No. 17-55504

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GUILLERMO ROBLES,

Plaintiff-Appellant,

v.

DOMINO'S PIZZA LLC,

Defendant-Appellee.

On Appeal from the United States District Court
For the Central District of California

District Court Case No. 2:16-cv-06599-SJO-FFM

MOTION OF THE ATLANTIC LEGAL FOUNDATION FOR LEAVE TO PARTICIPATE AS *AMICUS CURIAE*

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December 27, 2017

Pursuant to Federal Rules of Appellate Procedure 29(a)(3), the Atlantic Legal Foundation ("The Foundation" or "*amicus*") respectfully requests leave to file the accompanying *amicus* brief in support of Appellee Domino's Pizza LLC. The Foundation's participation is desirable and will aid the Court's disposition of this appeal because, as discussed below, *amicus* and its counsel have a significant interest in affirming the lower court's decision, and can also offer a broad perspective on the issues presented. Appellee has consented to the Foundation's participation in this appeal. The Foundation attempted multiple times to confer with Appellant's counsel, but could not connect with him.

The Foundation is a non-profit public interest law firm founded in 1976. Its mandate is to advocate and protect the principles of less intrusive and more accountable government, a market-based economic system, and individual rights. It seeks to advance this goal through litigation and other public advocacy and through education. The Foundation's board of directors and legal advisory committee consist of legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists. The Foundation regularly appears as *amicus curiae* in the United States Supreme Court, federal courts of appeal and the highest courts of numerous states in cases involving issues of economic and regulatory significance to the business community.

The Court's decision in this proceeding will not only impact every business within its jurisdiction that has a website, but, more broadly, it will influence how federal agencies regulate conduct. The Foundation and its directors and advisors have a significant interest in ensuring that regulations are properly adopted and that affected persons have an opportunity to participate in the regulatory process and have fair notice of what is required of them.

This brief focuses on two principal issues: (1) the lack of judicial deference afforded to regulatory agencies that attempt to short-circuit the notice and comment protections of the Administrative Procedures Act ("APA") with respect to regulatory law making; and (2) the uncertainty and costs that arise when competing judicial directives are issued because federal agencies have abdicated their duty to promulgate regulations pursuant to the APA.

The Foundation respectfully requests that the Court grant it leave to participate as *amicus curiae* in this matter.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29(a)(4)(A) of the Rules of this Court, amicus curiae Atlantic Legal Foundation states that it is a 26 U.S.C. § 501(c)(3) charitable, nonprofit, nonpartisan, public interest law firm incorporated as a Pennsylvania not for profit corporation. It has no shareholders, subsidiaries or parent corporations. It does not issue stock or other securities.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 27, 2017.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

December 27, 2017

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE ATLANTIC LEGAL FOUNDATION IN SUPPORT OF DEFENDANT-APPELLEE

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THE FOUNDATION'S INTEREST IN THIS CASE

The Atlantic Legal Foundation (the "Foundation") is a non-profit public interest law firm founded in 1976 whose mandate is to advocate and protect the principles of less intrusive and more accountable government, a market-based economic system, and individual rights. It seeks to advance this goal through litigation and other public advocacy and through education. The Foundation's board of directors and legal advisory council consist of legal scholars, senior corporate legal officers, private practitioners, business executives, and prominent scientists. The Foundation's directors and advisors are familiar with the federal, state and local regulation and have decades of experience with attempts to reconcile sometimes inconsistent legislation or regulations promulgated by various levels of government. The Foundation regularly appears as *amicus curiae* in the United States Supreme Court, federal courts of appeal and the highest courts of numerous states in cases involving issues of economic and regulatory significance to the business community.

The Court's decision in this proceeding will not only impact every business within its jurisdiction that has a website, but it will influence how federal agencies regulate conduct.

The U.S. Department of Justice ("DOJ"), the agency delegated by Congress to effectuate the Americans with Disabilities Act, 42 U.S.C. § 12181 *et seq*.

("ADA"), has not properly promulgated website accessibility regulations. DOJ is required to undergo the rulemaking process set forth in the Administrative Procedures Act, 5 U.S.C. §553 (2017) ("APA") in order to issue regulations under the ADA. DOJ, however, has instead opted to advance non-governmental guidance through litigation – often third-party litigation brought by private parties and their private counsel – with the expectation that the judiciary will defer to its position. The Foundation and its members have a significant interest in ensuring that regulations are properly enacted and that citizens have fair notice of what is required of them.

This brief focuses on two principal issues: (1) the lack of judicial deference afforded to regulatory agencies that attempt to short-circuit the notice and comment protections of the APA with respect to regulatory law making; and (2) the uncertainty and costs that arise when competing judicial directives are issued because federal agencies have abdicated their duty to promulgate regulations pursuant to the APA.

Appellee Domino's Pizza LLC has consented to the filing of this amicus brief. The Foundation's counsel attempted multiple times to confer with Appellant Guillermo Robles' counsel, but his counsel's automated telephone system would not connect the call.

SUMMARY OF ARGUMENT

The Foundation supports the ADA's goals to ensure full and equal access to goods and services by individuals with disabilities. It also recognizes that websites have become an integral part of daily life subsequent to the passage of the ADA in 1990. The Foundation submits that any regulations governing access to websites must be promulgated by DOJ in accordance with the APA's rulemaking process. Unfortunately, DOJ has not enacted website accessibility regulations despite acknowledging the need to do so and despite publishing far-ranging revised ADA regulations in 2010 covering many other aspects of accessibility for those with disabilities.

Instead of following the law, DOJ has chosen to regulate through litigation by filing Statements of Interest in ADA website accessibility lawsuits across the country. In its Statements of Interest, DOJ claims that the ADA governs websites, not because the statute explicitly so provides, nor because DOJ has amended the ADA regulations to cover websites, but because DOJ has deemed it so as its litigation posture. To make matters worse, DOJ has failed to adopt standards setting forth the requirements for website accessibility, leaving businesses to guess at what is required to meet DOJ's mandate. Instead, DOJ demands that covered entities comply with the Web Content Accessibility Guidelines 2.0, Success Criteria AA ("WCAG 2.0 AA"), a set of evolving guidelines created by a private

non-governmental consortium without any notice and comment procedure and without meeting other requirements to which government regulations are subject.

DOJ's disregard for the regulatory process has led to a deluge of private ADA website lawsuits, resulting in a patchwork of judicial opinions imposing conflicting directives on businesses. The circuit courts are split on whether the ADA covers websites and, if so, to what extent. A business's website, therefore, may be subject to the ADA in some jurisdictions in which it operates, but not in others. And courts that have determined that the ADA applies to websites have imposed different standards for compliance because there are no enforceable website accessibility standards that have been properly promulgated by DOJ.

The court below rejected this inequitable and unworkable approach to website accessibility regulation. [1]In addition to due process and primary jurisdiction concerns,[2] the lower court's holding is correct because:

- The lower court correctly declined to give deference to DOJ's litigation position that websites are required to satisfy WCAG 2.0 AA because DOJ has not amended its Title III regulations pursuant to the APA's notice and comment provisions to encompass websites or to include website accessibility standards.

- The current disjointed approach to website accessibility creates uncertainty and unduly burdens businesses. It subjects businesses who operate a single website to competing requirements depending on where it is sued. It also compels businesses to expend an inordinate amount of resources in an

[1] *Robles v. Domino's Pizza LLC*, 2017 U.S. Dist. LEXIS 53133 (C.D. Cal. March 20, 2017).

[2] This brief does not address these issues as they are the focus of Appellee's brief.

attempt to meet ever-changing guidance, without any assurance that compliance efforts will be sufficient.

The Foundation respectfully submits that the Court should affirm the district court's decision.

ARGUMENT

I. DOJ's Position Is Not Entitled To Deference Because Its Strategy of Regulation Through Litigation Is Contrary To The Requirements Of The APA, 5 U.S.C. §553.

Instead of undertaking the APA's rulemaking process, DOJ has attempted to back-door ADA coverage of websites through litigation. DOJ has filed Statements of Interest across the country in private litigations, advocating that the ADA's existing statutory and regulatory language extends to websites and requires compliance with WCAG 2.0 AA.[3] The Court should not accord deference to DOJ's regulation through litigation approach.

[3] DOJ has filed at least four (4) Statements of Interest in ADA website accessibility lawsuits. *See* (1) Statement of Interest of the United States, *Nat'l Assoc. of the Deaf v. Netflix*, No. 11-30168 (D. Mass. May 15, 2012); (2) Statement of Interest of the United States, *Nat'l Assoc. of the Deaf v. MIT*, No. 15-300024 (D. Mass. Jun. 3, 2015); (3) Statement of Interest of the United States, *Nat'l Assoc. of the Deaf v. Harvard University*, No. 15- 300024 (D. Mass. Jun. 25, 2015); (4) Statement of Interest of the United States., *Gil v. Winn-Dixie Stores, Inc.*, No. 16-23020 (S.D. Fla. Dec. 12, 2016). *See also* Statement of Interest of the United States, *New v. Lucky Brand Dungarees Stores, Inc.*, 51 F.Supp.3d 1284 (S.D. Fla. 2014), www.ada.gov/briefs/lucky_brand_soi.pdf (advocating that the ADA covers websites). DOJ also has entered into at least 14 settlement agreements requiring businesses to reconfigure their websites to WCAG 2.0 AA. *See e.g.* Consent Decree, *Nat'l Fed. of the Blind, et al., United States of America v. HRB Digital LLC and HRB Tax Group, Inc.*, No. 13-10799 (D. Mass. Mar. 25, 2014),

Congress did not intend to regulate the Internet, which was in its nascent stage, when it passed the ADA in 1990. The statute provides 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 . . .." *See* 42 U.S.C. §12182(a) (2016). It lists 12 categories of a "place of public accommodation." 42 U.S.C. § 12181(7)(A)-(L) (2016). Absent from that list are internet websites.

DOJ's efforts to shoehorn website accessibility into its "effective communication" regulations are unavailing. DOJ had the opportunity to add websites to its laundry list of auxiliary aids and services that could be used to provide effective communication, but it declined to do so.[4]

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www.ada.gov/hrb-cd.htm; Settlement Agreement, *The United States of America and Ahold U.S.A., Inc. and Peapod, LLC* (Nov. 14, 2014), http://www.ada.gov/peapod_sa.htm.

[4] When DOJ issued the 2010 regulations, DOJ made extensive revisions to its Title III regulations, including to address developing technologies such as video remote interpreting services and electronic personal assistance mobility devices. *See* 28 C.F.R. §§ 36.303 (b)(1) (providing examples of auxiliary aids and services) and 36.311(b) (adding provisions on mobility devices). It could have included accessibility guidelines for websites, but it declined to do so. DOJ failed to address websites at all despite acknowledging that commercial use of the Internet had become widespread. *See* 28 C.F.R. Parts 35 and 36 [CRT Docket No. 110] RINS 1190-AA61, DOJ's Advanced Notice of Proposed Rulemaking on Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43,460 (July 26, 2010) ("ANPRM"). DOJ's omission of website regulations was intentional, not a mere oversight. Informal Statements of Interest are not entitled to deference in light of DOJ's intentional and considered regulatory inaction.

DOJ has not promulgated website accessibility standards pursuant to the APA's notice and comment provisions. DOJ's failure on this front renders it ineligible for deference. Indeed, the courts have rejected previous attempts by DOJ to regulate the ADA through litigation rather than adhering to the procedural framework of the APA.[5]

DOJ's position on website accessibility lacks consistency and persuasiveness. DOJ has taken inconsistent positions on the ADA's applicability to websites and what is required of a website.

A. DOJ Has Failed To Properly Issue Website Accessibility Regulations Pursuant To The APA.

DOJ's delegated authority to promulgate regulations under the ADA is not unfettered. 5 U.S.C. § 533 (providing requirements for agency rulemaking). The APA provides an important check on law-making by unelected officials because it requires DOJ to undertake rulemaking procedures in order to promulgate new rules or amend existing ones. The APA ensures that rulemaking remains a product of rational decision-making, and stays within the purview of the Constitution. *See*

[5] This is not the first time DOJ has ignored the procedures required by the APA to advance a one-size fits all solution for ADA compliance. It has a history of side-stepping the APA in the "line of sight" cases involving assembly areas and movie theatres. Here, just like the issue of line of sight, DOJ has abandoned the requisite notice and comment period in an effort to force web accessibility compliance. However, unlike line of sight where DOJ was offering a new interpretation of an existing regulation, what is at issue here is far more egregious. DOJ is not offering an interpretation of an existing regulation; rather, it has dictated what the law requires, without issuing regulations. *See Infra* at Section I (D).

Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1206 (2015) ("'allow[ing] any agency to make fundamental change in its interpretation of a substantive regulation without notice and comment' would undermine the APA's procedural framework.").

The text of the APA makes clear what an agency must do to properly promulgate a rule. 5 USCS § 533 (b) requires that an agency must first provide (1) "general notice of proposed rule making published in the Federal Register . . . and the notice shall include (i) a statement of time, place and nature of public rulemaking proceedings; (ii) reference to the legal authority under which the rule is proposed; and (iii) the terms or substance of the proposed rule." DOJ took this step when it published its ANPRM on July 26, 2010. *See* at n. 3.

DOJ, however, never began or completed the other necessary steps. To create an enforceable regulatory scheme, the APA required DOJ to "give interested persons an opportunity to participate through submission of written data, views, or arguments [and] . . . *After consideration* of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and understanding. (emphasis added). *See* 5 USCS § 533 (c). DOJ was then required to publish a final rule. *See* 5 USCS § 533 (d). None of this has occurred.

The courts have consistently recognized the importance of the APA's notice and comment requirements. *See Health Ins. Ass'n of Am., Inc. v. Shalala*, 23 F.3d

412, 421 (D.C. Cir. 1994) ("In order for a rule to be considered validly promulgated, it must be a "'logical outgrowth' of the proposals on which the public had an opportunity to comment."); *Am. Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1111, (D.C. Cir. 1993) (holding that "failure to provide notice-and-comment rulemaking will usually mean that affected parties have had no prior formal opportunity to present their contentions.").

Courts have routinely rejected an agency's attempt to impose a substantive requirement that has not undergone the requisite notice and comment process. Indeed, partial compliance with the APA has been deemed insufficient. *See Horsehead Resource Dev. Co. v. Browner,* 16 F.3d 1246, 1269 (D.C. Cir. 1994) (holding that proposed rule contemplating the possibility of changing an existing regulation "is not necessarily notice of the whole" and remanding the issue to the EPA.); *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005) ("a regulation will be deemed arbitrary and capricious, if the issuing agency failed to address significant comments raised during the rulemaking."); *see also, Ass'n of Private Sector Colleges & Univs. v. Duncan*, 681 F.3d 427, 463 (D.C. Cir. 2012) (affirming that the Distance Education Regulations of the Department of Education violates the APA, "because the Department had failed to provide adequate notice of the rule to regulated parties. . . . More importantly, we find the Department's claims that parties should have anticipated the regulation wanting.").

DOJ's failure in this case is more egregious because DOJ has not partially failed to comply, it has utterly failed to comply with the APA.

B. DOJ's Disregard For Proper Rulemaking Renders Its Litigation Position Ineligible For *Chevron* Deference.

The Foundation recognizes that courts afford an administrative agency a degree of deference when promulgating regulations to implement a statute that Congress delegated authority to the agency to administer.[6] However, that deference does not grant a *carte blanche* to DOJ to ignore the requirements of the APA, which it has consistently done on the issue of website accessibility for persons with disabilities. DOJ is not entitled to the deference courts have shown administrative agencies pursuant to *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

Chevron deference is a two-step process, and requires that where a statute speaks clearly to the precise question at issue, the court "must give effect to the unambiguously expressed intent of Congress." *Id*. at 843. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is

[6] *See Bragdon v. Abbott*, 524 U.S. 624, 646 (1998) ("As the agency directed by Congress to issue implementing regulations . . . to render technical assistance explaining the responsibilities of covered individuals and institutions, . . . and to enforce Title III in court,. . . The Department [of Justice]'s views are entitled to deference.").

whether the agency's answer is based on a permissible construction of the statute." *Id*.

DOJ's position that the ADA applies to websites and requires compliance with WCAG 2.0 does not warrant *Chevron* deference because DOJ has not promulgated "rules carrying the force of law." *See United States v. Mead Corp*., 533 U.S. 218, 226-227 (2001) ("deference in accordance with *Chevron*, however, is warranted only when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."). As explained above (*see* subpart A *supra*), DOJ eschewed using either its rulemaking or its adjudicatory powers in this matter.

C. DOJ's Failure To Comply With The APA Renders Its Litigation Position Ineligible For Deference.

The Supreme Court has taught that deference may be extended to an agency's perspective when it exercises its rulemaking authority, and when an agency authorized to administer a statute interprets its own regulation or the statute by other means. In *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 131 S. Ct. 871, 178 L. Ed. 2d 716 (2011), the federal agency presented its position in an amicus brief and the Supreme Court held: "we defer to an agency's interpretation of its own regulation, advanced in a legal brief, unless that interpretation is 'plainly

erroneous or inconsistent with the regulation.'" *Id*. at 880 (quoting *Auer v. Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997)). In *Capistrano Unified School District v. Wartenberg*, 59 F.3d 884 (9th Cir. 1995), the Department of Education clarified its position in a "letter to all chief state school officers," and the Court held that the agency was "entitled to deference in its interpretation of the statute, because the interpretation is based on a permissible construction of the existing statutory language." *Id*. at 894.

Even when an agency's decision does not qualify for *Chevron* deference, "an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency, . . . and given the value of uniformity in its administrative and judicial understandings of what a national law requires." *Mead Corp.*, 533 U.S. 218 at 234 (quoting *Skidmore v. Swift*, 323 U.S. 134, 139-40, 65 S. Ct. 161, 89 L. Ed. 124 (1994)).

1. DOJ Is Not Entitled To *Auer* Deference

Here, however, deference to DOJ's position that its Title III regulations encompass websites is not warranted because DOJ explicitly chose not to include websites when it amended its Title III regulations in 2010, despite recognizing the

need to clarify whether the ADA covers websites.[7] In 2010, DOJ undertook a significant revision of its definition of a "place of public accommodation," but did not add websites to the listed categories. *See* Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. 56236, 56253 (Sept. 15, 2010) (codified at 28 C.F.R. § 36.104) (revising definition of a "place of lodging", one of the enumerated places of public accommodation). It added over a dozen examples of auxiliary aids and services, but did not include websites. *See* Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. 56236, 56253 (Sept. 15, 2010) (codified at 28 C.F.R. § 36.303(b)) (adding, for instance, screen reader software, magnification software and real-time captioning).

DOJ has not adopted *any* website accessibility standard. DOJ's extant Title III regulations certainly cannot reasonably be interpreted to require compliance with WCAG 2.0 AA. WCAG 2.0 AA are merely guidelines established by a private, non-governmental group. DOJ's mere proposal of WCAG 2.0 AA does not warrant deference. As the lower court aptly noted, this Court has refused to defer

[7] *See* ANPRM ("Although the Department has been clear that the ADA applies to websites of private entities that meet the definition of "public accommodations," inconsistent court decisions, differing standards for determining Web accessibility, and repeated calls for Department action indicate remaining uncertainty regarding the applicability of the ADA to websites of entities covered by title III. For these reasons, the Department is exploring what regulatory guidance it can propose to make clear to entities covered by the ADA their obligations to make their websites accessible.").

to a proposed regulation published by DOJ. *See Cal. Rural Legal Assistance v. Legal Services Corp*, 917 F.2d 1171, 1173 (9th Cir. 1990) ("declin[ing] to take cognizance" of a proposed regulation because it "does not represent an agency's considered interpretation of its statute."). It has found "[t]he DOJ's interpretation in a notice of proposed rulemaking [] similarly unpersuasive." *Arizona ex rel. Goddard v. Harkins Amusement Enters., Inc.*, 603 F.3d 666, 674 (9th Cir. 2010).

Proposed rulemakings have not undergone the careful consideration of alternatives proposed by the public, have not been weighed against the burdens on the regulated community that would be imposed, and, in short, have not faced the rigorous scrutiny mandated by the APA. Nor have they undergone the analyses required by Executive Order 12866 (58 F.R. 51735, October 4, 1993), which requires that before a regulation can be adopted the issuing agency must assess the general economic costs and benefits of the regulatory proposal and for every "major" rule, complete a Regulatory Impact Analysis (RIA) that describes the costs and benefits of the proposed rule and alternative approaches, and justifies the chosen approach.

One example of the unintended consequences of DOJ's backdoor attempt to regulate without circumspectly considering the consequences of its actions is the removal of online content. *See* Lisa Fickenscher, "Company scraps site to avoid suits for ADA violations," New York Post, December 17, 2017, available at

https://nypost.com/2017/12/17/company-scraps-site-to-avoid-suits-for-ada-violations (last viewed December 24, 2017) (reporting that a major operator of numerous New York franchises of well-known restaurant chains announced in December 2017 that it "took down the [company's] Web site after [it] heard lawyers are suing companies for Americans with Disability Act violations for not providing access for blind and deaf people."); *see also* Public Affairs at UC Berkeley, "Campus message on Course Capture video, podcast changes," Berkeley News, March 1, 2017, available at http://news.berkeley.edu/2017/03/01/course-capture/ (last viewed December 26, 2017) (announcing that Berkeley was restricting public access to thousands of free online lectures and courses in response to DOJ findings that many were inaccessible to those with hearing and vision impairments). Thus, one result of DOJ's haphazard, informal and irregular attempt to regulate through private litigation is that the general public, including persons with disabilities, is harmed by DOJ's misguided attempt to benefit those with certain disabilities without considering the range of impacts its actions will have. It also illustrates the dangers of DOJ "subcontracting" out to the plaintiff's bar the job of making or enforcing a regulatory agenda without complying with the APA's safeguards.

There is no telling if DOJ ever will adopt website accessibility regulations in light of factors that may be brought to its attention in a proper rulemaking process.

The current Unified Agenda of Regulatory and Deregulatory Actions shows that DOJ's rulemaking for Titles II and III of the ADA for websites is now inactive.[8]

Just yesterday, DOJ announced its withdrawal of the ANPRM. *See* Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions, available at https://www.federalregister.gov/documents/2017/12/26/2017-27510/nondiscrimination-on-the-basis-of-disability-notice-of-withdrawal-of-four-previously-announced (last viewed December 26, 2017). DOJ explained that it is "evaluating whether promulgating regulations about the accessibility of Web information and services is necessary and appropriate. Such an evaluation will be informed by additional review of data and further analysis. [DOJ] will continue to assess whether specific technical standards are necessary and appropriate to assist covered entities with complying with the ADA." The Foundation hopes that DOJ will bring its litigation position in this case into line with its current regulatory stance. Whether it does so or not, the changing regulatory landscape requires the Court to decline to give deference to DOJ's argument.

[8] Executive Office of Management and Budget, Office of Information and Regulatory Affairs, (October 17, 2017), https://www.reginfo.gov/public/jsp/eAgenda/InactiveRINs_2017_Agenda_Update.pdf.

2. DOJ's Reference To WCAG 2.0 As Informal Guidance Does Not Warrant *Skidmore* Deference.

In light of DOJ's many failures catalogued above, DOJ is left only with its power to persuade. When weighing the persuasiveness of an agency's pronouncements in a particular case, a court should look "upon the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *See Skidmore*, 323 U.S. 134 at 140. DOJ's position on website accessibility is not persuasive.

DOJ has not advanced a consistent theory on the ADA's applicability to websites. DOJ has claimed that a website is covered by the ADA because the website *is* a place of public accommodation. *See* Statement of Interest of United States of America, *Nat'l Assoc. of the Deaf v. Netflix*, No 11-30168 at *5 (D. Mass. May 15, 2012) ("Netflix, which operates its website and Watch Instantly service through computer servers and the Internet, is a public accommodation subject to title III of the ADA, even if it has no physical structure where customers come to access its services."). But it has alternatively claimed that a website warrants ADA coverage because it is a service *of* a place of public accommodation. *See Gil v. Winn-Dixie Stores, Inc.*, No. 16-23020 (S.D. Fla. Dec. 12, 2016) [D.E. 23 at 5] ("Title III applies to discrimination in the goods and services 'of' a place of public accommodation, rather than being limited to those goods and services provided 'at'

or 'in' a place of public accommodation."). DOJ has also argued that the ADA extends to websites as part of a covered entity's obligation to furnish appropriate auxiliary aids and services that are necessary to ensure effective communication with individuals with disabilities so that they are not deprived of access to goods and services. *Winn Dixie* SOI at 4.

In yet another shift, DOJ appears to be rethinking whether the ADA applies to websites at all. *Magee v. Coca Cola*, No. 16-668, involved a matter before the U.S. Supreme Court on the ADA's applicability to vending machines. DOJ filed an amicus brief arguing that the court should not grant review of whether web-only businesses are covered by Title III. *See* Brief for the United States as Amicus Curiae at p. 22, July 2017 ("Questions concerning Title III's application to non-physical establishments – including websites or digital services – may someday warrant this Court's attention. This case is not a suitable vehicle for addressing those emerging issues, however, since petitioner encountered respondent's machines in person, not by telephone or over the Internet.").

The district court in *Robles v. YUM! Brands, Inc. dba Pizza Hut*, No. 2:16-cv-08211-ODW-SS (C.D. Cal.) invited DOJ to intervene because the defendant argued (among others) that the ADA was unconstitutionally vague as to its coverage of websites. 2:16-cv-08211-ODW-SS (Aug. 22, 2017 C.D. Cal.) [D.E.

47]. DOJ did not take that opportunity to express its views in that case to that court.

Further, DOJ has not consistently required compliance with WCAG 2.0. Rather, DOJ has explained that places of public accommodation may meet website accessibility obligations "by providing an accessible alternative for individuals to enjoy its good and services, such as a staffed information line." *See* 75 Fed. Reg. 43464; 28 C.F.R. § 36, Appendix A.

DOJ's haphazard arguments and enforcement policies deprive its arguments here of persuasive power.

D. Courts Have Rejected DOJ's Efforts To Circumvent The APA's Rulemaking Process And Have Not Given Deference To DOJ's Litigation Position

This is not the first time DOJ has attempted to regulate ADA compliance through litigation. In a series of cases involving lines of sight at movie theaters, DOJ argued for requirements that had not undergone the scrutiny of the APA's rulemaking process. *U.S. v. Hoyts Cinemas Corp*., 380 F.3d 558 (1st Cir. 2004), involved an ADA enforcement action brought by DOJ against a movie theater owner. In that case, DOJ asserted that "standard 4.33.3's" provision for wheelchair areas to be an "integral" part of the seating plan meant that wheelchair seating had to be in all stadium sections of the theater regardless of the sloped seating. *Id*. at 568. The *Hoyts* court declined to give deference to the agency's position because it

was tantamount to a rule change that had not undergone the required rulemaking process. *Id*. at 569. The court explained: "Deference to the agency's view does not mean abdication. Here, the Department's gloss . . . is an unnatural reading of 'integral,' . . . ." *Id*. "The Department is free to interpret reasonably an existing regulation without formally amending it; but where, as here, the interpretation has the practical effect of altering the regulation, a formal amendment–almost certainly prospective and after notice and comment–is the proper course." *Id*.

There are other parallels between DOJ's mistaken approach in the line of sight cases and its regulation through litigation strategy involving website accessibility in this case. Then, as now, DOJ made no effort to address comments by the affected industries, even though well-settled law requires it to do so. *See Indep. Living Res. v. Or. Arena Corp*., 982 F.Supp. 698, 737 (D. Or. 1997) (noting that "DOJ did not respond to public comments regarding individual Standards, nor did DOJ explain the agency's reasoning in adopting a specific Standard or why it had rejected language suggested by persons commenting on the proposed Standards."). 376 public comments have been submitted since DOJ issued its ANPRM on website accessibility more than seven years go, but DOJ has not responded publically to a single comment. Also similar to line of sight cases, DOJ's attempt to regulate websites through litigation has led to an eruption of litigation across the country (discussed more below). As *Hoyts* instructs, if DOJ

contends that its delegated regulatory authority extends to websites, then, pursuant to the APA's rulemaking process, DOJ must amend its regulations to encompass websites and to set standards for compliance.

In sum, this is a situation where DOJ, without undertaking a rulemaking proceeding, without soliciting, receiving, evaluating and weighing public comment, without considering alternatives, and without considering the impact of its imposed standards, has as a practical matter amended the definitions of a "place of public accommodation" and "auxiliary aids and services" to shoehorn websites within the ambit of the ADA. It has then effectively sought to impose WCAG 2.0 AA as the standard for website accessibility. DOJ now expects the judicial branch to enforce its mandates. The Court should deny deference to DOJ's position.

E. Congress May Need To Intervene In Light Of DOJ's Conduct

Congressional intervention and judicial enforcement of legislative mandates may be required to correct DOJ's failure to adopt website regulations. *Ctr. for Food Safety v. Hamburg*, 954 F. Supp. 2d 965 (N.D. Ca. 2013) is instructive here because Judge Phyllis Hamilton, consistent with Congressional mandate, directed the Food and Drug Administration (FDA) to issue regulations. The district court did not itself promulgate standards, unlike some courts that have imposed website accessibility standards because DOJ has not done so. *See e.g.*, *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340, 1350-51 (S.D. Fla. 2017). Congress enacted the

FDA Food Safety Modernization Act of 2010 (FSMA), Pub. L. No. 111-353, 124 Stat. 3885 (2011) to modernize food safety laws by mandating science-based standards, and directed the FDA to promulgate new regulations in seven specified areas within 18 months. *Id*. at 967. The FDA failed to do so, and the court entered a declaratory judgment "that the FDA has violated the FSMA and the APA by failing to issue regulations . . . and continues to be in violation of the FSMA and the APA for failing to promulgate the regulations." *Id*. at 972. The court further ordered the parties to prepare a joint written statement setting proposed deadlines for publication of final FSMA regulations, which also would include an economic analysis. *Id*.at 972.

In *Ctr. for Food Safety*, as here, it was critically important that the regulations were properly promulgated through the APA notice and comment process because FSMA's final rules not only eventually addressed the industry's needs, but also recognized the need for different levels of compliance depending on the scope and size of a respective grower or manufacturer's operations.[9] Like

[9] When final regulations were implemented in accordance with the Court's order, the FDA directed compliance based on rational rulemaking. The proposed rule for the "Current Good Manufacturing Practice and Hazard Analysis and Risk-Based Preventive Controls For Human Food" 21 CFR 117 received more the 8,000 comments. *See* Final Rule, Current Good Manufacturing Practice and Hazard Analysis and Risk-Based Preventive Controls For Human Food" 21 CFR 117, Sec I (f), at regulations.gov, https://www.regulations.gov/document?D=FDA-2011-N-0920-1979 (last viewed December 27, 2017). Due to the commentary, the FDA acknowledged the need to create exceptions for small farms and different

the rational food safety rule the FDA eventually promulgated, a website accessibility rulemaking would benefit from public notice and comment in order to develop a reasoned approach. The process could consider, for example, whether different standards for compliance should apply to small versus large businesses. A collaborative approach also could address acceptable alternatives, good faith compliance efforts, technical implementation issues, and a notice and cure provision.

II. The Lack of Website Regulations Adversely Impacts the Public

The disjointed regulation by litigation approach to website accessibility has resulted in conflicting directives and burdensome costs to businesses.

A. Competing Directives Yield Inconsistent Results

The circuit courts are split on whether the ADA covers websites. The Third, Sixth, and Ninth Circuits have interpreted the term "place of public accommodation" to require a nexus between the alleged discrimination and a physical, concrete place. *Parker v. Metropolitan Life Ins. Co*., 121 F. 3d 1006 (6th

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compliance standards for small farms versus large farms because compliance with the proposed rule would be too burdensome for small farms given the size of their operations and resources. *See Id*. Furthermore, the FDA held public meetings to hear commentary from the industry affected by the rule on October 20, 2015 in Chicago. *See* FDA.Gov, http://wayback.archiveit.org/7993/20170111073828/http://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm461791.htm (last viewed December 27, 2017). As result of the comments, the rule does not cover produce farms that have an average annual value of produce sold during the previous three-year period of $25,000.00 or less. 21 U.S.C. § 341 *et seq*, Sec. 105.

Cir. 1997); *Ford v. Schering-Plough Corp.*, 145 F. 3d 601 (3d Cir. 1998); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F. 3d 1104 (9th Cir. 2000); *Earll v. Ebay, Inc.*, 599 Fed. Appx. 695 (9th Cir. 2015); *cf. National Federation of the Blind v. Target Corporation*, 452 F.Supp.2d 946 (N.D. Cal. 2006). In contrast, the First and Seventh Circuits have determined that a place of public accommodation is not limited to a physical, concrete place. *Carparts v. Automotive Wholesaler's Assoc. of New England*, 37 F.3d 12 (1st Cir. 1994); *Doe v. Mut. of Omaha Ins. Co.*, 179 F. 3d 557, 558 (7th Cir. 1999). The issue is on appeal in the Eleventh Circuit in *Winn-Dixie Stores, Inc. v. Gil*, No 17-13467.

The absence of website regulations has resulted in inconsistent mandates, which, in turn, has led to lack of uniformity in remediation requirements. Indeed, a covered entity operating in a single jurisdiction, much less multiple jurisdictions, faces conflicting directives in attempting to achieve compliance.

Even within the same judicial district, the Central District of California, two conflicting opinions have been issued: the district court's opinion in this case directly conflicts with *Gorecki v. Hobby Lobby Stores, Inc.*, No. 17-01131 (C.D. Cal. June 5, 2017). The *Hobby Lobby* court expressly rejected the due process and primary jurisdiction arguments accepted by the district court in this case and instead denied dismissal of the complaint and issued an injunction requiring the defendant to enhance its website to an unspecified standard.

A district court in the Southern District of New York held that a business' ongoing efforts to enhance its website, even in the absence of regulations, will not shield it from an ADA claim. *See Markett v. Five Guys Enterprises LLC*, No. 17-00788 (S.D.N.Y. July 21, 2017) (rejecting an argument that an ADA claim was moot, finding that the defendant had yet to "successfully" enhance its website and that defendant had not established that "it [is] absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.") (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610, (2000)).

A district court in the Eastern District of New York indicated that it will determine what features a website must include. *See Andrews v. Blick Art Materials, LLC*, No. 17-007676 (E.D.N.Y. Aug. 1. 2017) (directing a "Science Day" where experts would demonstrate web access technology to the court "to explore the technology available to enable the 'blind to see' websites [and] how burdensome it would be for the defendant to make its website compatible with available technology.").[10]

In addition to the inconsistent mandates, these decisions discourage efforts to implement website enhancements. *Hobby Lobby* and *Blick Art* instruct that a covered entity might as well wait until it is hauled into court so either the plaintiff

[10] This is a striking example of the court assuming the role of regulator and making decisions that require technical expertise.

or a group of experts can determine what accessible features a website must contain. *Five Guys* teaches website owners or operators that proactive efforts will be in vain until "successfully" implemented, whatever that may mean, and until then the business owner is at risk.

The *Winn-Dixie* decision, from a court sitting in the Southern District of Florida, is the most expansive interpretation of the ADA to date. It held that a place of public accommodation must ensure that its website – and linked third-party sites – comply with WCAG 2.0 AA. *Winn-Dixie*, 257 F. Supp. 3d at 1351. Yet the *Winn-Dixie* opinion provides no guidance as to how a place of public accommodation is to ensure that another, unrelated, business that controls another website can compel the third-party controlled website to comply with a non-governmental guideline that has not been formally adopted by DOJ. It leaves a covered entity to speculate whether a representation of compliance with WCAG 2.0 AA by the owner or operator of a linked website is sufficient, whether it must monitor the third-party website, or whether something more is required.

B. The Lack of Website Regulations Results in Burdensome Costs

The conflicting mandates resulting from the lack of properly adopted and published website regulations also imposes significant costs on businesses. Businesses want individuals with disabilities to be able to access their products or services in-store and online, but they simply do not know what they must do in

order to make their websites sufficiently accessible because there are no regulations. In the meantime, the cost to keep up with evolving guidance is staggering and ongoing. Several steps are involved and each is time-consuming and requires specialized knowledge to execute. In many cases, covered entities need to hire additional employees, retain outside web consultants, or both. For instance:

- The evaluation of a website normally includes automated and manual user tests (e.g., screen reader software). Technical expertise is required to analyze and evaluate the results, identify false positives (which are common), and resolve subjective elements (e.g., whether a text description for an image is sufficiently, but not overly, detailed).
- Revamping a website involves writing new code, developing new design templates, re-inputting content, images and multimedia, and often moving to a different platform altogether. This is an expensive endeavor which can take months to accomplish.
- Continuous monitoring and enhancements are required because consumer-facing websites are constantly changing to accurately reflect products or services offered and to meet market demand.[11]

Covered entities should not be forced to bear such a high burden in the absence of properly developed and issued regulations, especially when the guidance is constantly changing. *See* Web Content Accessibility Guidelines

[11] *See e.g.* Comments and Response to the ANPR regarding Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, National Retail Federation, January 24, 2011, CRT Docket No. 110; RIN 1190-AA61; Comments and Response to the ANPR regarding Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, National Restaurant Association, January 24, 2011, CRT Docket No. 110; RIN 1190-AA61.

(WCAG) 2.1, W3C Working Draft, 07 December 2017, http://www.w3.org/TR/WCAG21/ (last visited December 26, 2017) (providing a working draft of WCAG 2.1, which extends WCAG 2.0, and discussing the parallel development of WCAG 3.0, a "more substantial restructuring of web accessibility guidance than would be realistic for dot-releases of WCAG 2.").

Given the burden that inconsistent rulings impose on covered entities, the Court should decline to engage in or encourage DOJ's regulation by litigation approach.

CONCLUSION

For the foregoing reasons, the Foundation respectfully requests that the Court affirm the lower court's opinion.

CERTIFICATE OF COMPLIANCE STATEMENT OF AMICUS CURIAE

Pursuant to Rule 29(a)(4)(E) of the Rules of this Court, *amicus curiae* Atlantic Legal Foundation states that no party other than *amicus curiae* or its counsel has authored or contributed money or other services in the preparation of the *amicus* brief.

/s/ *Carol C. Lumpkin*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 27, 2017.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

December 27, 2017

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,775 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman 14-point font.

/s/ *Carol C. Lumpkin*