disabled individuals have separate modification demands.

In the alternative, the *Winn-Dixie* opinion mandates that covered entities ensure that websites, including linked third-party websites, comply with WCAG 2.0, but provides no direction on how an entity can demonstrate compliance. As discussed above, different testing software creates different results and there can be endless disputes over what constitutes compliance for guidelines that were never intended to be regulations. In addition, the guidance from *Winn-Dixie* conflicts with other authority relied upon by Robles (including *Dave & Busters*, *Hobby Lobby*, and *CVS Pharmacy*) that suggest companies are not required to comply with WCAG 2.0. It also makes no attempt to address the significant due process concerns identified by the District Court below of wholesale adoption of third party guidelines as mandatory standards. As if to drive home the point, WCAG 2.0 is about to be superseded by WCAG 2.1, which includes 15 new Success Criteria. *See* WCAG 2.1, W3C Working Draft 7 December 2017, (last accessed December 14, 2017), https://www.w3.org/TR/WCAG21/.

As a result, businesses have not been afforded fair notice of what the ADA specifically requires to make a website accessible. In *Botosan*, this Court denied a due process challenge to the ADA *because* of the detailed and comprehensive regulations that had been issued. 216 F.3d at 836-37. The Court found that the ADA was not vague as to its requirements precisely because DOJ has printed a detailed handbook containing "numerous diagrams and specifications explaining the types of modifications and auxiliary aids (e.g., handrails, grab bars, ramps) that a building must install to be ADA compliant." *Id*. at 836-37. The Court found that, taking the ADA "together with administrative regulations and interpretations" the readily achievable requirement was "sufficiently specific to put the owner of a public accommodation on notice of what is required by Title III." *Id*. at 836; citing *U.S. v. Schneiderman*, 968 F.2d 1564, 1568 (2d Cir. 1992), *cert denied*, 507 U.S. 921 (1993) (explaining that administrative regulations and interpretations may provide sufficient clarification to save an otherwise vague statute).

By contrast here, there are no regulations – leaving covered entities in the dark and subject to repeated litigation over the same issue with no certainty.

This problem is made worse by the fact that global businesses are subject to different, evolving obligations dependent on what jurisdiction they are sued in. *E.g. Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997) (personal jurisdiction may exist in many different states where websites are interactive);

*Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997). Therefore, the District Court properly found that fundamental principles of due process barred Robles' claims and this question must be answered by the federal agency in the first instance.

2. Covered Entities Need A Specific Standard To Inform Their Software Engineers How To Design Their Websites To Be Accessible.

When Robles argues that covered entities had "fair notice" of their obligations under the ADA, he fundamentally misses the point the argument. As the District Court below acknowledged, the issue presented is that covered entities do not have fair notice of what *specifically* the ADA requires companies to do in order to make their websites accessible. Domino's wants individuals with visual disabilities to be able to access its goods and services online and has made efforts to program its website to be compatible with screen reader software. However, it does not know what would make its website sufficiently accessible because there are no regulations.

Fundamentally, as the DOJ has implicitly acknowledged through its advance notice of rulemaking, there are a variety of approaches companies could *potentially* take to provide access. In the absence of an official standard, the cost to design, redesign, maintain, and keep up with shifting guidance with unpredictable and conflicting authority is immense.

At a minimum, covered entities would need to evaluate their website through automated and manual software tests, cull through the results, and resolve elements on a case-by-case basis (making judgment calls on each element). If a website needs to be redesigned entirely, the process is not inexpensive as this can involve new code, new design templates, involvement of a creative team, and selecting and programming the new content. This might involve a new web platform or outside servers. In addition, commercial websites are complex, multi-layered and are constantly changing in a highly dynamic marketplace.

Therefore, just as Domino's needs a consistent set of referenceable standards when it designs its restaurants to ensure that its locations are accessible to persons with disabilities, Domino's needs consistent standards when it designs its website.

In opposition, Robles relies on statements from the DOJ, and other snippets from the legislative history, that purportedly show that covered entities should have known that their websites were covered by the ADA. However, a business reasonably could have understood the DOJ's public statements to mean that it could wait to make significant technical improvements until the rulemaking process was complete. Indeed, as discussed above, courts do not require compliance with draft regulations or businesses to comply with a higher accessibility standard than what is found in the ADAAG.

Specifically, in its 2010 NOPR, the DOJ asks the public (1) whether the DOJ should adopt WCAG 2.0's AA success criteria, (2) whether instead the DOJ should adopt section 508 standards (or some other standard entirely), (3) how the DOJ should address the ongoing changes to WCAG 2.0, and (4) how the DOJ should address the ever-changing nature of websites, including whether performance standards should be used and not specific technical standards. 75 Fed. Reg. 43460-01, 2010 WL 2888003. Moreover, in that same NOPR, the DOJ further acknowledged that once it promulgated a final rule, it needed to set an effective date for the application of any new regulations requiring websites covered by the ADA to be accessible. *Id*. at 43465. The DOJ's initial proposal was six months for new websites and two years for existing websites – recognizing that businesses would be entitled to a fair notice period before they would be held to that technical standard. *Id*.[9] In addition, the DOJ stated in its NOPR that, in the alternative to providing an "accessible" website, covered entities "may comply with the ADA's requirement for access by providing an accessible alternative, such as a staffed telephone line." *Id*. at 43466.

[9] For instance, when the ADA was first passed and design standards promulgated for physical structures, new construction subject to Title III had to comply with the new 1991 standards within eighteen months after the ADA standards were first published. *See* 28 CFR 36.401(a).

As a result, businesses, aided by counsel, could reasonably conclude that before spending money and resources on designing an accessible website (whatever that may be) they could wait, at a minimum, for the DOJ to issue standards. In the meantime, the DOJ endorsed allowing covered businesses to serve visually impaired customers through a staffed telephone line, which is exactly what Domino's offers. (ER 067-073).

3. The DOJ's Recent Statements Have Created Further Uncertainty For Covered Entities.

Moreover, Robles' position ignores the most recent statements by the DOJ concerning website accessibility. The DOJ's recent *amicus brief* in *Magee v. Coca-Cola Refreshments USA, Inc.* appears to conflict with its prior statements regarding website accessibility. (Request for Judicial Notice, Exh. A). In its July 2017 brief to the Supreme Court, the DOJ confirms that the phrase "places of public accommodation" is limited in its application. The brief reviews the twelve "places of public accommodation" identified in the statute and evaluates the catch-all category of "other sales or rental establishment[s]." 42 U.S.C. § 12181(7)(E). The DOJ concludes that the Fifth Circuit "correctly rejected the idea that vending machines could be covered as 'places of public accommodation' under the ADA. *Id*. In support of its conclusion, the DOJ cites to *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 496 (1945). (Exh. A at 14). In *Walling*, the Supreme Court construed the term "establishment" to mean a "distinct physical place of business," such as a

retail store or a wholesale warehouse. *Id*. ("Congress used the word 'establishment' as it is normally used in business and in government – as meaning a distinct physical place of business." (emphasis added); *see also Magee*, 833 F.3d at 534-35 (using principles of *noscitur a sociis* ("a word is known by the company it keeps") to interpret the term "place of public accommodation" to mean an actual, physical place).

In the same brief, the DOJ retreats from its earlier statements that the ADA applies to non-physical places stating: "Questions concerning Title III's application to nonphysical establishments—including websites or digital services—may someday warrant this Court's attention." (Exh. A at 29). Notably, the DOJ refuses to support or re-state or even cite to its prior commentary that the ADA applies to websites. (*Id*.).

At a minimum, citizens of ordinary intelligence are not "on notice" that the ADA requires all covered entities to provide a website that complies with WCAG 2.0 Level AA or some other, unspecified standard. *AMC*, 549 F.3d at 770 ("the capacity of in-house counsel or others to read correctly legislative tea leaves does not alleviate the government from its obligation to fashion coherent regulations that put citizens of 'ordinary intelligence' on notice as to what the law requires of them.")(emphasis added); *Botosan*, 216 F.3d at 836.

4. The DOJ Must Engage In A Formal Rulemaking; Because It Has Not Done So, This Court Does Not Need To Defer To Its Litigation Position.

Courts, including this one, have criticized the DOJ for attempting to regulate through litigation – rather than through the tough work of crafting regulations through the Administrative Procedure Act rulemaking process. As examples, in *Hoyts*, 380 F.3d at 569, the First Circuit explained that while "the [DOJ] is free to interpret reasonably an existing regulation without formally amending it; but where . . . the interpretation has the practical effect of altering the regulation, a formal amendment – almost certainly prospective and after notice and comment – is the proper course." *accord AMC*, 549 F.3d at 769 (sharing First Circuit's frustration that "the government could have solved the [interpretation] problem, without time- and cost consuming litigation, by merely clarifying . . . through amendment or some other public announcement"); *Lara*, 207 F.3d at 789 (holding that in the absence of more specific regulations, the Court would not side with the DOJ's "litigating position"); *see also Shalala v. Guernsey Mem'l. Hosp.*, 514 U.S. 87, 100 (1997) (explaining that APA rulemaking would be required if a new agency position effected substantive change in the regulations).

The DOJ's very act of giving notice of proposed standards for website accessibility, the first step in the APA process, acknowledges this process. The DOJ, however, has ignored the numerous comments that were submitted and has

not publicly responded to a single one. In doing so, the DOJ has denied the public an opportunity to engage in the rulemaking process and inappropriately attempted to force courts to perform *ad hoc* rulemaking in its stead. This Court should not allow the DOJ to escape its obligations to the public by endorsing a website by website, case by case determination of ADA liability in the judicial system.[10]

As this Court has observed, it is not bound by the DOJ's litigation position or draft regulations. *Arizona ex re. Goddard v. Harkins Amusement Enter., Inc.*, 603 F.3d 666, 674 (9th Cir. 2010) ("This court has declined to give deference to Access Board guidelines that have not yet been adopted by the DOJ. Moreover, we have refused to defer to a proposed regulation published by the DOJ itself. The DOJ's interpretation in a notice of proposed rulemaking is similarly unpersuasive.") (citations omitted).

To illustrate, in *Lonberg v. Sanborn Theaters, Inc.*, the Court disagreed with the DOJ, which had intervened on behalf of a private plaintiff who was attempting to hold the architect of a non-compliant building liable for a violation of the ADA. 259 F.3d 1029, 1034-36 (9th Cir. 2001). The DOJ intervened in the lawsuit and

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[10] The hundreds of form website accessibility lawsuits filed in the past year across the country by a handful of private plaintiffs illustrate the problem. This number does not include the numerous demand letters sent by plaintiffs' law firms. Imposing liability in the absence of official regulations only serves to unnecessarily strain businesses with a dubious benefit to the disabled community.

argued that the language of the ADA, permitting actions against owners and operators of public accommodations for "design and construct" discrimination, also applied to architects of such properties – essentially a design *or* construct interpretation of the statute. *Id*. at 1033-34. The Court disagreed. The Court reasoned that, given the general limitation of the remedy of injunctive relief, the architect who built the building was "out of the picture" by the time an eligible plaintiff would bring suit. *Id*. at 1036. As a result, this Court agreed with the defendant that the DOJ's interpretation was inconsistent with the text of the statute because it would create liability in persons against whom there is no meaningful remedy. *Id*.

Robles asks the Court to set aside all of these identifiable due process concerns because the question is one of "remedy" and not "liability." However, this skips the first critical question posed by Robles' lawsuit: What standard does a website have to meet to satisfy the ADA? This is a question of *liability* and not remedy. Moreover, it leaves unresolved the due process concerns inherent in awarding damages under California's Unruh Act.[11] What happens if a Court determines that an entity violated the ADA by failing to design an accessible website but determines that it would violate due process to require a business to

[11] The Unruh Act provides that a violation of the ADA forms the basis for a violation of the Unruh Act. Cal. Civ. Code § 51(f).

spend $500,000 to redesign its website to comply with WCAG 2.0? Assuming the plaintiff can prove the other elements of his claim, are statutory damages owed to the plaintiff? What if other plaintiffs bring suit on the same grounds?

The District Court below properly found that this is a policy question that should be answered by a federal agency in the first instance and not sorted out by the courts on a case by case, ad hoc basis.

5. The Application Of The Primary Jurisdiction Does Not Require Robles To Have An Agency Forum To Resolve His Dispute.

Robles finally complains that it would not be "efficient" to refer this issue to the federal agency. As discussed above, there have been hundreds of lawsuits filed just this year against businesses across the country – aided by the failure of the DOJ to act and create enforceable standards. This kind of shotgun litigation attacking the accessibility of hundreds of websites all at once and requiring each individual judge to determine what constitutes an "accessible" website is hardly efficient.

Further, application of the doctrine of primary jurisdiction does not require Robles to have an independent forum to resolve his dispute as this misunderstands the nature of the doctrine. The primary jurisdiction doctrine applies "to claims that are properly cognizable in court but contains some issue within the special competence of an administrative agency. It requires the court to enable a 'referral' to an administrative agency, staying further proceedings so as to give the parties a

reasonable opportunity to seek an administrative ruling." *Reiter v. Cooper*, 507 U.S. 258, 268-69 (1993) (explaining that it is a discretionary doctrine regarding the exercise of jurisdiction and distinguishing it from the doctrine of exhaustion of administrative remedies).

Robles may file a complaint directly with the DOJ and may participate in the rulemaking process. *E.g.* https://www.ada.gov/fact_on_complaint.htm. Robles has presented no evidence he has attempted to do this or that the DOJ has refused to respond to his concerns.

### F. The District Court's Observation Regarding The Telephone Service Was Entirely Proper.

Robles' final challenge to the District Court's ruling below is its observation, in dicta, that Robles failed to articulate why Domino's provision of a telephone hotline for the visually impaired does not satisfy the ADA. Robles fundamentally misunderstands the point of the District Court's observation and the argument presented by Domino's.

The ADA requires places of public accommodation to communicate effectively with persons with disabilities. Assuming there are no "design and construct" requirements for websites that broadly apply to places of public accommodation, all the covered entity must do is provide effective communication to the individual with disability. The flaw in the reasoning advanced by Robles is discerned by a closer look at effective communications mandate.

Courts dismiss ADA claims where plaintiffs do not plead that communication was "not effective" but instead insist on a preferred alternative (which the ADA does not require). *See Dobard v. S.F. Bay Area Rapid Transit Dist.*, 1993 WL 372256, at *3-4 (N.D. Cal. Sept. 7, 1993) (motion to dismiss granted because plaintiff could not state an effective communications claim where plaintiff demanded real-time captioning but conceded sign-language interpreters and listening devices were provided). In this case, the DOJ has said that a staffed telephone line is an acceptable alternative and Domino's has followed that guidance by offering a staffed telephone line to assist visually impaired customers. *NOPR* at 43466.

Assuming that a covered entity is required to make the goods and services available on its website accessible to persons with disabilities, then the ADA expressly gives the entity with the choice on how it communicates with the person with a disability. The ADA recognizes that "effective communication" is context-specific and public accommodations should not "guess" at plaintiff's need for a reasonable accommodation. The ADA also leaves the ultimate decision on how to communicate with the public accommodation. 28 C.F.R. § 36.303(c)(1)(ii) ("A public accommodation should consult with individuals with disabilities whenever possible to determine what type of auxiliary aid is needed to ensure effective communication, but the ultimate decision as to what measures to take

rests with the public accommodation, provided that the method chosen results in effective communication.").

The problem with mandating a single solution (absent official regulations) is that the subjective needs of a given individual are context specific. For instance, Robles' claim begs the question of how and if Domino's should accommodate blind and/or visually impaired individuals who cannot use screen readers. The ADA would no doubt require that Domino's continue to provide effective communication and not insist that the person learn how to use a screen reader.

To illustrate this, in *Godbey v. Iredell Mem'l Hosp., Inc.*, the Court dealt with a claim that a hospital failed to effectively communicate with a patient by failing to have sign language interpreters available. 2013 WL 4494708, at *6 (W.D.N.C. Aug. 19, 2013). In *Godbey*, the Court observed that by announcing a broadly applicable rule requiring hospitals to provide sign language interpreters would ignore that some deaf persons may not be able to communicate via sign language. *Id*; *see also Collins v. Dartmouth-Hitchcock Med. Ctr.*, 2015 WL 268842, *4 (D.N.H. Jan. 21, 2015) (denying ADA claim where hospital provided effective communication to patients using pad of paper rather than sign language interpreter and stating the ADA does "not require that disabled persons be treated preferentially or necessarily given the accommodation of their choice").

As a result, the ADA envisions a back-and-forth process for effective communication. What is missing from Robles' complaint is any allegation that he attempted to, but was unable, to communicate with Domino's. For instance, if Robles was able to communicate with Domino's restaurant locations via the telephone to order a pizza, that satisfies Domino's obligation to effectively communicate with its customers.

Robles fails to allege this or that he experienced any inability to otherwise communicate with Domino's – other than his expressed subjective preference to order pizza through the website rather than the telephone. As numerous courts have observed, the ADA does not entitle disabled persons to be given the accommodation of their choice or require the use of the latest technology. *Collins,* 2015 WL 268842, at *4; *Dobard*, 1993 WL 372256, at *3-4. Therefore, Robles should be required to request an accommodation before bringing his claim and present evidence that his requested accommodation is reasonable and necessary.

Robles ignores these obligations and instead argues that this is an "affirmative defense." However, Robles overlooks that "screen reader software" is itself an auxiliary aid or service – just like a qualified reader. 28 C.F.R. § 36.303. Therefore, he is required to allege that the offered auxiliary aid is not effective for him. The District Court rightly observed that simply stating that a phone line is somehow not "private" or "independent" is not enough. Robles does not explain

how providing credit card information over the phone to a representative is meaningfully different to providing the number electronically. For instance, the DOJ has specifically stated that there are adequate protections for ensuring the confidentiality of banking transactions while using telephonic relay services for the deaf and hard of hearing. 28 C.F.R. Appendix C (§ 36.103). Robles offers no meaningful distinction. In addition, there are a number of situations whereby Robles may need to contact a Domino's restaurant directly even if he ordered online – such as to inquire about a missing pizza or wrong order.

Finally, in a last ditch effort to avoid the reality of the phone service, Robles argues that "of critical importance" the declaration of Mandi Galluch fails to allege that the accessibility banner is accessible to screen reader users. However, first, Robles never raised this issue in the District Court below. Second, Robles actually conceded that he was able to locate the number and dialed it. (ER 372). Third, it is self-evident that an accessibility banner specifically directed at those customers who "are using a screen reader" is accessible to screen reader users. Therefore, this complaint is specious.

## VII. CONCLUSION

For all the foregoing reasons, Domino's respectfully requests that the Court affirm the District Court's decision below.

Dated: December 20, 2017

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## CERTIFICATE OF COMPLIANCE

I, Gregory F. Hurley, certify:

Pursuant to Fed. R. App. 32(a)(7)(C) and Ninth Circuit Rule 32-1, that the attached Answering Brief of Appellee complies with the type-volume limitation of Fed. R. App. P. 32(a)(5) and (6), is proportionally spaced, has a typeface of 14 points, and contains 13,499 words (as determined by the Microsoft Word program).

Dated: December 20, 2017

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## STATEMENT OF RELATED CASES

No other cases in this Court are deemed related to this case pursuant to Circuit Rule 28-2.6.

Dated: December 20, 2017

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing 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 December 20, 2017. 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: December 20, 2017

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