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

BRIEF OF WASHINGTON LEGAL FOUNDATION 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 for individuals with disabilities.

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INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes and defends free enterprise, individual rights, limited government, and the rule of law. It often appears as an *amicus curiae* in important statutory-interpretation cases, to urge the Court to stop agencies and lower courts from rewriting federal law. *See, e.g., King v. Burwell*, 135 S. Ct. 2480 (2015); *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302 (2014); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

WLF supports the laudable goals of Title III of the Americans with Disabilities Act. Yet a series of lower court decisions—including the Ninth Circuit's decision here—has improperly expanded that statute's reach far beyond anything its text can sustain. Simply put, nothing in Title III imposes discrete accessibility requirements on Internet websites and mobile apps.

The lower courts are frantically trying to fill this statutory void with judge-made legislation. And DOJ has tried, but so far failed, to expand the statute's regulatory sweep by formal rule. Because rewriting the ADA is a task the Constitution reserves solely for Congress, this Court's review is warranted.

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[*] No party's counsel authored any part of this brief. No person or entity, other than WLF and its counsel, helped pay for the preparation or submission of this brief. At least ten days before its brief was due, WLF notified all counsel of record of WLF's intent to file as *amicus curiae*. All parties have consented to the filing of WLF's brief.

STATEMENT OF THE CASE

The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq*., is a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *Id.* § 12101(b)(1). The ADA "forbids discrimination against disabled individuals in major areas of public life, among them employment (Title I of the Act), public services (Title II), and public accommodations (Title III)." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001) (citations omitted).

This case is about the third area, public accommodations. Title III of the ADA says that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." *See* 42 U.S.C. § 12182.

The ADA lists twelve categories of "private entities" that "are considered public accommodations for purposes of [the ADA]," if their operation "affect[s] commerce." 42 U.S.C. § 12181(7). Those twelve categories run the gamut from hotels, movie theaters, and amusement parks to hospitals, schools, and bus stations—but every category is a physical location. *Ibid.* The relevant category here is "a restaurant, bar, or other establishment serving food or drink." *Id.* § 12181(7)(B).

The ADA authorizes the Department of Justice to issue regulations implementing Title III. 42

U.S.C. § 12186(b). Under that authority, DOJ has defined a "place of public accommodation" as any "facility operated by a private entity whose operations affect commerce and fall within at least one of" the twelve categories specified in § 12181(7). 28 C.F.R. § 36.104. A "facility" is "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." *Ibid.*

While it details twelve categories of "public accommodations," Title III says nothing about the Internet or online accessibility. DOJ has acknowledged that the "Internet as it is known today did not exist when Congress enacted the ADA." Dep't. of Justice, *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, 43,463 (July 26, 2010). As a result, "neither the ADA nor [its] regulations * * * specifically address access to Web sites." *Ibid.*

Congress amended the ADA in 2008 but added nothing about the Internet, websites, or mobile apps. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553. And though it has issued a bevy of incoherent and contradictory statements on the question over the years, DOJ has never issued a rule applying Title III to the Internet.

Petitioner Domino's Pizza LLC is a restaurant chain that sells over 2.5 million pizzas worldwide every day. It offers its customers "at least 15 ways to

order pizza." Pet. Br. 11. Besides visiting a Domino's restaurant, customers may, for example, phone their local store for delivery or in-store pickup. *Ibid.* They may order pizza via text message, Tweet, or voice-activated device (such as Amazon's Alexa). *Ibid.* Customers may also order pizza (for delivery or in-store pickup) through Domino's website and mobile app. *Id.* at 12.

Respondent Guillermo Robles, a blind resident of California, sued Domino's under the ADA. Robles's complaint alleges that by failing to "design, construct, maintain, and operate" its website and mobile app "to be fully accessible to him," Domino's violated Title III of the ADA. Pet. App. 2a. Robles did not phone his local Domino's store for pizza delivery or in-store pickup. Nor did he try any of Domino's other means for ordering pizza. Robles uses screen-reading software to access the Internet; he alleges that Domino's website and app lacked adequate written descriptions for every digital image, preventing him from completing an online order. *Id.* at 57a-60a.

On Domino's motion, the district court dismissed Robles's suit. Pet. App. 22a-42a. The court agreed that the ADA applies to the websites and mobile apps of brick-and-mortar places of public accommodation. *Id.* at 27a-29a. But the court held that applying the ADA to Domino's website and mobile app, without "meaningful guidance" from DOJ on *how* to comply, would violate Domino's due process rights. *Id.* at 34a.

The Ninth Circuit reversed. Pet. App. 1a-21a. The panel held that (1) Title III applies to Domino's website and mobile app and (2) Domino's had fair

notice of its Title III obligations under the ADA. "The alleged inaccessibility of Domino's website and app," the court opined, "impedes access to the goods and services of its physical pizza franchise—which are places of public accommodation." *Id.* at 8a.

The Ninth Circuit remanded the case for the district court "to decide in the first instance whether Domino's website and app provide the blind with effective communication and full and equal enjoyment of its products and services" under the ADA. *Id.* at 21a.

SUMMARY OF ARGUMENT

As Domino's emphasizes in its petition, the decision below is not only unwise, it is profoundly wrong. Congress never even enacted, much less debated, an ADA that defines Internet websites and mobile apps as "public accommodations." Pet. Br. 32. By imposing discrete accessibility requirements on Domino's website and mobile app, the Ninth Circuit effectively "rewrites Title III." *Ibid.* Yet the panel's "need to rewrite clear provisions of the statute should have alerted [it] that it had taken a wrong interpretive turn." *UARG*, 573 U.S. at 328. The Court should grant review to stop the Ninth Circuit's rewrite of Title III from becoming the law of the land.

To be clear, the question Domino's petition poses "is not what Congress 'would have wanted,'" but "what Congress enacted." *Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992). And because Congress did not enact an ADA that regulates, or even allows the regulation of, websites and mobile apps, any rule

DOJ might enact that does so would be *ultra vires*. Indeed, whether to expand the ADA to cover the vast digital economy is a "major question"—that is, a question of "such economic and political magnitude" that Congress would never commit it to the discretion of an agency without explicitly saying so. *Brown & Williamson*, 529 U.S. at 133.

Yet if DOJ may not amend the ADA, neither may the Ninth Circuit. Enacted before the Internet age, the ADA omits any mention of websites or mobile apps. "To supply omissions transcends the judicial function." *Iselin v. United States*, 270 U.S. 245, 251 (1926) (Brandeis, J.). Judges do not wield the statutes they want; they must enforce the statutes they get. And the statutes they get come not from themselves, nor from the Executive, but from the people's representatives in Congress. Neither the Ninth Circuit nor any other court may rewrite federal law—no matter how well intentioned they may be.

Acting on an understandable but still misguided desire to achieve rough justice for the disabled, many lower courts have drifted far from these fundamental principles. Only this Court's intervention can remind those courts of their proper, narrow role in our constitutional structure. Only then will the difficult social and economic policy choices at stake be returned to their rightful place—the Congress.

REASONS FOR GRANTING THE PETITION

As the petition and at least three appeals court decisions make clear, the ADA does not reach Internet websites and mobile apps. This is hardly surprising. The World Wide Web did not exist in 1990, when Congress enacted the ADA. Tim Berners-Lee, a CERN research fellow in Switzerland, would not create the first web server, web browser, or website until 1991. *See* James Gillies & Robert Calliau, *How the Web Was Born: The Story of the World Wide Web* 230-35 (2000).

Even so, some observers have suggested that DOJ could mitigate many of the petition's concerns—problems of regulatory uncertainty and burdensome litigation—if only it would promulgate a uniform Internet-accessibility standard under the ADA. *See* Samuel D. Levy & Martin S. Krezalek, *A Call for Regulation: The DOJ Ignored Website Accessibility Regulation and Enterprising Chaos Ensued*, N.Y.L.J., Nov. 9, 2018. But that expedient view of the problem overlooks a glaring defect—Congress never authorized such a rule.

Yet even if the ADA were ambiguous on that point—and it is not—"an ambiguous grant of authority is not enough." *United States Telecom Ass'n v. FCC*, 855 F.3d 381, 421 (D.C. Cir. 2019) (Kavanaugh, J., dissenting from denial of rehearing en banc). Instead, "Congress must *clearly* authorize an agency to take such a major regulatory action." *Ibid.* Above all, only Congress may rewrite federal law. And only Congress can answer the momentous question of whether and how to extend the ADA's accessibility regime to Internet websites and mobile apps.

The Ninth Circuit's extra-statutory overreach cries out for this Court's review.

I. REVIEW IS WARRANTED TO ENSURE THAT THE SWEEPING REGULATION OF AMERICA'S DIGITAL ECONOMY REMAINS A "MAJOR QUESTION" SOLELY FOR CONGRESS.

A. Only Congress May Resolve a Major Question.

An agency may fill a statutory gap only when the "statutory circumstances" clarify that Congress meant to grant it such power. *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001). The statutory circumstances here betray any suggestion that Congress meant for Title III of the ADA to reach cyberspace. To fall within the scope of Title III, a public accommodation must be a physical place like those enumerated in § 12181(7). To expand the ADA to cover virtual spaces would be to create new rights and burdens that Congress never approved.

While Congress often grants the Executive authority to resolve "interstitial matters" in the "course of the statute's daily administration," Congress itself is "more likely to have focused upon, and answered, major questions." Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986). And even "if Congress has delegated an agency general rulemaking or adjudicatory power, judges presume that Congress does not delegate its authority to settle or amend major social and economic policy decisions." William N. Eskridge Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* 288 (2016).

This Court "expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *UARG*, 573 U.S. at 324 (quoting *Brown & Williamson*, 529 U.S. at 160). Consistent with this principle, the Court has repeatedly refused to extend the scope of a statute's regulatory reach over a "major question" without a *clear* congressional grant:

- In vacating a Federal Communications Commission rule that would have exempted certain telephone companies from statutory rate-filing requirements, the Court found it "highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion." *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994).

- In rejecting the Food and Drug Administration's attempt to regulate cigarettes as "drugs" or "devices" under the Food, Drug, and Cosmetic Act, the Court was "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Brown & Williamson*, 529 U.S. at 146.

- In overturning an interpretative rule by the U.S. Attorney General that would have prohibited, under the Controlled Substances Act (CSA), physicians from prescribing drugs for assisted suicide, the Court rejected the "idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the CSA's registration pro-

vision." *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006).

- In vacating an Environmental Protection Agency rule that would have subjected millions of previously unregulated greenhouse-gas emitters to onerous permitting requirements under the Clean Air Act, the Court expressed "skepticism" that the "long-extant statute" contained "an unheralded power to regulate so 'significant [a] portion of the American economy.'" *UARG*, 573 U.S. at 324 (quoting *Brown & Williamson*, 529 U.S. at 159).

- In refusing to defer to the Internal Revenue Service's view that the Affordable Care Act authorizes billions of dollars each year in government subsidies to individuals who obtained health insurance through a federal exchange, the Court explained that, given the "deep 'economic and political significance'" of that question, "[h]ad Congress wished to assign [it] to an agency, it surely would have done so expressly." *King*, 135 S. Ct. at 2489 (quoting *UARG*, 573 U.S. at 324).

At bottom, this Court's major-questions doctrine "supports a presumption of *non*delegation in the face of statutory ambiguity over major policy questions or questions of major political or economic significance." Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part 1,* 65 Stan. L. Rev. 901, 1003 (2013).

The "key reason" for the doctrine "is the strong presumption of continuity for major policies unless and until Congress has deliberated about and enacted a change in those major policies." Eskridge, *supra*, at 289. "Because a major policy change should be made by the most democratically accountable process—Article I, Section 7 legislation—this kind of continuity is consistent with democratic values." *Ibid.*

B. Whether and How to Impose a Federal Accessibility Regime on the Digital Economy Is a Major Question.

Though the Court has not provided a bright-line test for when the expansion of a statute's regulatory reach presents a major question, its precedents suggest some relevant factors. These include (1) "the amount of money involved for regulated and affected parties," (2) "the overall impact on the economy," (3) "the number of people affected," and (4) "the degree of congressional and public attention to the issue." *United States Telecom*, 855 F.3d at 422-23 (Kavanaugh, J.) (collecting cases). Here, under any conceivable test, the Ninth Circuit's drastic expansion of the ADA raises a major question.

The financial impact of the Ninth Circuit's version of the ADA is staggering, both as a share of the economy affected and in the dollars at stake. According to the Bureau of Economic Analysis (BEA), America's "digital economy" accounted for $1.35 trillion of GDP in 2017. *See Digital Economy Accounted for 6.9% of GDP in 2017*, BEA (Apr. 4, 2019), <https://tinyurl.com/yxutmdcf>. In 2018, $504.6 bil-

lion in goods were sold online, and that amount will likely surpass $735 billion in 2023. *See* J. Clement, *Retail e-commerce sales in the United States from 2017 to 2023*, Statista (Jan. 16, 2019), <https://tinyurl.com/y9gc44ht>. Mobile apps generated $88.3 billion in revenue in 2016 and will likely generate around $189 billion in revenue by 2020. *See* J. Clement, *Mobile App Usage—Statistics and Facts*, Statista (Oct. 10, 2017), <https://tinyurl.com/y5vdzl5s>.

Virtually every brick-and-mortar business in the United States, from the smallest mom-and-pop shop to the largest multi-national corporation, maintains an Internet website. In December 2018, 206.1 million unique users visited Amazon.com and 131.9 million unique users visited second-ranked Walmart.com. *See* J. Clement, *Most popular retail websites in the United States as of December 2018, ranked by visitors (in millions)*, Statista (July 3, 2019), <https://tinyurl.com/y3egeel7>. And regulated parties estimate the cost of ADA Internet compliance would range from $250,000 to $3 million per website. *See, e.g., Gil v. Winn Dixie Stores, Inc.*, 257 F. Supp. 3d 1340, 1345-47 (S.D. Fla. 2017); Comments of Am. Bankers Ass'n, Proposed Rulemaking, Dkt No. 110 RIN 19-AA61 (Jan 24, 2011).

Nor is Congress in the dark. Congress has long understood that the ADA does not mandate Internet accessibility for the disabled. It held hearings, once in 2000 and twice in 2010, at which it considered whether to address Internet accessibility under the ADA. *See Innovation and Inclusion: The Americans with Disabilities Act at 20: Hearing before the Subcomm. on Commc'ns, Tech., and the Internet of the S. Comm. on Commerce, Sci., and Transp.*, 111th

Cong. (May 26, 2010); *Achieving the Promises of the Americans with Disabilities Act in the Digital Age—Current Issues, Challenges, and Opportunities: Hearing before the Subcomm. on the Constitution, Civil Rights,* 111th Cong. (Apr. 22, 2010); *The Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearing before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. (Feb. 9, 2000). Yet Congress has never considered a bill that would amend the ADA to require Internet accessibility.

Instead, whenever it has sought to ensure disabled persons' access to the Internet, Congress has always turned elsewhere. In 1998, for instance, Congress amended § 508 of the Rehabilitation Act to require that all federal government websites be accessible to persons with disabilities. *See* 29 U.S.C. § 794d (2000). More recently, Congress enacted the Twenty-First Century Communications and Video Accessibility Act of 2010. Pub. L. No. 111-260, 124 Stat. 2751. It authorizes the FCC—*not* DOJ—to promulgate regulations to address certain online-accessibility barriers for persons with disabilities. *See* 47 U.S.C. § 613 (2010).

Finally, Congress knows how to amend federal law when it wants to. Congress amended the ADA in 2008—the year *after* Apple introduced its popular iPhone—but nothing in those amendments mentions the Internet, websites, or mobile apps. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

In sum, whether and how to impose a federal accessibility regime on the entire digital economy

qualifies as a major question. Only Congress can answer it. This Court should intervene to review the Ninth Circuit's misguided response before it disrupts vast swaths of the U.S. economy.

II. THIS COURT'S INTERVENTION IS CRUCIAL BECAUSE THE DOJ LACKS BOTH THE AUTHORITY AND THE ABILITY TO CREATE AN INTERNET-ACCESSIBILITY RULE.

Perhaps the best evidence of the sheer magnitude and complexity of any attempt to regulate Internet-website accessibility is the DOJ's inability to craft a workable rule—or, indeed, *any* rule—that does so. DOJ concedes that "a clear requirement" informing covered entities of "what is required under the ADA" to make websites accessible "does not exist." 75 Fed. Reg. at 43,464. And while it has issued a cascade of contradictory *statements* on whether (and how far) Title III's accessibility requirements apply to Internet websites, DOJ has never issued a *rule* applying the ADA to Internet websites. Nor can it.

DOJ's inability to come up with a rule is hardly surprising. Congress designed the ADA for the material world—buildings, parks, stations, 12 U.S.C. § 12181(7)—and it does not translate neatly from physical space to cyberspace. To begin with, the web does not lend itself to regularization. Maintaining web accessibility is not like adding ramps or checking sink heights. "Whether a door provides 32 [inches] clear width is an objectively verifiable fact." Comments of U.S. Chamber of Commerce, Proposed Rulemaking, Dkt No. 110 RIN 1190-AA61 (Jan. 24, 2011). "By contrast, many Web accessibility criteria"—whether, for example, a "text alternative" to an

image "is appropriately descriptive"—"have an inherent degree of subjectivity." *Ibid.*

Web accessibility is also inherently complex. Consider the obstacles faced by a company like AT&T:

> AT&T's Web sites contain, among other things, content developed and controlled by AT&T, content provided by others not controlled by AT&T, and embedded functions, such as media players, which may or may not be in AT&T's power to alter. Accessibility, by its nature, must be addressed at every phase of production, by different parts of AT&T responsible for those functions—from concept to design to content to code development to deployment and, thereafter, to updates.

Comments of AT&T Inc., Proposed Rulemaking, Dkt No. 110 RIN 1190-AA61 (Mar. 8, 2011).

At any given time "there is no viable technique for making certain [web] content accessible." Comments of eBay Inc., Proposed Rulemaking, Dkt No. 110 RIN 1190-AA61 (Jan. 24, 2011). Because "assistive technology support" tends to "lag behind the emergence of new technology," an "alternative format" of a website will not—*can*not—always "offer all the 'bells and whistles' of the original page." Comments of Nat'l Rest. Assoc. and Retail Indus. Leaders Assoc., Proposed Rulemaking, Dkt No. 110 RIN 1190-AA61 (Jan. 24, 2011).

Congress enacted the ADA to provide "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(2). Yet the subjectivity of what qualifies as "access" in cyberspace, the complexity of website design, and the ever-shifting technology of the electronic world are, and always will be, major obstacles to web accessibility. Someone must, then, make the tough and even arbitrary choices about what counts as "accessibility" online.

In a 2010 Advance Notice of Proposed Rulemaking, DOJ's Civil Rights Division volunteered itself for this role. *See* Dep't. of Justice, *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations*, 75 Fed. Reg. 43,460-01 (July 26, 2010). So far as DOJ was concerned, Congress need take no part in the drafting of ADA 2.0.

Without the slightest guidance from Congress, DOJ began asking the hard questions and even—with all the clarity of a Magic 8-Ball—trying to *answer* them. Should Title III require a website to ensure the accessibility of a third-party payment vendor that it neither operates nor controls? DOJ says: Most likely, yes. *Id.* at 43,465. Should Title III require a website to ensure the accessibility of an informal online marketplace? DOJ says: Very doubtful. *Ibid.* Should Title III require a website to ensure the accessibility of its patrons' personal videos or photos? DOJ says: Reply hazy, try again. *Ibid.*

In other words, DOJ's Civil Rights Division offered vague guidance it was ill-equipped to provide

in response to questions Congress never authorized it to ask. "This confirms that the authority claimed by the Attorney General is both beyond his expertise and incongruous with the statutory purposes and design." *Gonzales*, 546 U.S. at 267. *Cf. King*, 135 S. Ct. at 2489 ("It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort.").

Seven years later, DOJ threw up its hands and withdrew the ANPRM, advising parties not to treat it as "the Department of Justice's position on these issues." Dep't. of Justice, *Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions*, 82 Fed. Reg. 60,932, 60,933 (Dec. 26, 2017). This fumbling around—for the better part of a decade!—is revealing, yet unsurprising. It is simply what happens when an agency chooses to act without guidance (or authority) from the legislature.

Of course, DOJ has zero authority to draft what amounts to a whole new law. This is, rather, one of those times when an agency "choose[s] their policy first and then later seek[s] to defend its legality." David S. Tatel, *The Administrative Process and the Rule of Environmental Law*, 34 Harv. Envtl. L. Rev. 1, 2 (2010). But if DOJ cannot write its own web-accessibility law from scratch, still less so may the courts.

III. ONLY THIS COURT CAN STOP JUDGES AND JURIES FROM REWRITING THE ADA AND EXCEEDING THEIR PROPER ROLE.

If a court may draft its own sweeping regulations without regard to the legislature or the statutory text, it becomes a vehicle for overseeing public policy. That is not a role any court should embrace. Yet without this Court's review, the lower courts will go on essentially rewriting the ADA on an ad hoc basis.

The "U.S. Constitution explicitly disconnects federal judges from the legislative power and, in doing so, undercuts any judicial claim to derivative lawmaking authority." John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1, 59 (Jan. 2001). This "sharp separation of legislative and judicial powers was designed, in large measure, to limit judicial discretion—and thus to promote governance according to known and established laws." *Id.* at 61.

When the political branches are presented with a societal problem, they can collect data, study incentives, consider diverse viewpoints, and then craft a balanced solution. In crafting the ADA, for example, Congress carefully struck "a balance between guaranteeing access to individuals with disabilities and recognizing the legitimate cost concerns of businesses and other private entities." *Preamble to Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities* (July 26, 1991), *reprinted in* 28 C.F.R. Pt. 36, App. B, at 645 (1997). That is why, for

example, Congress "establish[ed] different standards for existing facilities and new construction." *Ibid.*

By contrast, when a court (or a jury) is presented with a societal problem, it can do no more than hear from a few witnesses, maybe a few experts, and a few lawyers—then impose remedies limited to the parties in the lawsuit. Litigation, with its inherent limitations (and frightful expense), is no way to go about crafting major public policy.

Disturbing as it may be for the Executive to seize the power to legislate, at least DOJ can be expected (if it ever gets its act together) to create just *one* set of spurious rules. But if the courts continue trying to draft web-accessibility standards, they will add the vice of inconsistency to the evil of illegitimacy. Compare *Nat'l Assoc. of the Deaf v. Netflix*, 869 F. Supp. 2d 196 (D. Mass. 2012) (Netflix's streaming service is subject to Title III), with *Cullen v. Netflix*, 880 F. Supp. 2d 1017 (N.D. Cal. 2012) (not so fast).

Nor are the courts any better equipped than DOJ to draw fine policy lines. Consider, for example, how hard it can be to distinguish a website's "inventory" from its "interface." Title III "does not require a public accommodation to alter its inventory to include accessible or special goods that are designed for, or facilitate use by, individuals with disabilities." 28 C.F.R. § 36.307(a). In short, "the content of the goods or services offered by a place of public accommodation is not regulated." *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 560 (7th Cir. 1999).

So while "a camera store may not refuse to sell cameras to a disabled person," it "is not required to

stock cameras specially designed for such persons." *Ibid.* This conclusion finds support in the ADA's silence about *how* a company would adjust its inventory to accommodate the disabled. "Had Congress purposed to impose so enormous a burden on the retail sector of the economy and so vast a supervisory responsibility on the federal courts," it surely "would have made its intention clearer and could at least have imposed some standards." *Ibid.* It did not, and the judiciary is neither equipped nor authorized to press ahead anyway, "making standardless decisions about the composition of retail inventories." *Ibid.*

Yet the *online* distinction between access to a product or service, on the one hand, and the product or service itself, on the other, is often "illusory." *Carparts Dist. Ctr., Inc. v. Auto. Wholesaler's Assoc. of New Eng., Inc.*, 37 F.3d 12, 19 (1st Cir. 1994). For many websites, "access" *is* "inventory." The whole point of many websites is to offer a unique aural or visual experience. That experience is often irreducible and untranslatable. Just as "it is hardly a feasible judicial function to decide whether shoestores should sell single shoes to one-legged persons and if so at what price," *Mut. of Omaha*, 179 F.3d at 560, so it is "hardly a feasible judicial function" to decide how Facebook must modify the protean array of photo collages, ad videos, comments, and "like" reactions in a blind person's News Feed.

Courts applying Title III to the Internet have tended to duck this problem. *How* to comply with Title III is, they say, a matter not of liability but of remedy. It is, they say, a matter for the end of a case, not the beginning. But when a district court rejects a defendant's attempt to cut an ADA lawsuit off at the

early stage, settlement becomes all but inevitable. It is, in fact, often the *very next event* in the case. *See, e.g., Rios v. N.Y. & Co., Inc.*, 2:17-cv-4676 (C.D. Cal. 2017) (order denying motion for judgment on the pleadings at Dkt #27; notice of settlement at Dkt #28); *Reed v. CVS Pharm.*, 2:17-cv-3877 (C.D. Cal. 2017) (order denying motion to dismiss at Dkt #27; notice of settlement at Dkt #28); *Robles v. Yum! Brands, Inc.*, No. 2:16-cv-8211 (C.D. Cal. 2018) (order denying motion for summary judgment at Dkt #57; notice of settlement at Dkt #62). Leaving standard-setting for the remedy stage may be convenient for courts, but it leaves businesses in an impossible bind.

A court that creates a radical new regulatory rule to address a nationwide problem acts in defiance of many blind spots. "The omnipresence of unintended consequences" of public policy "can be attributed, in large part, to the absence of relevant information." Cass R. Sunstein, *The Cost-Benefit Revolution* 79 (2018). Yet "the decisions that follow adjudication, involving a small number of parties," often "turn out to be inadequately informed." *Id.* at 86. This lawsuit proves the point. In contrast, the political branches are better able to "collect dispersed knowledge" and "bring it to bear on official choices." *Id*. at 88.

Even if the federal courts could somehow craft a serviceable approach to addressing the problem of Internet accessibility for disabled Americans, that would not justify such drastic judicial action. "Judicial amendment flatly contradicts democratic self-governance." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 96

(2012). There is *no* authority permitting judges to transform the ADA into a tool for setting public policy of the highest order. That would be a "serious invasion of the legislative domain." *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 479 n.26 (1995).

What's more, it is "impossible for a court—even one that knows each legislator's complete table of preferences—to say what the whole body would have done with a proposal it did not consider in fact." Frank H. Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533, 547-48 (1983). Such "judicial predictions of how the legislature would have decided issues it did not in fact decide are bound to be little more than wild guesses." *Id.* at 548.

Without this Court's review, such wild guesses will only continue to multiply.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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