Appeal No. 17-13467

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

WINN-DIXIE STORES, INC.,

Defendant - Appellant,

vs.

JUAN CARLOS GIL,

Plaintiff - Appellee.

Appeal from a Final Judgment of the United States District Court for the Southern District of Florida, Miami Division

Case No. 1:16-cv-23020-RNS

BRIEF FOR *AMICUS CURIAE* THE FLORIDA JUSTICE REFORM INSTITUTE, IN SUPPORT OF DEFENDANT/APPELLANT

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, the Florida Justice Reform Institute (the "Institute") hereby certifies that list of the trial judges, attorneys, persons, associations of persons, firms, partnerships, corporations, including subsidiaries, conglomerates, affiliates and parent corporations, or other indefinable legal entities related to a party that have an interest in the outcome of this appeal:

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THE INSTITUTE'S INTEREST IN THIS CASE

The Florida Justice Reform Institute ("Institute") is Florida's leading organization of concerned citizens, small business owners, and business leaders who are working toward the common goal of promoting predictability in the civil justice system in Florida through the elimination of wasteful civil litigation and the promotion of fair and equitable legal practices.

The Court's decision in this proceeding will affect every business within its jurisdiction that has a website. It will particularly impact businesses in Florida, which has long been a hotbed for Americans with Disabilities Act ("ADA") litigation and is currently leading the country in ADA website accessibility lawsuits. Indeed, over 400 website accessibility lawsuits have been filed nationwide in federal court this year alone.[1] The Institute and its members have a significant interest in apprising the Court of the adverse consequences that the lower court's ruling imposes on businesses and in promoting a rational and consistent approach to website accessibility under the ADA.

Given the intrinsic role that due process plays in our legal system, it is inappropriate to hold a business liable under the ADA for an alleged inaccessible website when neither the statute nor its implementing regulations, identifies websites as covered by the ADA. Furthermore, there are no laws or regulations

[1] This approximate figure is based on a review of PACER.

setting forth the minimum requirements for an accessible website. In other words, there is no notice to the public.

All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The Institute 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 since the passage of the ADA in 1990 and, as such, submits that any laws governing access to websites must be promulgated. The U.S. Department of Justice ("DOJ"), the agency delegated by Congress to effectuate the statute, must act in accordance with the rulemaking process set forth in the Administrative Procedures Act ("APA"). To date, the DOJ has not done so despite having published revised ADA regulations in 2010, and announcing its intention to issue them over seven (7) years ago.

Instead of following the law, the 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, the DOJ claims the ADA governs websites, not because the statute states as such, nor because the DOJ has duly amended the ADA regulations to include coverage of websites, but because the DOJ has decreed it so in litigation. To make matters worse, the DOJ has failed to adopt standards setting forth the requirements of an accessible website, leaving

businesses to guess at what is required to meet the DOJ's mandate. Instead, the 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. DOJ makes this demand without having adopted WCAG 2.0 AA.

The DOJ's disregard for the regulatory process has led to a deluge of ADA website lawsuits resulting in a patchwork of opinions imposing conflicting directives on businesses. Consequently, 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.

The lower court's opinion, the most onerous on businesses thus far, requires covered entities to conform their websites – and third-party websites linked to their site (but which they do not operate or control) – to WCAG 2.0 AA. [D.E. 63 at 12] The lower court should not compel citizens to comply with standards issued by a private non-governmental organization, where Congress has not passed legislation and the DOJ itself has not implemented formal rules.

The lower court's holding is erroneous for the following reasons:

- There are no laws or regulations that bring websites within the purview of the ADA. The ADA does not define a website as a place of public accommodation. The ADA likewise does not define a website as a type of auxiliary aid or service necessary to facilitate effective communication with individuals with disabilities.

- The ruling violates due process of the law and the protections afforded by the APA. Our constitutional system of government requires agency regulation through the APA's rulemaking process, a framework that respects due process of the law and the authority vested in the three equal branches of government. It does not allow a federal agency to circumvent the rulemaking process, and instead delegate to the judiciary the authority to create law based on the agency's litigation position.

- The disjointed approach to website accessibility creates uncertainty and unduly burdens businesses. It subjects businesses who operate a single website to competing requirements depending on which jurisdiction it is sued. It also compels businesses to expend an inordinate amount of resources in an attempt to meet ever-changing guidance, without any assurance that these compliance efforts will be sufficient.

The Institute respectfully submits that the Court should reverse the lower court's holding.

ARGUMENT

I. There Is No Law or Regulation That Puts Websites Within the Purview of the ADA

Title III of the ADA governs access to a "place of public accommodation." It 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); *see also* 28 C.F.R. §36.201(a) (2016). The

statute enumerates 12 categories of a "place of public accommodation." 42 U.S.C. § 12181(7)(A)-(L) (2016). Glaringly absent from that list are websites. The DOJ could have added websites to the definition of a "place of public accommodation" when it amended its Title III regulations in 2010; in fact, the DOJ revised that very definition. *See* Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. 56236, 56250 (Sept. 15, 2010)(codified at 28 C.F.R. § 36.104). The DOJ, however, chose not to expand a "place of public accommodation" to include websites. *See e.g., Access Now, Inc. v. Sw. Airlines, Co.*, 227 F. Supp. 2d 1312, 1318-19 (S.D. Fla. 2002) ("Here, to fall within the scope of the ADA as presently drafted, a public accommodation must be a physical, concrete structure. To expand the ADA to cover 'virtual spaces,' would create new rights without well-defined standards.") *appeal dismissed* 385 F.3d 1324, 1335 (11th Cir. 2004).

Additionally, the ADA does not define websites as a type of "auxiliary aid and service" necessary to ensure "effective communication" to individuals with disabilities. *See* 28 C.F.R. § 36.303(a)-(c) (2016). The statute sets forth several examples of auxiliary aids and services and, again in 2010, the DOJ added over a dozen more examples when it amended its Title III regulations. *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). Given the opportunity to include websites within the regulations, the DOJ excluded them.

There is likewise no law or regulation setting forth what constitutes an accessible website. Rather, there are guidelines masquerading as enforceable rules established in 2008, by a private, non-governmental group. The DOJ has had ample opportunity to promulgate website accessibility standards. To date, it has not chosen to do so.

Indeed, the court in *Gomez v. Bang & Olufsen America, Inc*. aptly described the current legal landscape: "[i]f Congress – recognizing that the internet is an integral part of modern society – wishes to amend the ADA to define a website as a place of public accommodation, it may do so. But the Court, having no legislative power, cannot create law where none exist." No. 16-23801, at 11, n. 3 (S.D. Fla. Feb. 2, 2017). Unlike the court in *Bang & Olufsen*, the lower court found that Winn-Dixie's website was inaccessible by relying on the requirements of WCAG 2.0 AA – unpromulgated standards that are not the law.

Absent Congressional action and instead of undergoing the APA's rulemaking process, the DOJ has attempted to back-door ADA coverage over websites through litigation. It has filed Statements of Interest across the country advocating that the ADA's existing statutory and regulatory language clearly

extends to websites. It has advanced various theories on this point, which are inconsistent and contradicted by the plain language of the ADA and its regulations.

In a recent ADA website accessibility lawsuit, *Nat'l Assoc. of the Deaf v. Netflix*, the DOJ proclaimed: "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." *See* Statement of Interest of United States of America, No 11-30168 at *5 (D. Mass. May 15, 2012). Yet, as discussed above, one would search in vain to find a website as one of the enumerated categories of a "place of public accommodation."

In its Statement of Interest filed in the lower court, however, the DOJ asserts: "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." [D.E. 23 at 5] ("*Winn-Dixie* SOI"). This logic, however, cannot be reconciled with the DOJ's position in *Netflix*: Netflix, a website, cannot be both a "place of public accommodation" *and* a service of a "place of public accommodation."

Advancing yet another theory, the DOJ claims 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* Sol at 4. Yet, the DOJ's 2010 amended laundry list of examples of auxiliary aids and services makes no mention of websites. *Id.* There is simply no legislative or regulatory hook to bring websites within the purview of the ADA.

To the extent the Court determines – against the unambiguous language of the statute – that the ADA otherwise extends to websites, then the Court should hold that, at most, the ADA prohibits a website (like any other element) from acting as a barrier to access to a place of public accommodation. *See Rendon v. Valleycrest Prods., Inc*., 294 F.3d 1279, 1283-84, 1286 (11th Cir. 2002) (holding that the plaintiffs stated a Title III ADA claim because the telephone selection process to become a contestant on "Who Wants to Be a Millionaire" restricted access to the television studio, a place of public accommodation; "[t]here is nothing in the text of the statute to suggest that discrimination via an imposition of screening or eligibility requirements must occur on site to offend the ADA"); *See e.g., Kidwell v. Florida Commission on Human Relations*, No. 16-00403, at * 4 (M.D. Fla. Jan. 17, 2017) (dismissing ADA claim because plaintiff was "unable to demonstrate that either Busch Gardens' or Sea World's online website prevents his access to 'a specific, physical, concrete space . . .'"); *Gomez*, No. 16-23801, at *11 ("[T]he ADA does not require places of public accommodations to create full-

service websites for disabled persons. [ ] All the ADA requires is that, if a retailer chooses to have a website, the website cannot impede a disabled person's full use and enjoyment of the brick-and-mortar store").

II. The Lack of Website Regulations and Enforcement of Guidance Violate a Covered Entity's Right to Due Process and to the Protections of the APA

Due process requires that the government provide citizens with sufficient notice of what conduct complies with the law. "[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Village of Hoffman Estates*, 455 U.S. 489, 498 (1982). The APA is intended to ensure due process in the regulatory context so that the public has notice of, and an opportunity to comment on, regulations setting forth what conduct complies with the law.[2]

[2] First, the APA requires an agency to provide "general notice of proposed rule making published in the Federal Register" that addresses certain points delineated in the statute. *See* 5 U.S.C.S. § 533 (b) (2016). Second, the DOJ is required to "give interested persons an opportunity to participate through submission of written data, views, or arguments . . . [and] *[a]fter consideration* of the relevant matter presented, [ ] incorporate in the rules adopted a concise general statement of their basis and understanding." (emphasis added). *See* 5 U.S.C.S. § 533 (c) (2016). Third, the DOJ is required to publish the final rule. *See* 5 U.S.C.S. § 533 (d) (2016). Not a single one of these steps has been followed with respect to the DOJ's *de facto* expansion of the Title III regulations to include websites.

A. The Lower Court's Decision Violates Due Process

This is not the first time the DOJ has violated due process in the context of the ADA. Lessons from the DOJ's efforts to change assembly area regulations without proper notice caution against the current piece-meal development of website accessibility jurisprudence. "Those who don't learn from history are doomed to repeat it." George Santayana, *Reason in Common Sense*, Volume I of The Life of Reason, 284, (1905). In *U.S. v AMC Entertainment*, the Ninth Circuit addressed whether the § 4.33.3 standard providing for "lines of sight comparable to those members of the general public" required unobstructed views of the movie theater screen or similar viewing angles for patrons with disabilities. 549 F.3d 760, 763 (9th Cir. 2008). Because the "lines of sight" standard was ambiguous and the Access Board and the DOJ refused to provide direction as to its meaning, litigants turned to the courts for guidance. *Id*. at 764. To no surprise, conflicting opinions were issued as the courts grappled with the meaning of § 4.33.3. *Id*. at 764-67 (explaining the conflicting opinions). The DOJ finally announced its interpretation of § 4.33.3 in an amicus brief[3] and, based on it, the Ninth Circuit concluded that § 4.33.3 required comparable viewing angles. *Id*. at 762. (citing *Or. Paralyzed Veterans of Am. v. Regal Cinemas, Inc*. 339 F.3d 1126, 1133 (9th Cir. 2003)). The Ninth Circuit, however, reversed the district court's injunctive order requiring that

[3] *Id*. at 765 (quoting *Lara v. Cinemark USA, Inc*., 1998 WL 1048497, at *2 (W.D. Tex. Aug. 21, 1998)).

AMC retrofit its theaters to incorporate comparable viewing angles as a violation of due process. *Id*. at 770. It explained that prior to the filing of the DOJ's amicus brief, AMC was not on notice of the regulators' interpretation of § 4.33.3. *Id*.

Due process likewise requires reversal of the lower court's order enjoining Winn-Dixie to modify its website to conform to WCAG 2.0 AA, mere guidance created by a private consortium that has no authority to issue law. As the lower court acknowledged, "[t]here is no federal organization that mandates particulars of website accessibility." *See* [D.E. 63 at 2]; *see also* ANPRM (seeking comment on whether the DOJ should adopt WCAG 2.0's Level AA Success Criteria, another WCAG Success Criteria, i.e., Level A or Level AAA, or the Section 508 Standards).[4] Moreover, there is no certainty as to when website accessibility regulations will be issued as the current Unified Agenda of Regulatory and Deregulatory Actions shows that the DOJ's rulemaking for Titles II and III of the ADA for websites is now inactive.[5] As such, and like in *AMC* where there is no

[4] The DOJ's litigation position – that the ADA requires websites to conform to WCAG 2.0 AA – also offers no aid to the lower Court's opinion. Unlike the DOJ's amicus brief in *Lara*, which was an interpretation of an existing enforceable standard (§ 4.33.3), the DOJ's Statement of Interest filed in the lower court is not a mere interpretation of an existing regulation. As discussed below, it is a substantive rule change that must go through the APA's rulemaking process.

[5]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.

notice of what the law requires, the lower court had no authority to require Winn-Dixie to reconfigure its website to meet WCAG 2.0 AA.

B. Courts Have Rejected the DOJ's Efforts to Circumvent the APA's Rulemaking Process and Have Not Given Deference to the DOJ's Litigation Position

U.S. v. Hoyts Cinemas Corp. involved an ADA enforcement action brought by the DOJ against a movie theater owner. 380 F.3d 558 (1st Cir. 2004). In that case, the 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 quality of sloped seating. *Id*. at 568. The *Hoyts* court declined to afford 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. It 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*.

Similar to *Hoyts*, the DOJ's conduct with regard to websites amounts to a substantive change to its regulations. Indeed, it establishes a binding norm that the

ADA covers websites.[6] Time and again, the DOJ has filed Statements of Interests proclaiming that the ADA covers websites based on the theories discussed above.[7] This has had the practical effect of compelling businesses to modify their websites based on non-legal guidance in order to avoid lawsuits spawned by the DOJ's litigation position, and to avoid the risk of enforcement by the DOJ, which has entered into at least 14 settlement agreements requiring businesses to reconfigure

[6] The Eleventh Circuit has looked at the following factors when considering whether an agency's position amounts to a substantive change to a regulation, which would require notice and comment under the APA, versus a mere interpretation of an existing regulation, which would not implicate the APA: (1) the agency is free to exercise its discretion to follow its statement, (2) the statement was published in the Federal Register or the Code of Federal Regulations, (3) the agency's expressed intentions as reflected by its characterizations of the statement; and (4) the action has binding effects on private parties. *Nat'l Mining Ass'n v. Sec'y of Labor, Mine Safety & Health Admin.*, 589 F.3d 1368, 1371 (11th Cir. 2009) (quoting *Ctr. for Auto Safety & Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 807 (D.C. Cir. 2006)).

[7] The DOJ has filed at least four (4) Statements of Interest in ADA website accessibility lawsuits across the country. *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).

their websites to WCAG 2.0 AA.[8] The DOJ, however, is not empowered to regulate through litigation. As *Hoyts* instructs, if the DOJ contends that its delegated regulatory authority extends to websites, then, pursuant to the APA's rulemaking process, the DOJ needs to amend its regulations to encompass websites.

To compound matters, the DOJ has effectively compelled covered entities to conform their websites to WCAG 2.0 AA, without formally adopting it as the technical standard for website accessibility. Under established procedure, the DOJ is required to promulgate enforceable website accessibility standards through the APA's rulemaking process, not through litigation or enforcement actions. The DOJ's very act of giving notice of proposed standards for website accessibility, the first step in the APA process, acknowledges this point.[9] The DOJ, however, ignored the 376 comments that were submitted and never publically responded to a single one. It has thus deprived the public of meaningful engagement in the rulemaking process. *See Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236-37

[8] *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), 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.

[9] *See* the 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).

(D.C. Cir. 2008) (enforcing the APA's notice and comment requirements ensures that an agency does not "fail to reveal portions of the technical basis of a proposed rule in time to allow for meaningful commentary so that 'a genuine interchange' occurs rather than 'allow[ing] an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs.").

Moreover, the DOJ was required to do an economic analysis[10] regarding an expansion of the ADA to include websites and any adopted technical standard for accessibility.[11] No economic analysis was done here.

In sum, this is a situation where the DOJ, with the stroke of a pen, has 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 imposed WCAG 2.0 AA as the standard for website accessibility. The DOJ has not gone through the APA's notice and comment procedures which are required when making a substantive change to a regulation. It has expected the

[10] Federal agencies must submit "significant regulatory action" to the Office of Management and Budget's Office of Information and Regulatory Affairs for review and approval prior to publication in the Federal Register. *See* Exec. Order No. 12866, 58 C.F.R. 51735 (Sept. 30, 1993).

[11] A proposed regulatory action is deemed to be "economically significant" under section 3(f)(1) of Executive Order 12866 if it has an annual effect on the economy of $100 million or more. *Id*. Regulatory actions that are deemed to be economically significant must include a formal regulatory analysis—a report analyzing the economic costs and benefits of the regulatory action. *Id*.

judiciary to issue its mandates. Respectfully, the Court should decline the invitation and deny deference to the DOJ's position.

C. Congress May Need to Intervene in Light of the DOJ's Conduct

Given the lack of action, it may take future Congressional intervention to correct the DOJ's failure to adopt website regulations, or for a court to enter an injunction. When Congress enacted the Food and Drug Administration (FDA) Food Safety Modernization Act of 2010 (FSMA), Pub. L. No. 111-353, 124 Stat. 3885 (2011), which was signed into law to modernize food safety laws and regulations by mandating science based standards, the FDA was directed to promulgate new regulations in seven areas within 18 months. *Ctr. for Food Safety v. Hamburg*, 954 F. Supp. 2d 965, 967 (N.D. Ca. 2013). 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 forth proposed deadlines for publication of final FSMA regulations, which also would have included an economic analysis. *Id*. 972.

In *Ctr. for Food Safety*, as here, it was critically important for regulations to be properly promulgated through notice and comment 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.[12] Like the rational rule the FDA eventually promulgated, the DOJ also could benefit from public notice and comment in order to develop a tailored approach to website accessibility instead of a one-size-fits-all rule through litigation. The process could consider whether different standards for compliance should apply between small and large businesses. A collaborative approach also could address acceptable alternatives to an accessible website, good faith compliance efforts, technical glitches, and a notice and cure provision.

II. The Lack of Website Regulations Adversely Impacts the Public

The disjointed approach to website accessibility has resulted in conflicting directives and costs to businesses.

A. Competing Directives Adversely Impacting the Public Yield Inconsistent Results

The absence of website regulations has inevitably resulted in inconsistent mandates, which, in turn, has led to lack of uniformity in remediation

[12] When final regulations were implemented in accordance with the Court's order, the FDA directed compliance based on rational rulemaking. For example, as a 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.

requirements.[13] For example:

Two conflicting opinions have been issued out of the Central District of California.

- *Robles v. Dominos Pizza LLC*, No. 16-06599 (C.D. Cal. Mar. 20, 2017) (dismissing ADA complaint because requiring defendant to have an accessible website, in the absence of DOJ website regulations, would violate its constitutional right to due process, and the "primary jurisdiction" doctrine "allows courts to stay proceedings or dismiss a complaint without prejudice pending the resolution of an issue within the special competence of an administrative agency.")

- *Gorecki v. Hobby Lobby Stores, Inc.*, No. 17-01131 (C.D. Cal. June 5, 2017) (denying dismissal despite that complaint sought to enjoin defendant to enhance its website to an unspecified standard and noting conflict with *Dominos*).

Moreover, 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*

[13] 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 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); *c.f. National Federation of the Blind v. Target Corporation*, 452 F.Supp.2d 946 (N.D. Cal. 2006). In contrast, the Fifth 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).

Enterprises LLC, No. 17-00788 (S.D.N.Y. July 21, 2017) (rejecting that ADA claim was moot because defendant had yet to "successfully" enhance its website and there was no clear assurance that accessibility issues would be avoided in the future).

Across the way, 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.").

Sitting in the Southern District of Florida, the *Winn-Dixie* court, stretching further, held that a place of public accommodation must ensure that its website and linked third-party sites comply with WCAG 2.0 AA.

A covered entity operating in these jurisdictions faces conflicting directives in attempting to achieve compliance. The opinions do not rely on a single standard for website accessibility.

Additionally, the opinions discourage proactive 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 or a group of experts can

determine what accessible features its website must contain. *Five Guys* instructs that proactive efforts will be in vain until "successfully" implemented, as if a website can be overhauled overnight.

Moreover, the *Winn-Dixie* opinion directs covered entities to ensure that linked third-party websites meet WCAG 2.0 AA, but provides no direction on how to accomplish that. It leaves a covered entity to speculate whether a representation of compliance with WCAG 2.0 AA 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 website regulations also imposes a significant cost burden on businesses. Businesses want individuals with disabilities to be able to access their products in-store and online. But they simply do not know what to 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 software and manual user tests, including with screen reader software. Technical expertise is required to cull through 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 several months to over a year to accomplish.

- Furthermore, continuous monitoring and enhancements are required because consumer-facing websites are constantly changing to meet market demand.

Covered entities should not be forced to bear such a high burden in the absence of properly issued regulations, especially when the guidance is constantly changing. Indeed, WCAG 2.0 is about to be superseded by WCAG 2.1, which, among other changes, includes 15 new Success Criteria. *See* Web Content Accessibility Guidelines (WCAG) 2.1, W3C Working Draft 12 September 2017, (October 17, 2017), http://www.w3.org/TR/WCAG21/.

The cost burden increases exponentially under the lower court's mandate that covered entities must ensure that linked third-party websites comply with WCAG 2.0 AA. Glaringly absent from the opinion is the source of this "legal obligation." There is none. Not even the DOJ has advocated for such an expanse of the ADA. Instead, the DOJ has indicated that a covered entity "would not be required to ensure the accessibility of websites that are linked to its site, but that it does not operate or control." *See* ANPRM at n. 7. It is only the narrow circumstance in which a patron must go to another site to access a business' goods

and services that the DOJ has contemplated (not required) application of the ADA. *Id*.

The lower court's opinion disregards the practical implications of its mandate regarding third-party websites. Many covered entities, particularly small businesses, lack the bargaining power to demand that contracts be modified to require compliance with WCAG 2.0 AA or include protections (e.g., indemnification) in the event of litigation based on a third-party's website. It is an unreasonable burden to expect that a business could compel giant search engines, social media platforms and payment merchants to comply with guidance.[14] Thus, businesses face having to forfeit the benefits of third-party websites or bear the brunt of litigation based on linked third-party sites. Like "drive-by" lawsuits which have long plagued businesses,[15] "surf-by" lawsuits brought by serial plaintiffs filing form complaints also put a strain on businesses. Indeed, hundreds of website accessibility lawsuits have been filed this year alone, with Florida leading the pack. This number does not include the numerous demand letters sent by plaintiff's

[14] At least one court has held that a social media website is not a place of public accommodation. *Young v. Facebook, Inc*., 790 F. Supp. 2d 1110 (N.D. Cal. 2011).

[15] Florida businesses have long been the targets of Title III ADA litigation. Since 2012, almost 6,000 such lawsuits have been filed in Florida. *See* http://www.sun-sentinel.com/opinion/commentary/fl-oped-americans-with-disabilities-act-bill-20170306-story.html (last visited September 26, 2017). ADA litigation abuse also has gained national attention. The ADA Education and Reform Bill (H.R.620) was introduced on January 24, 2017, as part of bipartisan effort to address the unintended consequences of "drive-by" ADA litigation.

firms. This ruling now opens the floodgates to lawsuits based on the condition of another party's website. Some already have been filed in Florida.

Given the burden that inconsistent rulings impose on covered entities, the Court should respectfully decline to engage in a regulation by litigation approach.

CONCLUSION

For the foregoing reasons, the Institute respectfully requests that the Court reverse the lower court's opinion.

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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 5,680 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.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via email this 17th day of October, 2017 upon:

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