No. 18-1539

In the Supreme Court of the United States

DOMINO'S PIZZA LLC, PETITIONER,

v.

GUILLERMO ROBLES, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

The Ninth Circuit held that Title III requires any brick-and-mortar public accommodation that offers goods or services online to retool its websites and apps to be fully accessible to individuals with ADA-covered disabilities. That ruling exacerbates circuit splits over Title III's applicability online. That ruling imposes a nationwide accessibility mandate that is indifferent to whether such customers have full and equal enjoyment of a public accommodation's goods and services through alternative means of access (like phone ordering). And that ruling bears no resemblance to the statute Congress enacted. Domino's supports ensuring that all customers, regardless of disability, can fully access online offerings. *Accord* Retail Br. 4-8. But Congress, not the courts, must impose that requirement.

The decision below has already prompted forum-shopping plaintiffs to deluge courts within the Ninth Circuit with accessibility suits. This state of affairs perversely thwarts greater accessibility. Defendants settle or drop online offerings rather than shouldering heavy costs to achieve an elusive level of accessibility. Companies balk at innovations that might improve accessibility for one group but offer less access to others. Chamber Br. 12-13; *cf.* Opp. 30. Five *amici*, encompassing 500,000 restaurants, 300,000 businesses, and 18,000 retailers, stress the impossibility of guessing what accessibility means in the online environment. This case is a clean vehicle to resolve two related circuit conflicts concerning critical questions about Title III's applicability to the Internet. Only this Court's immediate intervention can resolve these monumentally important legal issues.

I. The Decision Below Worsens Circuit Conflicts

The decision below deepened two related circuit splits. First, the Ninth Circuit entrenched a 3-3 split over whether web-only businesses can face liability. The Ninth Circuit did so by reiterating that Title III only covers websites or apps that facilitate access to the goods or services of a physical venue. Pet. 15-17, 21-22; Retail Br. 12-13. Second, the Ninth Circuit widened a 3-3 divide by holding that websites and other virtual means of accessing the goods or services of a physical venue must be fully accessible in their own right. Pet. 17-22.

1. Respondent denies that the decision below imposes a standalone accessibility requirement. Observing that the Ninth Circuit does not use the word "standalone" or its variants, respondent argues the court just reiterated that Title III applies to websites or apps with a "nexus" to a physical place of public accommodation. Opp. 25; *cf.* Pet. 21-22. But as respondent notes, the court "held that Title III reached petitioner's website and app because they 'facilitate access to the goods and services of a place of public accommodation—Domino's physical restaurants.'" Opp. 26 (quoting Pet.App. 8a-9a). The court thus held that respondent pled a viable claim "because Robles alleged that the inaccessibility of the Domino's website and app 'impedes access to the goods and services of its physical pizza franchises.'" *Id.* (quoting Pet.App. 8a).

That holding is unambiguous: Because websites and apps are each ways to order from restaurants, website inaccessibility unlawfully impedes access to restaurants' goods (here, custom pizzas). Pet.App. 8a, 21a. That result treats Domino's website and app as standalone public accommodations that each must satisfy Title III. Customers have thirteen other ways to order custom pizzas from

Domino's restaurants. But the court never required respondent to allege their inaccessibility. The absence of the word "standalone" does not change the result that businesses must make websites and apps fully accessible even if disabled customers have unimpeded access to goods and services of the brick-and-mortar establishments. Hundreds of businesses and nonprofits read the decision this way, as do hordes of plaintiffs descending on federal district courts within the Ninth Circuit. Chamber Br. 9-11.

2. Respondent observes that other circuits' decisions did not involve the Internet. Opp. 1, 14-18, 21-22. But courts, DOJ, businesses, nonprofits, and commentators have acknowledged the division of authority over Title III's application to the Internet. Pet. 22-26; Cato Br. 2-7; Retail Br. 13. Either everyone else is imagining things, or respondent refuses to acknowledge the obvious.

a. The circuits disagree about whether Title III covers vendors (like web-only businesses) with no physical outposts. The central disagreement dividing the First, Second, and Seventh Circuits from the Third, Sixth, and Ninth Circuits is whether a "public accommodation" is limited to physical spaces. Pet. 16-17; Retail Br. 9-11.

The First, Second, and Seventh Circuits hold that public accommodations are *not* limited to physical places, and encompass any vendor offering goods or services to the public. Pet. 15-16, 18. Respondent concedes that the First Circuit declined to limit the phrase "public accommodation" to "actual physical structures." Opp. 20 (quoting *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n*, 37 F.3d 12, 19 (1st Cir. 1994)). Respondent ignores language in the Second and Seventh Circuit's decisions adopting *Carparts*. Pet. 16, 22-23. Respondent disregards the Seventh Circuit's references to websites as

places of public accommodation. Pet. 16 (quoting *Doe v. Mut. of Omaha Ins.*, 179 F.3d 557, 559 (7th Cir. 1999) and *Morgan v. Joint Admin. Bd., Ret. Plan*, 268 F.3d 456, 459 (7th Cir. 2001)); *cf.* Opp. 20. If web-only businesses offer goods or services to the public, they meet these circuits' definition of a "public accommodation." District courts within these circuits have drawn that same conclusion. Pet. 23.

The Third, Sixth, and Ninth Circuits, however, define a "public accommodation" as a physical space, thereby ruling out web-only businesses. Pet. 17 (citing *e.g.*, *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612–13 (3d Cir. 1998); *Parker v. Metro. Life Ins.*, 121 F.3d 1006, 1010–12 (6th Cir. 1997) (en banc)). Respondent limits these decisions to their facts, Opp. 16-17, but never explains how a web-only business could qualify as a physical space under these decisions. District courts within these circuits consider those holdings applicable to websites. Pet. 23.

b. The decision below implicates the related split over Title III's applicability to websites offering access to the goods and services of a brick-and-mortar location.

In the First, Second, and Seventh Circuits, websites that offer goods or services to the public—whether standalone businesses or ones connected to physical locations—are themselves a "public accommodation." Pet. 18. Respondent is thus wrong (at 16) that this case would not implicate any split because Domino's is not a web-only business.

But the Third, Sixth, and Eleventh Circuits look to whether a disabled individual lacks equal access to the goods and services of the *physical* place of public accommodation, considering the net effect of all the methods of

accessing those goods and services. Pet. 18-19. Respondent asserts that these cases embrace a generic "nexus" requirement that non-physical methods of access comply with Title III if they facilitate access to goods or services of brick-and-mortar establishments. *Id.* 18, 23. But these courts require more: The inaccessibility of a website or phone line must inhibit overall access to the goods or services of the physical location. Pet. 19-21; Retail Br. 11-12.

For instance, blind customers may not challenge the services of credit card companies if the services do not hamper their enjoyment of the goods and services of a physical property. *Peoples v. Discover Fin. Servs., Inc.*, 387 F. App'x 179, 184 (3d Cir. 2010). By contrast, the Eleventh Circuit let a Title III claim proceed where an inaccessible telephone selection process was the sole means of accessing a studio game show (a public accommodation). *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279, 1286 (11th Cir. 2002). *Rendon* would not have come out the same way if multiple gateways existed. *Cf.* Opp. 23 & n.4. Applying *Rendon*, district courts have dismissed Title III claims where an inaccessible website did not reduce overall access to the physical location's goods or services. Pet. 23.

The decision below exacerbates this tension by requiring some connection between a website and the goods and services of a physical venue, unlike the First, Second, and Seventh Circuits. But then the decision below treats the inaccessibility of a website or app as necessarily reducing overall access to the goods or services of the physical venue, regardless of other methods of access. Chamber Br. 3; Retail Br. 12-13. The Third, Sixth, and Eleventh Circuits disagree. This Court should resolve this untenable uncertainty.

II. The Decision Below Is Profoundly Important

The decision below has such significant nationwide consequences that it warrants review even absent a circuit split. *See* S. Ct. R. 10. Respondent acknowledges the "large and growing amount of litigation" over web accessibility. Opp. 32. The rate at which plaintiffs file web accessibility federal lawsuits has skyrocketed to one every working hour. Jason Taylor, *Midyear ADA Website and Mobile App Accessibility Lawsuit Report*, UsableNet (July 2, 2019, 10:35 AM), https://blog.usablenet.com/mid-year-ada-web-accessibility-lawsuit-report-blog; Chamber Br. 7-8. This litigation significantly burdens companies and nonprofits and undermines the goal of enhancing accessibility. Pet. 25–30; Chamber Br. 7–8, 11–12; Retail Br. 16–22; Restaurant Br. 10; Cato Br. 12–15.

Respondent applauds this tsunami of litigation as a benevolent wave of opportunities for further percolation. Opp. 33. But respondent does not dispute that if Domino's reads the Ninth Circuit's decision correctly, the decision would impose a nationwide website-accessibility mandate that would make further percolation pointless. Pet. 25; Retail Br. 3, 13–14. Nor does respondent contest that plaintiffs are already filing in California federal courts "more than seven times as many [suits] as the federal courts there saw in *all* of 2018." Chamber Br. 10-11; Pet. 27. Further prospects for percolation are dim because 95% of these cases settle. Pet. 29; Chamber Br. 8. Respondent speculates that settlements reflect "widespread" violations, Opp. 33, but that assumes he is right on the merits. Evidence shows that the cost and uncertainty of attempting to comply with moving-target accessibility standards is the real culprit. Pet. 29-30; Retail Br. 19-20; Chamber Br. 7–8.

Respondent states that "the Department of Justice's failure to issue internet-specific regulations offers no reason for this Court to rush headlong into the area." Opp. 34. But the problem is not the absence of DOJ regulations *per se*. Rather, DOJ has vacillated as to how and when companies and nonprofits must meet accessibility standards. Pet. 9-11, 23-24; Cato Br. 7-12; Chamber Br. 6–7, 18; WLF Br. 14–17; Retail Br. 16. DOJ's inability or unwillingness to answer these questions spans decades, underscoring that only this Court can resolve whether websites and apps must be independently accessible when they facilitate access to the goods and services of public accommodations.

Respondent invokes the hitherto-unknown anti-Internet canon of certiorari, under which this Court should avoid "rul[ing] broadly in areas of advancing technology." Opp. 35; *but see Apple v. Pepper*, 139 S. Ct. 1514 (2019); *Carpenter v. United States*, 138 S. Ct. 2206 (2018); *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017); *Riley v. California*, 134 S. Ct. 2473 (2014). Respondent does not say when the Internet might be sufficiently mature to warrant this Court's attention. And respondent's embrace (at 35) of "the common-law approach" to Internet regulation is a curious euphemism for haphazard regulation via the plaintiffs' bar that hurts companies and disabled individuals alike. Pet. 26–30; Chamber Br. 9, 11–13; Retail Br. 20–22; Cato Br. 14–15.

Respondent hypothesizes that "different fact settings will present highly distinct questions." Opp. 35-36. But the question presented—whether a website and app must, in isolation, comply with Title III—is a one-size-fits-all clean legal issue appropriate for this Court's resolution. Absent immediate intervention, the Ninth Circuit's decision will unleash a Pandora's box of compliance questions,

including whether compliance standards might vary by entity or by the type of good or service involved.

Respondent argues it is too soon to tell whether "the inaccessibility of the website or app would necessarily resolve this case" because the district court can rule post-discovery whether Domino's telephone hotline for website troubleshooting ensures adequate website accessibility. Opp. 26-27. That argument only underscores the breadth of what the Ninth Circuit already decided, i.e., that Title III requires Domino's website and app, in isolation, to be fully accessible. That holding is why the issue on remand is whether the telephone hotline solves *website* accessibility problems, not whether Domino's thirteen other methods for ordering ensure that respondent can access Domino's restaurants' offerings. Pet. App. 4a n.4, 21a.[1] Nothing on remand will affect that ruling. This Court routinely grants petitions in a similar posture. *E.g., Dig. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767 (2018); *Integrity Staffing Sols., Inc. v. Busk*, 574 U.S. 27 (2014).

III. The Ninth Circuit's Decision Is Wrong

Title III guarantees "full and equal enjoyment of the goods [and] services . . . of any place of public accommodation." 42 U.S.C. § 12182(a). Nothing in the text requires *every* means of accessing the public accommodation's offerings to be fully accessible. Pet. 32-33; Chamber Br. 14-15; Opp. 29. Domino's position is not that any pre-Internet statute cannot possibly extend to the Internet,

[1] Respondent (at Opp. 26 n.5) incorrectly asserts that Domino's waived the argument that Title III looks at the aggregate effect of all means of access. Domino's argued below that its goods and services were sufficiently accessible because disabled customers had multiple means of access, including "call[ing] their local Domino's." Dkt. 20 at 15 (Dec. 20, 2017).

but that Title III's textual focus on *physical* places of public accommodation negates the notion that Title III extends to all sorts of websites and apps. *Cf.* Opp. 27-28.

1. Respondent portrays the question presented as whether Title III requires websites to be fully accessible when they offer special benefits unavailable through other means. *Id.* 24. More hyperbolically, respondent claims "this case resembles one in which nondisabled customers have ready access to the front door through a stairway that adjourns a sidewalk, while wheelchair users must enter the back door via a ramp surrounded by trash dumpsters in an alley." *Id.* 29. Respondent surmises that ordering pizza by phone is inferior to using the Internet in terms of convenience, accuracy, privacy, and supposed online-only discounts. *Id.* 8-10 & n.1, 23 & n.4, 24. Respondent concludes that because accessibility barriers allegedly deprived him of these comparative benefits, "the plain text of Title III" establishes a statutory violation. Opp. 24.

Respondent's complaint, however, nowhere alleges the inferiority of ordering pizza offline. His eleventh-hour claim about the specialness of Domino's website and app relies on extra-record citations. *Id.* 8-9 & n.1. The only alleged harm in respondent's complaint is his inability to order a custom pizza through Domino's website and app. Pet. App. 49a, 55a-58a.

Nor does the Ninth Circuit's decision rest on allegedly unique benefits of websites and apps. That court understood respondent's Title III allegation to be that he "could not order [a customized] pizza because Domino's failed to design its website and app so his software could read them." Pet.App. 2a; *see* Pet.App. 8a; Pet.App. 23a (district court's similar view). The court accepted respondent's contention that Domino's had to make its physical

offerings fully accessible on its website and app, regardless of other means of access. That is just like arguing that a stairway leading to a restaurant's entrance denies equal access even if there is an accessible ramp leading to the same entrance. Chamber Br. 14; *cf.* Opp. 29.

It is outrageous for respondent to compare Domino's offline options to segregated restaurants or to consigning disabled customers to a trash-laden back-alley entrance. Opp. 29. Until this brief, respondent's theory was that because he allegedly lacked access to two methods of ordering custom pizzas (Domino's website and app), it was irrelevant if he had full and unfettered access to thirteen other means of ordering custom pizza. That framing is what the Ninth Circuit evaluated, and respondent's overheated analogies are no excuse for belatedly refashioning his complaint.

2. Respondent claims Title III's text "plainly reaches online offerings that provide access to the goods and services of a place of public accommodation." Opp. 27, 28. Respondent defends the Ninth Circuit's conclusion that websites and apps must be accessible if they "facilitate access to the goods and services of a place of public accommodation." *Id.* 26 (quoting Pet.App. 8a-9a). But the key feature of the decision below is a standalone accessibility requirement. Respondent denies that requirement exists, and says the Ninth Circuit's holding would not necessarily require mail-order catalogues or telephone hotlines to be fully accessible, because those mandates might "impose an undue burden" on sellers. Opp. 31. But companies and nonprofits should not have to hope to prevail on defenses down the road to avoid liability for suits that should never proceed past a motion to dismiss.

3. Respondent (at 24-25, 27-28, 31) suggests that inaccessible websites and apps violate a purported Title III

obligation to provide auxiliary aids and services to facilitate navigation of those means of access. Respondent does not explain whether this reading would impose an accessibility mandate on all websites and apps, or only on those associated with physical places of public accommodation.

Regardless, Title III contains no such requirement. Title III prohibits public accommodations from "fail[ing] to take such steps as may be necessary to ensure that no individual with a disability is . . . treated differently . . . because of the absence of auxiliary aids and services." 42 U.S.C. § 12182(b)(2)(A)(iii); *see* 28 C.F.R. § 36.303(a) & (c)(1). But those auxiliary aids are things the public accommodation must furnish "in order to provide [individuals with disabilities] with 'full and equal enjoyment' *of [the public accommodation's] goods, services, facilities, and privileges*." *Feldman v. Pro Football, Inc.*, 419 F. App'x 381, 390-91 (4th Cir. 2011) (per curiam) (emphasis added) (citation omitted); *see Argenyi v. Creighton Univ.*, 703 F.3d 441, 449 (8th Cir. 2013). Public accommodations like restaurants may need to provide auxiliary aids (like Braille menus) to ensure that disabled customers can fully enjoy the restaurant's offerings. But Title III does not require public accommodations to equip each website, app, telephone hotline, stairway, or mail-order catalogue with the aids necessary to provide equal access to *that particular method* of accessing goods or services. Pet. 32-34; Chamber Br. 15-16.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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