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 RESTAURANT LAW CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Title III of the ADA requires a website or mobile phone application that offers goods or services to the public to satisfy discrete accessibility requirements with respect to individuals with disabilities.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Restaurant Law Center (the "Law Center") is a public policy organization affiliated with the National Restaurant Association, the largest foodservice trade association in the world. The industry is comprised of over one million restaurants and other foodservice outlets employing over 15 million people. Restaurants and other foodservice providers are the nation's second-largest private-sector employers. The Law Center provides courts with the industry's perspective on legal issues significantly impacting it. Specifically, the Law Center highlights the potential industry-wide consequences of pending cases such as this one, through *amicus* briefs on behalf of the industry.

Many of *Amicus'* members operate websites and mobile applications in conjunction with their businesses. The members use these websites in a variety of ways and for many different reasons. Some websites simply provide information about a business' location and hours of operation and, in doing so, only reiterate information available elsewhere (i.e., by calling the business or visiting in person). Other websites function more as advertisements, mirroring ads printed in

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[1] Pursuant to Rule 37.2(a), timely notice of intent to file this brief was provided to counsel for the parties, and all parties have consented to the filing of this brief. In accordance with Rule 37.6, counsel for *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amicus curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

catalogues or shown on television. Still other websites are more interactive in nature, allowing visitors to purchase products or services online, submit questions to customer service departments, or communicate with fellow visitors on discussion forums. Some of these websites are static, whereas others change constantly. Moreover, many of them include content created and controlled by (or links to content created and controlled by) third parties like Google, YouTube, and Facebook. In sum, the websites used by *Amicus'* members are diverse in both form and functionality.

The Restaurant Law Center vigorously supports the goals of Title III of the Americans With Disabilities Act ("Title III" or the "ADA"). However, a series of court decisions – including the Ninth Circuit Court of Appeals' decision that forms the basis of this petition – have created significant uncertainty regarding the circumstances under which websites may fall within Title III's reach and, more specifically, what measures businesses must take to ensure their websites meet any supposed accessibility requirements that exist under the law. *Amicus'* members have a strong interest in securing clarity from this Court on the scope and extent to which Title III of the ADA applies to business websites.

INTRODUCTION AND SUMMARY OF ARGUMENT

Certiorari is warranted here to resolve a legal and practical dilemma created by extending the ADA to non-physical "spaces" like websites and mobile applications. Some lower courts have taken on a pseudo-legislative role in expanding Title III's reach despite statutory and regulatory silence. And, there are, in any event, no definitive guidelines setting forth what a company should do to comply with this new judicially-created law. Companies are left to discern a classic "riddle, wrapped in a mystery, inside an enigma,"[2] but without a key to safely complying with the ADA, leaving them the equally unpalatable options of trying to comply and being sued or not trying to comply and being sued. This dilemma deserves guidance from this Court.

Respondent Guillermo Robles' Complaint reflects one of the latest class-action trends vexing the American business landscape. In nearly identical fashion to hundreds of other lawsuits in recent years, Robles is targeting the website of a brick-and-mortar business, alleging that the website is inaccessible to blind and

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[2] *See* "Today in history: Winston Churchill described Russia as 'a riddle wrapped in a mystery inside an enigma.' " (*available at* https://www.thetimesnews.com/news/20160930/today-in-history-winston-churchill-described-russia-as-a-riddle-wrapped-in-mystery-inside-enigma, Sep. 30, 2016) (quoting Winston Churchill, Oct. 1, 1939 radio broadcast); *see also* Alan Cowell, "Churchill's definition of Russia still rings true" (*available at* https://www.nytimes.com/2008/08/01/world/europe/01iht-letter.1.14939466.html, Aug. 1, 2008).

visually impaired individuals in violation of Title III of the ADA. Indeed, in 2018 alone, the number of federal website accessibility lawsuits brought under the ADA exploded to over 2,250 – a 177% increase from such lawsuits brought in 2017.

These complaints, including Robles', are at odds with the text of the ADA and its traditional application, both of which are limited to physical places of public accommodation. The lower courts' extension of the ADA is, legally, a bridge too far, creating a myriad of difficulties for the courts, litigants, businesses, and the disabled.

Not surprisingly, the decentralized nature of the district court and circuit court decisions has produced inconsistent standards from one jurisdiction to the next, leaving companies in vulnerable positions.

Compounding the problem is the reality that websites and mobile applications, unlike physical places, have no jurisdictional boundaries and can be accessed from anywhere. Thus, a Ninth Circuit decision regarding Title III's scope has the same effect on a website of a Boston-based company as a First Circuit decision. Potentially, that means the strictest circuit court opinion in terms of mandating Title III compliance could become a *de facto* national rule for any business that has a website until and unless this Court clarifies what is and is not required under Title III.

Practically speaking, no binding standards exist because there is no agreement from one court to the next as what may or may not be required – even for the

same company sued in different jurisdictions. As a result, it is impossible for businesses to know how to ensure their websites meet whatever obligations – if any – are required by Title III. Businesses can try, as many have, to modify their websites in good faith to increase access for the disabled, but the lack of a definitive legal standard means that there is no clear path to take.

Here, the Ninth Circuit reversed the dismissal of a website accessibility lawsuit in which the district court emphasized the uncertainties businesses face in attempting to determine their legal obligations under Title III. Consequently, businesses and disabled individuals will continue disagreeing about what (if any) guidelines govern website accessibility – and will continue to expend considerable judicial (and financial) resources in the process. Accordingly, *Amicus* respectfully urges this Court to grant the petition and clarify whether websites are subject to Title III requirements.

ARGUMENT

I. By Extending Title III To Websites, Courts Ignore The Statutory Language Of Title III And Create A Patchwork Of Inconsistent Exposure To Liability For Multi-State Businesses

A. Under The Statutory Language Of Title III, Websites Are Not "Places Of Public Accommodation."

No interpretation of Title III supports the conclusion that a website – a collection of data – is a place of public accommodation. Specifically, Title III provides that "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." 42 U.S.C. § 12182(a) (emphasis added).

The most natural definition of the term "place" refers to "a physical environment." *See* MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/place (last visited November 30, 2017) (defining "place" as "a physical environment;" "a particular region, center of population, or location to visit;" or "a building, part of a building, or area occupied"). Title III itself defines the term "public accommodation" by listing twelve distinct categories of brick-and-mortar establishments open to the public at a specific physical location. 42 U.S.C. § 12181(7). In keeping with this definition, the ADA Title III Technical Assistance Manual Covering Public Accommodations and

Commercial Facilities clarifies that a "place of public accommodation" is limited to the twelve categories listed in the statute, while also equating the word "place" with "facilities":

> Can a facility be considered a place of public accommodation if it does not fall under one of these 12 categories? No, the 12 categories are an exhaustive list. However, within each category the examples given are just illustrations. For example, the category "sales or rental establishments" would include many facilities other than those specifically listed, such as video stores, carpet showrooms, and athletic equipment stores.

ADA Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities, ADA.GOV, https://www.ada.gov/taman3.html (last visited December 19, 2017).

Congress could have broadened the scope of Title III, but it chose not to. And courts "do not sit to rewrite laws so that they may address more precisely the particular problems Congress had in mind." *Block v. Meese*, 793 F. 2d 1303, 1310 (D.C. Cir. 1986). Had Congress intended Title III to apply to all businesses offering goods and services to the public, it would not have limited the defined list of public accommodations to only those offered at a "place." Following this inescapable logic, both the Third and Sixth Circuits have refused to extend Title III to non-physical locations or spaces. *See Ford v. Schering–Plough Corp*., 145 F. 3d 601, 612–14 (3d Cir. 1998) ("[W]e do not find . . . the terms in 42 U.S.C. § 12181(7) to refer to non-physical access or

even to be ambiguous as to their meaning."); *Parker v. Metro. Life Ins. Co.*, 121 F. 3d 1006, 1010–13 (6th Cir. 1997) ("As is evident by § 12187(7), a public accommodation is a physical place . . . "); *Stoutenborough v. Nat'l Football League, Inc.*, 59 F. 3d 580, 583 (6th Cir. 1995) (explaining that places of public accommodation are limited to physical "facilities").

The DOJ's regulations implementing Title III also explain that places of public accommodation are limited to physical places. The regulations define the term "place of public accommodation" as "a facility," which is further defined as "all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located." 28 C.F.R. § 36.104. This language confirms that places of public accommodation are only those spaces accessible at a specific physical location. A website, by contrast, is simply a collection of data that one "accesses" by requesting a web server to transmit the data to his or her computer from another host source. Under any natural definition, collections of data are not "places of public accommodation."

B. Title III's Judicial Expansion To Include Websites Is Inconsistent With The ADA's Language.

As explained above, Title III, by definition, does not apply to websites or mobile applications. And courts, having no legislative authority, "cannot create

law where none exists." *Gomez v. Bang & Olufsen Am., Inc.*, No. 1:16-cv-23801, 2017 WL 1957182, at *4, n.3 (S.D. Fla. Feb. 2, 2017); *see also J.H. by & through Holman v. Just for Kids, Inc.*, 248 F. Supp. 3d 1210, 1217 (D. Utah 2017) ("[T]he law's remedial purpose cannot overcome its plain meaning as written."); *Access Now, Inc. v. Sw. Airlines, Co.*, 227 F. Supp. 2d 1312, 1318 (S.D. Fla. 2002) ("[C]ourts must follow the law as written and wait for Congress to adopt or revise legislatively-defined standards that apply to those rights. . . ."); *Rome v. MTA/New York City Transit*, No. 97-cv-2945 (JG), 1997 WL 1048908, at *1 (E.D.N.Y. Nov. 18, 1997) ("[W]hile such reasoning [including non-physical spaces as places of public accommodation] may have a certain logic to it, it is contrary to the statute."). Nevertheless, some courts – using vastly different approaches – have begun expanding Title III's reach to include websites.

Predictably, entities with a broad geographic presence now face inconsistent exposure based upon a plaintiff's domicile or a courthouse address, even though websites are uniform throughout the country. *Compare National Ass'n of the Deaf v. Netflix*, 869 F. Supp. 2d 196 (D. Mass. 2012) (holding that Netflix's video streaming website *is* a place of public accommodation, even though its web-based services are unrelated to any physical space); *with Cullen v. Netflix*, 880 F. Supp. 2d 1017 (N.D. Cal. 2012) (holding that Netflix's online streaming service *is not* a place of public accommodation because Netflix's services are *only* available online). These *Netflix* decisions – under

which the same website is a place of public accommodation in one judicial district but not another – demonstrate the uncertainty businesses now face in determining their obligations, if any, under Title III. As currently written, Title III simply does not speak to website accessibility. By construing Title III to cover websites, courts are impermissibly assuming a legislative role and attempting to rewrite the law. And they are doing so in vastly different ways. A website, such as the one Robles challenges, cannot be made to comply with a patchwork of accessibility standards from one jurisdiction to the next. These inconsistencies do not benefit companies or the disabled and should not continue.

Litigants bringing suit under Title III have targeted nearly every type of industry and non-profit (oftentimes more than once), including restaurants, art galleries, hotels, banks, and universities, alleging that their websites are inadequately accessible to individuals with disabilities. *See, e.g.*, Elizabeth A. Harris, *Galleries From A to Z Sued Over Websites the Blind Can't Use*, N.Y. Times (Feb. 18, 2019), https://tinyurl.com/y4ywjm9q; Carol C. Lumpkin & Stephanie N. Moot, *Hotels fight recurring website accessibility lawsuits*, Hotel Management (July 26, 2018), https://tinyurl.com/y2m4ssja; Matt Steecker, *Colleges improve website accessibility as they are defendants in lawsuits*, Ithaca Journal (June 13, 2019), https://tinyurl.com/y5xt6hvh. If this Court fails to act, the alternative is *de facto* regulation by the plaintiffs' bar, on a case-by-case basis.

CONCLUSION

The dramatic surge in ADA website litigation and the inconsistent approaches of the various Circuit Courts of Appeal demonstrates the need for clearly-defined standards. The lower courts should not move to fill the vacuum left by the absence of definitive guidance. Without clarity from this Court, complaints attacking the supposed inaccessibility of commercial websites or mobile applications should not be permitted to move forward. For this and the foregoing reasons, *Amicus Curiae* respectfully requests that this Court grant the Petition for a Writ of Certiorari and provide much-needed clarification on the viability of website accessibility lawsuits.

Respectfully submitted,

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