No. 18-1539

In the Supreme Court of the United States

DOMINO'S PIZZA LLC,

Petitioner,

v.

GUILLERMO ROBLES,

Respondent.

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

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the websites and smartphone applications of brick-and-mortar businesses must comply with Title III of the Americans with Disabilities Act, either as standalone "places" of public accommodation, or as means of access bearing a sufficient commercial "nexus" to a physical place of public accommodation.

An answer to this question is of vital and immediate importance. Confusion as to Title III's application in the digital age has skyrocketed compliance and litigation costs—a situation the Justice Department has exacerbated through its prevaricating guidance.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

This case interests Cato because Americans with Disabilities Act claims, including under Title III, have skyrocketed in recent decades, and have resulted in a confused jurisprudence across circuit and district courts. Until the Department of Justice issues a clear set of rules and regulations in this area, undue compliance and litigation costs will continue to rise.

SUMMARY OF ARGUMENT

Title III of the Americans with Disabilities Act prohibits private businesses from denying the disabled equal access to the "goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." In Cato's view, this language limits Title III's authority to *physical* places of public accommodations—*e.g.*, a restaurant or a doctor's office. Several federal circuit courts agree with this view, which gives priority to the words and structure of the

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

statute, Other courts reject this approach, based on either particular interpretations of Congress's intent or on policy grounds. This circuit split has fueled a recent spike in Title III lawsuits, centered on whether it applies to websites and other virtual platforms.

The immediate cause of this disparity is lower courts' struggle to grapple with a pre-internet circuit split in an age of widespread internet use. As businesses increasingly integrate their goods and services onto digital platforms, plaintiffs, many of them dubious, have brought a deluge of claims arguing that Title III, which was enacted in 1990, extends to websites and smartphone applications of brick-and-mortar establishments. Some courts go so far as to extend Title III's requirements to website-only businesses, while others limit it to virtual platforms that bear a commercial "nexus" to a physical location. Whatever the answers to these questions, the current state of "regulation by litigation" is untenable. The legal status quo provides no clear blueprint for how, or even whether, certain businesses must comply with Title III.

Inconsistent Department of Justice "sub-regulations"—guidance that does not rise to the commonly-understood meaning of a "rule" or "regulation"—have only compounded the skyrocketing litigation and compliance costs resulting from uneven rulings, as businesses struggle to avoid unpredictable liability standards. In the absence of clear and consistent rules and regulations from the Justice Department, courts and the business world are adrift as to what the ADA actually mandates—and how businesses are to comply.

ARGUMENT

I. A CIRCUIT SPLIT COMPLICATES DIGITAL-AGE COURTS' EFFORTS TO FORMULATE A MODERN TITLE III DOCTRINE

A. The pre-internet circuit split does not provide effective guidance on Title III's application to virtual platforms.

Title III of the Americans with Disabilities Act ("ADA") provides, in clear and unambiguous language:

> 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. § 12181. The statute then provides an extensive list of the types of "public accommodations" of "entities [that] affect commerce" to which this prohibition against discrimination applies. *Id.*

The First, Second, and Seventh Circuit Courts coalesced around the rule, expressed in *Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.*, that the plain meaning of "public accommodation" is "not limited to physical structures for people to enter." 37 F.3d 12, 19 (1st Cir. 1994); *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28 (2nd Cir. 2000); *Morgan v. Joint Admin. Bd.*, 268 F.3d 456, 459 (7th Cir. 2001) ("An insurance company can no more refuse to sell a policy to a disabled person over the Internet than a furniture store can refuse to sell furniture to a disabled person who enters the store.").

The Third, Sixth, and Eleventh Circuits have held, in contrast, that the term "place" preceding "public accommodation," combined with the types of "accommodations" listed in the statute, limits Title III's prohibition against discrimination to *physical* places, and not to virtual ones. *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1011 (6th Cir. 1997) ("The prohibitions of Title III are restricted to 'places' of public accommodation," with "place" defined as "a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the twelve 'public accommodation' categories.") (cleaned up); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 613 (3d Cir. 1998) ("Goods, services, facilities, privileges, advantages, or accommodations . . . are not free-standing concepts but rather all refer to the statutory term 'public accommodation' and thus to what these places of public accommodation provide . . . . [Petitioner] cannot point to these terms as providing protection from discrimination unrelated to places") (cleaned up); *Rendon v. Valleycrest Productions, Ltd.*, 294 F.3d 1279, 1283 (11th Cir. 2002) (finding that Title III bans offsite screenings for disabled persons that impede their access to a service—a gameshow—"tak[ing] place at a public accommodation (a studio) within the meaning of [Title III] (covering theaters and other places of entertainment)").

B. The initial circuit split has morphed into a hodgepodge of digital-age doctrines.

This pre-internet circuit split over whether the ADA applies to non-physical spaces has engendered great confusion during the digital age. Faced with multiple frameworks in different jurisdictions, regulated entities are left without any meaningful guidance.

In *Weyer v. Twentieth Century Fox Film Corp.*, the Ninth Circuit set forth an approach that reflects a middle path between applying Title III to *all* (even website-only) private businesses that provide goods or services and limiting Title III's access requirements to discrete physical locations. 198 F.3d 1104 (9th Cir. 2000). The *Weyer* court held that, while Title III did not extend to website-only businesses, it could apply to websites that bore a sufficient commercial "nexus" to a discrete physical location in which goods or services are rendered. *Id.* at 1115.

Although *Weyer* potentially narrowed the precedential landscape, it has not produced anything resembling a universal doctrine. Some courts have moved beyond *Weyer* completely, citing *Carparts* or *Morgan* to hold that even a website-only business (*e.g.*, Facebook or Netflix) must be Title III-compliant. *See Access Living of Metro. Chi. v. Uber Techs., Inc.*, 351 F. Supp. 3d 1141, 1156 (N.D. Ill. 2018) (Although Uber does not have a physical site attached to its smartphone application, "[a] 'place of public accommodation' does not have to be a physical space, and plaintiffs have plausibly alleged that Uber operates a place of public accommodation."); *See also Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 200 (D. Mass. 2012) ("*Carparts*'s reasoning applies with equal force to services purchased over the Internet, such as video programming offered through [Netflix's] web site").

Other courts adopted the "nexus" doctrine but emphasize that a brick-and-mortar business's maintaining a website is not, alone, sufficient to place it under Title III's authority, or to confer standing through "dignitary harm" to anyone who cannot access it. *Walker v. Sam's Oyster House, LLC*, 2018 U.S. Dist. LEXIS

158439, at *5 (E.D. Pa. Sept. 18, 2018) ("A mere inability to access information on the Website, without more, is not cognizable under the ADA as a matter of law."); *Griffin v. Dep't of Labor Fed. Credit Union*, 293 F. Supp. 3d 576, 579 (E.D. Va. 2018) (rejecting standing where plaintiff is not eligible for membership in a credit union, the website for which he claims he could not access; "if a dignitary harm. . . were sufficient to confer standing . . . then any disabled person who learned of any barrier to access would automatically have standing to challenge the barrier"). The U.S. District Court for the Southern District of Florida recently summarized the prevailing view of those courts that follow *Weyer*'s "nexus" precedent:

> Based on the text of the ADA, the Eleventh Circuit's reasoning in *Rendon* and the rationale employed by other courts who have construed the ADA in the context of commercial websites, the Court concludes that a website that is wholly unconnected to a physical location is generally not a place of public accommodation under the ADA. However, if a plaintiff alleges that a website's inaccessibility impedes the plaintiff's 'access to a specific, physical, concrete space[,]' and establishes some nexus between the website and the physical place of public accommodation, the plaintiff's ADA claim can survive a motion to dismiss.

Gomez v. Bang & Olufsen Am., Inc., 2017 U.S. Dist. LEXIS 15457, at *10 (S.D. Fla. Feb. 2, 2017). The court in *Gomez* continued:

> While there is some disagreement amongst district courts on this question, it appears that the

> majority of courts agree that websites are not covered by the ADA unless some function on the website hinders the full use and enjoyment of a physical space.

Id. at *8.

As the foregoing discussion reveals, courts are adrift, filling in regulatory gaps with a smorgasbord of assumptions about how a pre-internet law ought to apply to the digital age. Businesses (and potential plaintiffs) thus lack a consistent legal framework for determining whether a website or smartphone application is (or even must be) Title III-compliant.

II. THE JUSTICE DEPARTMENT'S SUB-REGULATION OF TITLE III CAUSES UNDUE COMPLIANCE AND LITIGATION COSTS

The DOJ has never provided a clear set of rules on Title III's application to web-based access, instead offering a slipshod selection of sub-regulatory guidance that has only sown confusion and allowed professional plaintiffs to fill the void, increasing compliance and litigation costs in the process. Without clear compliance rules, courts are not obligated to accord these sub-regulations the deference judges typically give regulators in the interpretation of their statutory mandate.

Of course, this question is only relevant if this Court sustains the Ninth Circuit's judgment that Title III indeed applies to web-based access with a commercial "nexus" to physical places of public accommodation. But given that Title III could be read to prohibit discrimination in all forms of web-based access, the question warrants a deeper analysis.

How, then, should the courts treat the DOJ's existing sub-regulations? Well, for now, and until the DOJ promulgates official and consistent regulations, the soundest approach from an institution-preserving perspective is for the Court to restrict Title III to the most expansive reading that its *text* allows, treating the DOJ's sub-regulations the same as, say, *amicus* briefs—as recommendations and nothing more. Until courts can ground liability in actual rules instead of confusing regulatory guidance, outcomes from an explosion of Title III litigation will continue to be inconsistent, with at least some courts adopting the *Carparts* doctrine in the virtual context, while others hew to *Weyer*'s "nexus" argument.

To see how, it is worth sampling the various rulemaking proposals, guidance letters, statements of interest, and *amicus* briefs that together make up the DOJ's current position(s) on Title III's application to virtual platforms.

In 1996, DOJ in an advisory letter wrote that "[c]overed entities that use the Internet for communications regarding their programs, goods, or services must be prepared to offer those communications through accessible means as well." Deval Patrick, Asst. Attorney General, Letter to Sen. Tom Harkin (D-IA), Re: Application of the Americans with Disabilities Act to the Internet (Sept. 9, 1996), https://bit.ly/2JvOr1E.

In 2010, DOJ announced in an Advanced Notice of Proposed Rulemaking (the "2010 ANPRM") that it was exploring whether to promulgate official rules regarding Title III's application to web-based access. *Nondiscrimination on the Basis of Disability; Accessibility of*

Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43,460, 43,461 (July 26, 2010). In this same ANPRM, the DOJ recognized the need for it to step in and formulate a coherent regulatory framework:

> [I]nconsistent court decisions, differing standards for determining Web accessibility, and repeated calls for Department action indicate remaining uncertainty regarding the applicability of the ADA to Web sites of entities covered by Title III.

Id. at 43,464. DOJ also claimed that it "ha[d] been clear that the ADA applies to Web sites of private entities that meet the definition of 'public accommodations'"—*i.e.*, brick-and-mortar businesses. *Id*. That statement, however, is not entirely true. If DOJ had been clear, then why the need to explore the formulation of an official rule? The "inconsistent court decisions" predating the 2010 ANPRM alone are telling.

In 2017, the DOJ confirmed it was no longer considering the adoption of official rules, advising businesses not to "rely upon" its 2010 ANPRM "as presenting the [DOJ]'s position on these issues." *Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions*, 82 Fed. Reg. 60,932, 60,932, 60,933 (Dec. 26, 2017). But then, in 2018, the DOJ again reversed itself, stating "the ADA applies to public accommodations' websites." Stephen E. Boyd, Asst. Attorney General, Letter to Rep. Ted Budd (Sept. 25, 2018). Well, which is it?

The 2010 ANPRM reiterated DOJ's apparent position that "Web sites may comply with the ADA's re-

quirement 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." 75 Fed. Reg. at 43,466. The 2010 ANPRM then specified what is required to make that alternative actually "accessible"—specifications that sound an awful lot like those of Domino's alternative telephone access line. *Id*. at 43,466. If this does not outright support petitioner's argument, it at least demonstrates that in the absence of clear and consistent rules, it is fairly easy to cherry-pick from the hodgepodge of DOJ utterances to support one's chosen position.

DOJ nearly parodied its confused positions when it held in one *amicus* brief that Netflix's video-streaming website was a standalone public accommodation, while in another brief argued that M.I.T.'s online streaming videos were not (and thus not subject to Title III's access requirements). Statement of Interest at 5-7, *Nat'l Ass'n. of the Deaf v. Netflix*, No. 11-30168 (D. Mass. May 15, 2012); U.S. Dep't of Justice, Statement of Interest at 18, *Nat'l Ass'n. of the Deaf v. MIT*, No. 15-300024 (D. Mass. Jun. 3, 2015).

We might parse this distinction as the difference between a website-only business not contemplated in the pre-internet ADA and a website that provides access to a brick-and-mortar establishment—*i.e.*, an expansive *Carparts* reading versus the *Weyer* "nexus" doctrine. And, as a legal matter, there is certainly daylight between the two. But this split-hair legal distinction can have substantial real-life costs on the ground and in the courthouse. Even if that is where the line should be drawn, it is better for DOJ to draw it than for courts to doodle haphazardly.

Further, in 2016, DOJ solicited public comments on whether to extend Title II of the ADA to web-based access. *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities*, 81 Fed. Reg. 28,658 (May 9, 2016). Titles II and III impose similar requirements, the former on state and local governments, the latter on private businesses. The two are otherwise analogous, and comments on rulemaking for Title II strongly indicate positions commenters would take with respect to Title III's application to virtual platforms. Several commenters were trepidatious. Although they tended to support the formulation of some official rule, they worried about DOJ's potential use of the Web Content Accessibility Guidelines ("WCAG") 2.0 as the benchmark for compliance, and also urged that existing alternatives, such as telephone lines, could meet Title II's access requirements.[2] Of course, other commenters, mostly those advocating the rights of disabled persons, wholeheartedly endorsed strong regulations, including adoption of WCAG 2.0 as the standard for Title II compliance.[3] This dynamic might

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[2] Software & Info. Industry Ass'n, Comment Letter on Proposed Rule on Accessibility of Web Information and Services of State and Local Government Entities (Oct. 7, 2016), https://bit.ly/2NV5Ftz ("SIAA has significant concerns with the department's expectations for a public entity's level of conformance with the WCAG 2.0."); Am. Hotel & Lodging Ass'n, Comment Letter on Proposed Rule on Accessibility of Web Information and Services of State and Local Government Entities (Oct. 7, 2016), https://bit.ly/2JyPmyg ("[T]elephonic customer service—available during most times of the day—can be just as effective as having a website that conforms to WCAG 2.0.").

[3] *See*, *e.g.*, Nat'l Council on Disability, Comment Letter on Proposed Rule on Accessibility of Web Information and Services of

speak to the need for the DOJ, in formulating a rule, to also craft its own compliance standards, instead of adopting one that many in the industry do not support.

The mixed response to the 2016 Title II rulemaking proposal might explain the quiet withdrawal in 2017 of the agency's earlier rulemaking proposal. *See Robles v. Yum! Brands, Inc.*, 2018 WL 566781 at *6 (C.D. Cal. Jan. 24, 2018) ("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."). Whatever the actual cause (or causes), for the foreseeable future, there will be no official rules regarding Title III in the virtual space. Until then, courts and businesses are adrift. To avoid further undue litigation and compliance costs it is imperative that DOJ draw a coherent roadmap.

III. WITHOUT THE COURT'S INTERVENTION, THE COSTS OF "REGULATION BY LITIGATION" WILL CONTINUE TO RISE

Until the DOJ promulgates official rules that are clear and actionable, businesses cannot be expected, reasonably, to use non-binding, incomplete, and vacillating guidance as a blueprint for achieving Title III compliance. *See Gorecki v. Dave & Buster's, Inc.*, 2017 U.S. Dist. LEXIS 187208, at *6 (C.D. Cal. Oct. 10, 2017) (quoting defendant's motion: "it notes—correctly—that the Department of Justice . . . has 'failed

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State and Local Government Entities (Oct. 7, 2016), https://bit.ly/2GcgNM2 ("NCD strongly supports DOJ's adoption of WCAG 2.0 . . . as the baseline standard of accessibility . . . . NCD urges DOJ to adopt an aggressive timeframe for the effective date of a final rule.").

to issue standards or provide any guidance for what constitutes an 'accessible' website'").

In one recent case analogous to this one, the court put it this way:

> Recently, there have [sic] been an explosion of cases—under both Title II and III—alleging that websites violate the ADA . . . . Courts have struggled to apply traditional principles of standing to these website cases and have disagreed about what features a website must have to comply with the ADA. The latter is largely due to a complete lack of rules and regulations being promulgated by the Department of Justice despite being aware of this issue for years.

Price v. Escalante – Black Diamond Golf Club LLC, 2019 U.S. Dist. LEXIS 76288, at *9-10 (M.D. Fla. Apr. 29, 2019). *Amicus* discussed this problem in Part II, above, but mentions it here to emphasize the uneven outcomes that result when the plaintiffs' bar, instead of a centralized agency like DOJ, construct Title III "regulations" through piecemeal litigation.

And the plaintiffs' bar has good reason—or, rather, bad reason but good incentive—to pursue these claims. Title III provides for injunctive relief—an order to comply—but does not allow for damages. Title III does provide for the collection of attorney's fees, however, which can motivate unscrupulous lawyers to pursue plaintiffs. 42 U.S.C. § 12188; 42 U.S.C. § 2000a-3(b). And litigation motivated by attorneys' profit motive is unlikely to reflect an actual need for litigation-driven reform. A few states permit collecting actual damages for Title III violations. California's Unruh Civil Rights Act is a notable example, permitting up to $4,000 in

actual damages, as well as punitive damages. Cal. Civil Code § 52(a), (b) (West 2015). More broadly, it appears the plaintiffs' bar is the driving force behind the recent explosion in Title III litigation.

In the face of this onslaught, some defendant-businesses have argued that they should not face liability for non-compliance until the primary agency responsible for enforcing the ADA—the Justice Department—had promulgated clear rules on how to comply. *See Gorecki v. Hobby Lobby Stores, Inc.*, 2017 U.S. Dist. LEXIS 109123, at *6 (C.D. Cal. June 25, 2017).

Courts have mostly rejected this "primary jurisdiction" doctrine in the Title III context, and *amicus* agrees that the costs of continued can-kicking are too great to let this doctrine prevent courts from answering this question. *See Del-Orden v. Bonobos, Inc.*, 2017 U.S. Dist. LEXIS 209251, at *42-43 (S.D.N.Y. Dec. 20, 2017). *See also Gorecki v. Hobby Lobby Stores, Inc.*, 2017 U.S. Dist. 109123, at *20 ("The fact that the DOJ has announced it may issue specific technical requirements at some point in the future does not necessitate invoking primary jurisdiction.").

Yet without a clear set of rules for compliance, businesses will continue to struggle to meet Title III requirements, the substance of which may differ across circuits and district courts. The dangers of uncertainty are already in view. As petitioner warns:

> If this Court fails to act, the alternative is de facto regulation by the plaintiffs' bar. Plaintiffs filed over 10,000 Title III cases last year. Several thousand of those suits involved web accessibility—nearly triple the number from 2017, and almost ten times the amount filed in 2016.

Pet. Br. at 26, Domino's Pizza, LLC v. Robles (No. 18-1539) (internal citations omitted). Petitioner's brief includes citations to cases and articles predicting the "floodgates" will open ever wider as long as litigation continues to serve as the primary means of regulating Title III compliance. *Id*. at 27-31.

The costs of this sort of "de facto regulation" skyrocket in other contexts as well and can be more expensive than first formulating a regulatory blueprint for how to avoid liability. Regulation through litigation imposes more than just damages or, in the ADA context, attorney's fees. Courts could also order defendant-businesses to adopt more stringent regulations than an agency might have required. *See* W. Kip Viscusi, ed., Regulation Through Litigation, 3 (2002) (explaining how "litigation about products such as tobacco, guns, and lead paint . . . was being used as the financial lever to force companies to accept negotiated regulatory policies as part of the litigation"). *See also* Walter Olson, "ADA and the Web: The Hour Grows Late," Cato at Liberty Blog, Aug. 25, 2017, https://bit.ly/2vkREeU (noting that, until Congress or this Court clears up lower courts' confused treatment of the ADA's application to websites, "entrepreneurial lawyers" will continue to "fil[e] hundreds of lawsuits against local and national businesses over their websites, many of which settle for money out of court, and on the current momentum will soon be suing thousands more").

Amicus anticipates that the Court appreciates the potential costs of this kind of "regulation"—of the costs society bears when compliance rules emanate ad hoc from multiple benches, instead of from a centralized agency that can design rules to be applied nationally.

CONCLUSION

For the foregoing reasons, and those expressed by the petitioner, the Court should grant certiorari.

Respectfully submitted,

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