

913 F.3d 898

United States Court of Appeals, Ninth Circuit.

Guillermo ROBLES, an
Individual, Plaintiff-Appellant,

v.

DOMINO'S PIZZA, LLC, a Limited
Liability Corporation, Defendant-Appellee.

No. 17-55504

|
Argued and Submitted October
12, 2018 Pasadena, California

|
Filed January 15, 2019

Synopsis

Background: Blind customer brought action against pizzeria operator, alleging that operator's website and mobile application for ordering pizza was not fully accessible to him in violation of Americans with Disabilities Act (ADA) and California's Unruh Civil Rights Act (UCRA). The United States District Court for the Central District of California, No. 2:16-cv-06599-SJO-FFM, [S. James Otero, J., 2017 WL 1330216](#), granted operator's motion to dismiss. Customer appealed.

Holdings: The Court of Appeals, [Owens](#), Circuit Judge, held that:

[1] ADA applied to operator's website and mobile application;

[2] operator received fair notice that its website and mobile application were required to comply with ADA;

[3] allowing customer's action to proceed beyond pleading stage despite operator's lack of notice regarding the private industry standards that could possibly be imposed as equitable remedy would not violate operator's due process rights;

[4] due process did not require Department of Justice (DOJ) to issue specific guidelines for ADA compliance; and

[5] district court's invocation of primary jurisdiction doctrine to defer to DOJ's rulemaking process was inappropriate.

Reversed and remanded.

West Headnotes (23)

[1] Federal Courts

🔑 Statutes, regulations, and ordinances, questions concerning in general

The Court of Appeals reviews de novo a district court's interpretation and construction of a federal statute.

[Cases that cite this headnote](#)

[2] Federal Courts

🔑 Statutes, regulations, and ordinances, questions concerning in general

The constitutionality of a statute or regulation is a question of law, which is reviewed de novo.

[Cases that cite this headnote](#)

[3] Federal Courts

🔑 Jurisdiction

The Court of Appeals reviews de novo a district court's invocation of the primary jurisdiction doctrine.

[Cases that cite this headnote](#)

[4] Civil Rights

🔑 Public Accommodations

The ADA applies to the services of a place of public accommodation, not services in a place of public accommodation; to limit the ADA to discrimination in the provision of services occurring on the premises of a public accommodation would contradict the plain language of the statute. Americans with Disabilities Act of 1990 § 302, [42 U.S.C.A. § 12182\(a\)](#).

Cases that cite this headnote

[5] **Civil Rights**

🔑 **Discrimination by reason of handicap, disability, or illness**

Title III of ADA, prohibiting discrimination in places of public accommodation, applied to pizzeria operator's website and mobile application; website and mobile application were two of the primary means of ordering operator's products to be picked up at or delivered from pizzerias, which were places of public accommodation. Americans with Disabilities Act of 1990 § 302, 42 U.S.C.A. § 12182(a).

Cases that cite this headnote

[6] **Federal Courts**

🔑 **Mode and sufficiency of presentation**

An issue will generally be deemed waived on appeal if the argument was not raised sufficiently for the trial court to rule on it.

Cases that cite this headnote

[7] **Constitutional Law**

🔑 **Certainty and definiteness;vagueness**

An impermissibly vague statute violates due process because it does not give fair notice of conduct that is forbidden or required. U.S. Const. Amend. 14.

Cases that cite this headnote

[8] **Constitutional Law**

🔑 **Certainty and definiteness;vagueness**

A statute is vague in violation of due process not when it prohibits conduct according to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. U.S. Const. Amend. 14.

Cases that cite this headnote

[9] **Constitutional Law**

🔑 **Particular Subjects and Regulations**

Because the ADA is a statute that regulates commercial conduct, it is reviewed, for purposes of a vagueness argument under the Due Process Clause, under a less stringent standard of specificity than, for example, criminal laws or restrictions on speech. U.S. Const. Amend. 14; Americans with Disabilities Act of 1990 § 302, 42 U.S.C.A. § 12182(a).

Cases that cite this headnote

[10] **Constitutional Law**

🔑 **Trade or Business**

A statute regulating commercial conduct would be vague in violation of due process only if it is so indefinite in its terms that it fails to articulate comprehensible standards to which a person's conduct must conform. U.S. Const. Amend. 14.

Cases that cite this headnote

[11] **Civil Rights**

🔑 **Discrimination by reason of handicap, disability, or illness**

Constitutional Law

🔑 **Food and beverages;restaurants**

Pizzeria operator received fair notice, as required by Due Process Clause, that its website and mobile application for ordering pizzas were required to comply with Title III of ADA, which prohibited discrimination in places of public accommodation; ADA clearly stated that covered entities must provide full and equal enjoyment of their services to people with disabilities, and Department of Justice (DOJ), which was charged with issuing regulations concerning implementation of ADA, had clarified that ADA's provisions required "effective communication" and repeatedly affirmed application of ADA to websites of public accommodations. U.S. Const. Amend. 14; Americans with Disabilities Act of 1990 § 302,

42 U.S.C.A. § 12182(a); 28 C.F.R. § 36.303(c) (1).

[Cases that cite this headnote](#)

[12] Civil Rights

🔑 Discrimination by reason of handicap, disability, or illness

Constitutional Law

🔑 Food and beverages;restaurants

In blind customer's action alleging that pizzeria operator's website and mobile application failed to comply with ADA, whether operator would be required to comply with private industry standards for website accessibility developed by technology and accessibility experts was question of remedy not liability, and thus allowing customer's action to proceed beyond pleading stage despite operator's lack of notice regarding the private industry standards would not violate operator's due process rights; customer only sought to impose liability on operator for failing to comply with ADA, which, pursuant to regulation promulgated prior to creation of website and mobile application, unambiguously applied to websites of covered entities, and any due process concerns regarding the remedy would be premature until customer could establish liability. *U.S. Const. Amend. 14*; Americans with Disabilities Act of 1990 § 302, 42 U.S.C.A. § 12182(a).

[Cases that cite this headnote](#)

[13] Civil Rights

🔑 Administrative agencies and proceedings

Constitutional Law

🔑 Food and beverages;restaurants

Due process did not require Department of Justice (DOJ) to issue specific guidelines for what operators of public accommodations must do to make its websites and mobile applications compliant with ADA before pizzeria operator could be held liable for its alleged failure to make its website and mobile application accessible to blind customers.

U.S. Const. Amend. 14; Americans with Disabilities Act of 1990 § 302, 42 U.S.C.A. § 12182(a).

[Cases that cite this headnote](#)

[14] Constitutional Law

🔑 Certainty and definiteness;vagueness

As a general matter, in the context of a due process vagueness argument, the lack of specific regulations cannot eliminate a statutory obligation. *U.S. Const. Amend. 14*.

[Cases that cite this headnote](#)

[15] Action

🔑 Actions and administrative proceedings

Administrative Law and Procedure

🔑 Primary jurisdiction

The primary jurisdiction doctrine allows courts to stay proceedings or to dismiss a complaint without prejudice pending the resolution of an issue within the special competence of an administrative agency.

[Cases that cite this headnote](#)

[16] Administrative Law and Procedure

🔑 Primary jurisdiction

The primary jurisdiction doctrine is a prudential doctrine that does not implicate the subject matter jurisdiction of the federal courts.

[Cases that cite this headnote](#)

[17] Administrative Law and Procedure

🔑 Primary jurisdiction

The primary jurisdiction doctrine permits courts to determine that an otherwise cognizable claim implicates technical and policy questions that should be addressed in the first instance by the agency with regulatory authority over the relevant industry rather than by the judicial branch.

[Cases that cite this headnote](#)

[18] Administrative Law and Procedure

🔑 Primary jurisdiction

While no fixed formula exists for applying the doctrine of primary jurisdiction, courts consider: (1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration.

[Cases that cite this headnote](#)

[19] Administrative Law and Procedure

🔑 Primary jurisdiction

The purpose of the primary jurisdiction doctrine is not to secure expert advice from an agency every time a court is presented with an issue conceivably within the agency's ambit.

[Cases that cite this headnote](#)

[20] Administrative Law and Procedure

🔑 Primary jurisdiction

Efficiency is the deciding factor in whether a court should invoke the primary jurisdiction doctrine and yield to an administrative agency.

[Cases that cite this headnote](#)

[21] Administrative Law and Procedure

🔑 Primary jurisdiction

Even when agency expertise would be helpful, a court should not invoke the primary jurisdiction doctrine when the agency is aware of but has expressed no interest in the subject matter of the litigation.

[Cases that cite this headnote](#)

[22] Administrative Law and Procedure

🔑 Primary jurisdiction

Yielding to an administrative agency pursuant to the primary jurisdiction doctrine is not

required when a referral to the agency would significantly postpone a ruling that a court is otherwise competent to make.

[Cases that cite this headnote](#)

[23] Civil Rights

🔑 Administrative agencies and proceedings

In blind customer's action alleging that pizzeria operator's website and mobile application failed to comply with ADA, district court's invocation of primary jurisdiction doctrine to defer to Department of Justice's (DOJ) rulemaking process was inappropriate; DOJ issued but subsequently withdrew regulation regarding methods for websites and mobile applications to comply with ADA, customer had not ability to participate in DOJ's administrative hearing process, waiting for DOJ to complete its rulemaking process would delay resolution of customer's claims, and district court was capable of interpreting ADA's requirements of "full and equal enjoyment" and "auxiliary aids and services." Americans with Disabilities Act of 1990 § 302, 42 U.S.C.A. § 12182(a).

[Cases that cite this headnote](#)

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Development Association, Asian American Hotel Owners Association, Chamber of Commerce of the United States of America, International Council of Shopping Centers, International Franchise Association, National Association of Convenience Stores, National Association of Home Builders of the United States, National Association of Realtors, National Association of Theater Owners, National Federation of Independent Business Small Business Legal Center, National Multifamily Housing Council, National Retail Federation, Retail Litigation Center.

Appeal from the United States District Court for the Central District of California, S. James Otero, District Judge, Presiding, D.C. No. 2:16-cv-06599-SJO-FFM

Before: [Paul J. Watford](#) and [John B. Owens](#), Circuit Judges, and [Jennifer G. Zipps](#),* District Judge.

OPINION

[OWENS](#), Circuit Judge:

***902** Plaintiff Guillermo Robles, a blind man, appeals from the district court's dismissal of his complaint alleging violations of the Americans with Disabilities Act, [42 U.S.C. § 12101](#), and California's Unruh Civil Rights Act (UCRA), [California Civil Code § 51](#). Robles alleged that Defendant Domino's Pizza, LLC, (Domino's) failed to design, construct, maintain, and operate its website and mobile application (app) to be fully accessible to him. We have jurisdiction under [28 U.S.C. § 1291](#), and we reverse and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

Robles accesses the internet using screen-reading software, which vocalizes visual information on websites. Domino's operates a website and app that allows customers to order pizzas and other products for at-home delivery or in-store pickup, and receive exclusive discounts.

****2** On at least two occasions, Robles unsuccessfully attempted to order online a customized pizza from a nearby Domino's. Robles contends that he could not order the pizza because Domino's failed to design its website and app so his software could read them.

In September 2016, Robles filed this suit seeking damages and injunctive relief based on Domino's failure to "design, construct, maintain, and operate its [website and app] to be fully accessible to and independently usable by Mr. Robles and other blind or visually-impaired people," in violation of the ADA and UCRA. Robles sought a "permanent injunction requiring Defendant to ... comply with [Web Content Accessibility Guidelines (WCAG) 2.0] for its website and Mobile App."¹ Domino's *903 moved for summary judgment on the grounds that (1) the ADA did not cover Domino's online offerings; and (2) applying the ADA to the website or app violated Domino's due process rights. Domino's alternatively invoked the primary jurisdiction doctrine, which permits a court to dismiss a complaint pending the resolution of an issue before an administrative agency with special competence. See *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008) (defining primary jurisdiction doctrine).

The district court first held that Title III of the ADA applied to Domino's website and app. The court highlighted the ADA's "auxiliary aids and services" section, 42 U.S.C. § 12182(b)(2)(A)(iii), which requires that covered entities provide auxiliary aids and services to ensure that individuals with disabilities are not excluded from accessing the services of a "place of public accommodation"—in this case, from using the website or app to order goods from Domino's physical restaurants.

The district court then addressed Domino's argument that applying the ADA to its website and app violated its due process rights because the Department of Justice (DOJ) had failed to provide helpful guidance, despite announcing its intention to do so in 2010.² See *Nondiscrimination on the Basis of Disability*, 75 Fed. Reg. 43460-01 (July 26, 2010) (issuing Advance Notice of Proposed Rulemaking (ANPRM) to "explor[e] what regulatory guidance [DOJ] can propose to make clear to entities covered by the ADA their obligations to make their Web sites accessible").³

**3 The district court, relying heavily on *United States v. AMC Entertainment, Inc.*, 549 F.3d 760 (9th Cir. 2008), concluded that imposing the WCAG 2.0 standards on Domino's "without specifying a particular level of success criteria and without the DOJ offering meaningful guidance on this topic ... fl[ew] in the face of due

process."⁴ The district court held that DOJ "regulations and technical assistance are necessary for the Court to determine what obligations a regulated individual or institution must abide by in order to comply with Title III." In the district court's view, therefore, only the long-awaited regulations from DOJ could cure the due process concerns, so it had no choice but to invoke *904 the primary jurisdiction doctrine. The district court granted Domino's motion to dismiss without prejudice, and this appeal followed.

II. STANDARD OF REVIEW

[1] [2] [3] We review de novo the district court's interpretation and construction of a federal statute—here, the court's application of the ADA to websites and apps. See *ASARCO, LLC v. Celanese Chem. Co.*, 792 F.3d 1203, 1208 (9th Cir. 2015). As the constitutionality of a statute or regulation is a question of law, we also review de novo the district court's holding that applying the ADA to websites and apps would violate due process. See *Az. Libertarian Party v. Reagan*, 798 F.3d 723, 728 (9th Cir. 2015); *Preminger v. Peake*, 552 F.3d 757, 765 n.7 (9th Cir. 2008). Finally, we review de novo the court's invocation of the primary jurisdiction doctrine. See *Reid v. Johnson & Johnson*, 780 F.3d 952, 958 (9th Cir. 2015).

III. DISCUSSION

This appeal presents three questions. First, whether the ADA applies to Domino's website and app. Second, if so, whether that holding raises due process concerns. Third, whether a federal court should invoke the primary jurisdiction doctrine because DOJ has failed to provide meaningful guidance on how to make websites and apps comply with the ADA.

A. The ADA's Application to Domino's Website and App

The ADA "as a whole is intended 'to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.' " *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 589, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999) (quoting 42 U.S.C. § 12101(b)(1)). Title III of the ADA advances that goal by providing 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.” 42 U.S.C. § 12182(a). We agree with the district court that the ADA applies to Domino's website and app.

The ADA expressly provides that a place of public accommodation, like Domino's, engages in unlawful discrimination if it fails to “take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services.”⁵ *Id.* § 12182(b)(2)(A)(iii). DOJ regulations require that a public accommodation “furnish appropriate auxiliary aids and services where necessary to ensure *effective communication* with individuals with disabilities.” 28 C.F.R. § 36.303(c)(1) (emphasis added); see *Bragdon*, 524 U.S. at 646, 118 S.Ct. 2196 (holding that DOJ's administrative guidance on ADA compliance is entitled to deference). And DOJ defines “auxiliary aids and services” to include “accessible electronic and information technology” or “other effective methods of making visually delivered materials available *905 to individuals who are blind or have low vision.” 28 C.F.R. § 36.303(b)(2).

**4 [4] Therefore, the ADA mandates that places of public accommodation, like Domino's, provide auxiliary aids and services to make visual materials available to individuals who are blind. See *id.* § 36.303. This requirement applies to Domino's website and app, even though customers predominantly access them away from the physical restaurant: “The statute applies to the services of a place of public accommodation, not services *in* a place of public accommodation. To limit the ADA to discrimination in the provision of services occurring on the premises of a public accommodation would contradict the plain language of the statute.” *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F.Supp.2d 946, 953 (N.D. Cal. 2006) (emphasis in original) (internal citation omitted).

The alleged inaccessibility of Domino's website and app impedes access to the goods and services of its physical pizza franchises—which are places of public accommodation. See 42 U.S.C. § 12181(7)(B) (listing a restaurant as a covered “public accommodation”). Customers use the website and app to locate a nearby Domino's restaurant and order pizzas for at-home delivery or in-store pickup. This nexus between Domino's website and app and physical restaurants—

which Domino's does not contest—is critical to our analysis.⁶

In *Weyer v. Twentieth Century Fox Film Corp.*, our court examined whether an insurance company that administered an allegedly discriminatory employer-provided insurance policy was a covered “place of public accommodation.” 198 F.3d 1104, 1113–14 (9th Cir. 2000). We concluded that it was not. Because the ADA only covers “actual, physical places where goods or services are open to the public, and places where the public gets those goods or services,” there had to be “some connection between the good or service complained of and an actual physical place.” *Id.* at 1114. While the insurance company had a physical office, the insurance policy at issue did not concern accessibility, or “such matters as ramps and elevators so that disabled people can get to the office.” *Id.* And although it was administered by the insurance company, the employer-provided policy was not a good offered by the insurance company's physical office. *Id.* at 1115.

[5] Unlike the insurance policy in *Weyer*, Domino's website and app facilitate access to the goods and services of a place of public accommodation—Domino's physical restaurants. They are two of the primary (and heavily advertised) means of ordering Domino's products to be picked up at or delivered from Domino's restaurants. We agree with the district court in this case—and the many other district courts that have confronted this issue in similar contexts⁷—that the ADA applies to Domino's website and app, which connect customers *906 to the goods and services of Domino's physical restaurants.

B. Due Process

**5 [6] The second question we address is whether applying the ADA to Domino's website and app raises due process concerns. Despite concluding that the ADA covered Domino's website and app, the district court held that imposing liability on Domino's here would violate its Fourteenth Amendment right to due process.⁸

[7] [8] [9] [10] As a preliminary matter, we hold that Domino's has received fair notice that its website and app must comply with the ADA. An impermissibly vague statute violates due process because it does not “give fair notice of conduct that is forbidden or required.” *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253,

132 S.Ct. 2307, 183 L.Ed.2d 234 (2012). However, “[a] statute is vague not when it prohibits conduct according ‘to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.’” *Botosan v. Paul McNally Realty*, 216 F.3d 827, 836 (9th Cir. 2000) (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971)). Moreover, “[b]ecause the ADA is a statute that regulates commercial conduct, it is reviewed under a less stringent standard of specificity” than, for example, criminal laws or restrictions on speech. *Id.* (citing *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498–99, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982)).⁹ Therefore, the ADA would be vague “only if it is so indefinite in its terms that it fails to articulate comprehensible standards to which a person's conduct must conform.” *Id.*

[11] The ADA articulates comprehensible standards to which Domino's conduct must conform. Since its enactment in 1990, the ADA has clearly stated that covered entities must provide “full and equal enjoyment of the[ir] goods, services, facilities, privileges, advantages, or accommodations” to people with disabilities, 42 U.S.C. § 12182(a), and must “ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services,” *id.* § 12182(b)(2)(A)(iii). DOJ has clarified that these provisions require “effective communication.” 28 C.F.R. § 36.303(c) (1). Moreover, since it announced its position in 1996, DOJ has “repeatedly affirmed the application of [T]itle III to Web sites of public accommodations.” *907 75 Fed. Reg. 43460-01, 43464 (July 26, 2010). Thus, at least since 1996, Domino's has been on notice that its online offerings must effectively communicate with its disabled customers and facilitate “full and equal enjoyment” of Domino's goods and services. *See* 42 U.S.C. § 12182(a); *see also Gorecki*, 2017 WL 2957736, at *5 (“Title III's general prohibition of discrimination on the basis of disability, and its requirements to provide appropriate auxiliary aids and services, where necessary to ensure effective communication, place an affirmative obligation on places that meet the definition of a public accommodation to ensure disabled individuals have as full and equal enjoyment of their websites as non-disabled individuals.”).

**6 However, the heart of Domino's due process argument is not that Domino's lacked fair notice that its

website and app must comply with the ADA. Instead, Domino's argues that imposing liability would violate due process because (1) Robles seeks to impose liability on Domino's for failing to comply with WCAG 2.0, which are private, unenforceable guidelines; and (2) DOJ has not issued regulations specifying technical standards for compliance, so Domino's does not have “fair notice of what *specifically* the ADA requires companies to do in order to make their websites accessible.”

1. Robles Does Not Seek to Impose Liability Based on WCAG 2.0

[12] First, we address Domino's argument that Robles seeks to impose liability based on Domino's failure to comply with WCAG 2.0. Relying heavily on our decision in *AMC*, Domino's argues that this would violate due process because Domino's has not received fair notice of its obligation to comply with the WCAG 2.0 guidelines. Yet, as explained below, Domino's overstates both the holding of *AMC* and the significance of WCAG 2.0 in this case.

AMC concerned movie-theater accessibility for wheelchair-bound patrons. *See* 549 F.3d at 762. Our court reversed an injunction ordering that AMC's stadium-style theaters (many built before 1998) undergo a massive reconfiguration to comply with DOJ's interpretation of an ambiguous accessibility regulation (finalized in 1998). *Id.* at 768–70. Our court held that requiring AMC to reconfigure theaters built before DOJ announced its interpretation of the ambiguous regulation would violate due process. *Id.*

This case does not present the fair notice concerns of *AMC*, and the district court erred in equating the relevance of WCAG 2.0 with the regulation at issue in *AMC*. Here, Robles does not seek to impose liability based on Domino's failure to comply with WCAG 2.0. Rather, Robles merely argues—and we agree—that the district court can order compliance with WCAG 2.0 as an equitable remedy if, after discovery, the website and app fail to satisfy the ADA. At this stage, Robles only seeks to impose liability on Domino's for failing to comply with § 12182 of the ADA, not for the failure to comply with a regulation or guideline of which Domino's has not received fair notice. *See Reed*, 2017 WL 4457508, at *5 (“[A]t this point in the litigation ... Plaintiff does not

seek to require [Defendant] to adopt any particular set of guidelines. Plaintiff simply alleges that her difficulty accessing [Defendant's] website and mobile app violate the ADA.”).

Also unlike in *AMC*—where the overbroad injunction would have required AMC to retrofit theaters built before it received fair notice of DOJ's position—Domino's does not allege that its website or app were created prior to (or never updated since) 1996, when DOJ announced *908 its position that the ADA applies to websites of covered entities. Further, the regulation at issue in *AMC* was ambiguous. See 549 F.3d at 764–67 (summarizing circuit split on how to interpret this regulation, which all courts agreed was ambiguous). It was unfair to expect AMC to have guessed which interpretation to follow when circuits were in disagreement and DOJ had not announced its position. *Id.* at 768. By contrast, the statutory provisions of § 12182 at issue here—requiring “auxiliary aids and services” and “full and equal enjoyment”—are flexible, but not ambiguous, and have been interpreted many times by federal courts.¹⁰ Finally, in *AMC*, our court limited its due process holding to the district court's remedy without disturbing liability. *Id.* at 768–70. Here, the district court dismissed the case at the pleading stage before Robles could conduct discovery and establish liability. Even if due process concerns akin to those in *AMC* were present here, further consideration of them “would be premature because due process constrains the remedies that may be imposed,” *Fortyone v. City of Lomita*, 766 F.3d 1098, 1106 n.13 (9th Cir. 2014) (citing *AMC*, 549 F.3d at 768–70) (emphasis added), and not the initial question of ADA compliance. See *Reed* 2017 WL 4457508, at *4 (“[W]hether or not [defendant's] digital offerings must comply with [WCAG], or any other set of noncompulsory guidelines, is a question of remedy, not liability.”) (emphasis in original).

2. The Lack of Specific Regulations Does Not Eliminate Domino's Statutory Duty

**7 [13] Second, we address Domino's argument that imposing liability here would violate due process because Domino's lacked “fair notice of what *specifically* the ADA requires companies to do in order to make their websites accessible.” In other words, Domino's argues it “needs consistent standards when it designs its website.” While we understand why Domino's *wants* DOJ to issue specific guidelines for website and app accessibility, the

Constitution only requires that Domino's receive fair notice of its legal duties, not a blueprint for compliance with its statutory obligations. And, as one district court noted, the lack of specific instructions from DOJ might be purposeful:

The DOJ's position that the ADA applies to websites being clear, it is no matter that the ADA and the DOJ fail to describe exactly how any given website must be made accessible to people with visual impairments. Indeed, this is often the case with the ADA's requirements, because the ADA and its implementing regulations are intended to give public accommodations maximum flexibility in meeting the statute's requirements. This flexibility is a feature, not a bug, and certainly not a violation of due process.

Reed, 2017 WL 4457508, at *5. A desire to maintain this flexibility might explain why DOJ withdrew its ANPRM related to website *909 accessibility and “continue[s] to assess *whether specific technical standards are necessary and appropriate* to assist covered entities with complying with the ADA.” 82 Fed. Reg. 60932-01 (Dec. 26, 2017) (emphasis added).

[14] And in any case, our precedent is clear that, “as a general matter, the lack of specific regulations cannot eliminate a statutory obligation.” *City of Lomita*, 766 F.3d at 1102; see also *Gorecki*, 2017 WL 2957736, at *4 (“The lack of specific regulations [regarding website accessibility] does not eliminate [defendant's] obligation to comply with the ADA or excuse its failure to comply with the mandates of the ADA.”).

For example, in *City of Lomita*, the defendant-city argued that although existing Title II regulations broadly prohibited it from discriminating in its services, requiring the city to provide accessible on-street parking would violate its due process rights absent specific regulatory guidance. 766 F.3d at 1102. Our court rejected that argument, and held that the ADA's regulations did not

“suggest[] that when technical specifications do not exist for a particular type of facility, public entities have no accessibility obligations.” *Id.* at 1103 (citing *Barden v. City of Sacramento*, 292 F.3d 1073, 1076–78 (9th Cir. 2002) (holding that Title II requires public entities to maintain accessible public sidewalks, notwithstanding absence of implementing regulations addressing sidewalks)).

Similarly, in *Kirola v. City & County of San Francisco*, we explained that even if there were no technical accessibility requirements for buildings and facilities under Title II of the ADA, “[p]ublic entities would not suddenly find themselves free to ignore access concerns when altering or building new rights-of-way, parks, and playgrounds.” 860 F.3d 1164, 1180 (9th Cir. 2017). Instead, our court applied Title II’s “readily accessible” and “usable” standards to determine whether the city violated the ADA. *Id.* Although DOJ guidance might have been helpful, “[g]iving content to general standards is foundational to the judicial function.” *Id.* (citing *Marbury v. Madison*, 5 U.S. 137, 177, 1 Cranch 137, 2 L.Ed. 60 (1803)).

Moreover, the possibility that an agency might issue technical standards in the future does not create a due process problem. In *Reich v. Montana Sulphur & Chemical Company*, our court held that although the Secretary of Labor would likely promulgate specific standards for safe and healthy working conditions, these standards would only “amplify and augment” the existing statutory obligation to provide a safe workspace and would not “displace” it. 32 F.3d 440, 445 (9th Cir. 1994); *cf. Or. Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 339 F.3d 1126, 1132–33 (9th Cir. 2003) (following DOJ’s interpretation of existing regulation, even though Access Board was addressing the specific topic at issue through rulemaking). The same logic applies here.

****8** In sum, we conclude that the district court erred in holding that imposing liability in this case would violate Domino’s due process rights. Domino’s has received fair notice that its website and app must provide effective communication and facilitate “full and equal enjoyment” of Domino’s goods and services to its customers who are disabled. Our Constitution does not require that Congress or DOJ spell out exactly how Domino’s should fulfill this obligation.

C. Primary Jurisdiction Doctrine

[15] [16] [17] Finally, we address the primary jurisdiction doctrine, which “allows courts to stay proceedings or to dismiss a complaint without prejudice pending the *910 resolution of an issue within the special competence of an administrative agency.” *Clark*, 523 F.3d at 1114. It is a prudential doctrine that does not “implicate[] the subject matter jurisdiction of the federal courts.” *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 759 (9th Cir. 2015) (quoting *Syntek Semiconductor Co., Ltd. v. Microchip Tech. Inc.*, 307 F.3d 775, 780 (9th Cir. 2002)). Rather, it permits courts to determine “that an otherwise cognizable claim implicates technical and policy questions that should be addressed in the first instance by the agency with regulatory authority over the relevant industry rather than by the judicial branch.” *Id.* at 760 (quoting *Clark*, 523 F.3d at 1114).

[18] While “no fixed formula exists for applying the doctrine of primary jurisdiction,” we consider: “(1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration.” *Davel Comme'n, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1086–87 (9th Cir. 2006); *see also Astiana*, 783 F.3d at 760 (same).

[19] [20] [21] [22] Here, the district court erred in invoking primary jurisdiction. The purpose of the doctrine is not to “secure expert advice” from an agency “every time a court is presented with an issue conceivably within the agency’s ambit.” *Brown v. MCI WorldCom Network Servs., Inc.*, 277 F.3d 1166, 1172 (9th Cir. 2002); *see also Astiana*, 783 F.3d at 760 (“Not every case that implicates the expertise of federal agencies warrants invocation of primary jurisdiction.”). Rather, “‘efficiency’ is the ‘deciding factor’ in whether to invoke primary jurisdiction.” *Astiana*, 783 F.3d at 760 (citation omitted). Our precedent is clear:

[E]ven when agency expertise would be helpful, a court should not invoke primary jurisdiction when the agency is aware of but has expressed no interest in the subject matter of the litigation. Similarly, primary jurisdiction is not required

when a referral to the agency would significantly postpone a ruling that a court is otherwise competent to make.

Id. at 761 (emphases added). Both circumstances are present here.

[23] First, DOJ is aware of the issue—it issued the ANPRM in 2010, 75 Fed. Reg. 43460-01 (July 26, 2010), and withdrew it in 2017, 82 Fed. Reg. 60932-01 (Dec. 26, 2017). Second, DOJ's withdrawal means that the potential for undue delay is not just likely, but inevitable. Robles has no ability to participate in an administrative hearing process with remedies. See *Arizona ex rel. Goddard v. Harkins Admin. Servs., Inc.*, 2011 WL 13202686, at *3 (D. Az. Feb. 8, 2011) (“[T]he DOJ does not have an administrative process in which these parties can directly participate to resolve their dispute. The absence of such an administrative process argues against referral to an agency under the primary jurisdiction doctrine.”).

**9 Therefore, according to the district court, Robles cannot vindicate his statutory rights unless DOJ reopens and completes its rulemaking process. This would “needlessly delay the resolution of” Robles' claims and undercut efficiency, “the ‘deciding factor’ in whether to invoke primary jurisdiction.” *Astiana*, 783 F.3d at 760 (citation omitted); see also *Reid*, 780 F.3d at 966–67 (declining to invoke primary jurisdiction in part because “it has been over a decade since the FDA indicated that it would issue a new [rule]”).

The delay is “needless” because the application of the ADA to the facts of this *911 case are well within the court's competence. Properly framed, the issues for the district court to resolve on remand are whether Domino's website and app provide the blind with auxiliary aids and services for effective communication and full and equal enjoyment of its products and services. Courts are perfectly capable of interpreting the meaning of “equal” and “effective” and have done so in a variety of contexts. See *supra* note 10 (providing examples of circuit courts interpreting ADA's requirements of “full and equal enjoyment” and “auxiliary aids and services”

in non-website contexts); see also *Georgia v. Ashcroft*, 539 U.S. 461, 462, 123 S.Ct. 2498, 156 L.Ed.2d 428 (2003) (interpreting “effective exercise of the electoral franchise”), superseded by statute, 52 U.S.C. §§ 10304(b) (d), as recognized in *Ala. Legislative Black Caucus v. Alabama*, — U.S. —, 135 S.Ct. 1257, 1273, 191 L.Ed.2d 314 (2015); *Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (interpreting right to “effective assistance of counsel”). In addition, if the court requires specialized or technical knowledge to understand Robles' assertions, the parties can submit expert testimony. See, e.g., *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 501–02 (4th Cir. 2016) (relying on credited expert testimony on security risks associated with “online ballot marking tool,” which the court held was a “reasonable modification” to make absentee voting accessible to blind voters); cf. *Strong v. Valdez Fine Foods*, 724 F.3d 1042, 1046–47 (9th Cir. 2013) (holding that expert testimony is not required to understand plaintiff's straightforward ADA claim about physical barriers). Whether Domino's website and app are effective means of communication is a fact-based inquiry within a court's competency.

Thus, we reverse the district court's reliance on the primary jurisdiction doctrine. Rather than promote efficiency—the deciding factor in whether to invoke primary jurisdiction—the district court's ruling unduly delays the resolution of an issue that a court can decide. See *Astiana*, 783 F.3d at 760–62.

IV. CONCLUSION

We express no opinion about whether Domino's website or app comply with the ADA. We leave it to the district court, after discovery, 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 as the ADA mandates.¹¹

REVERSED AND REMANDED.

All Citations

913 F.3d 898, 2019 WL 190134, 19 Cal. Daily Op. Serv. 641, 2019 Daily Journal D.A.R. 416

Footnotes

- * The Honorable Jennifer G. Zipp, United States District Judge for the District of Arizona, sitting by designation.
- 1 WCAG 2.0 guidelines are private industry standards for website accessibility developed by technology and accessibility experts. WCAG 2.0 guidelines have been widely adopted, including by federal agencies, which conform their public-facing, electronic content to WCAG 2.0 level A and level AA Success Criteria. [36 C.F.R. pt. 1194, app. A \(2017\)](#). In addition, the Department of Transportation requires airline websites to adopt these accessibility standards. See [14 C.F.R. § 382.43 \(2013\)](#). Notably, the Department of Justice has required ADA-covered entities to comply with WCAG 2.0 level AA (which incorporates level A) in many consent decrees and settlement agreements in which the United States has been a party.
- 2 DOJ is charged with issuing regulations concerning the implementation of the ADA. See [42 U.S.C. § 12186\(b\)](#) (“[T]he Attorney General shall issue regulations in an accessible format to carry out the provisions of this subchapter...”); [Bragdon v. Abbott](#), 524 U.S. 624, 646, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998) (noting that DOJ is “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”) (internal citations omitted).
- 3 We recognize that DOJ withdrew its ANPRM on December 26, 2017, so the district court did not have the benefit of considering this withdrawal when it issued its decision on March 20, 2017. See [Nondiscrimination on the Basis of Disability](#), 82 Fed. Reg. 60932-01 (Dec. 26, 2017).
- 4 Only after Robles filed this suit, Domino's website and app began displaying a telephone number that customers using screen-reading software could dial to receive assistance. The district court noted that Robles had “failed to articulate why [Domino's] provision of a telephone hotline for the visually impaired ... does not fall within the range of permissible options afforded under the ADA.” However, the district court did not reach whether a genuine issue of material fact existed as to the telephone hotline's compliance with the ADA, including whether the hotline guaranteed full and equal enjoyment and “protect[ed] the privacy and independence of the individual with a disability.” [28 C.F.R. § 36.303\(c\)\(1\)\(ii\) \(2017\)](#). We believe that the mere presence of the phone number, without discovery on its effectiveness, is insufficient to grant summary judgment in favor of Domino's.
- 5 The ADA exempts covered entities from the requirement to provide auxiliary aids and services where compliance would “fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.” [42 U.S.C. § 12182\(b\)\(2\)\(A\)\(iii\)](#); see also [28 C.F.R. § 36.303\(a\)](#). At this stage, Domino's does not argue that making its website or app accessible to blind people would fundamentally alter the nature of its offerings or be an undue burden.
- 6 We need not decide whether the ADA covers the websites or apps of a physical place of public accommodation where their inaccessibility does not impede access to the goods and services of a physical location.
- 7 See, e.g., [Robles v. Yum! Brands, Inc.](#), 2018 WL 566781, at *4 (C.D. Cal. Jan. 24, 2018); [Rios v. N.Y. & Co., Inc.](#), 2017 WL 5564530, at *3 (C.D. Cal. Nov. 16, 2017); [Reed v. CVS Pharmacy, Inc.](#), 2017 WL 4457508, at *3 (C.D. Cal. Oct. 3, 2017); [Gorecki v. Hobby Lobby Stores, Inc.](#), 2017 WL 2957736, at *3–4 (C.D. Cal. June 15, 2017); [Target](#), 452 F.Supp.2d at 953; [Gomez v. Gen. Nutrition Corp.](#), 323 F.Supp.3d 1368, 1375–76 (S.D. Fla. 2018); [Castillo v. Jo-Ann Stores, LLC](#), 286 F.Supp.3d 870, 881 (N.D. Ohio 2018); [Gil v. Winn-Dixie Stores, Inc.](#), 257 F.Supp.3d 1340, 1348–49 (S.D. Fla. 2017), appeal docketed, No. 17-13467 (11th Cir. Aug. 1, 2017).
- 8 The district court also held (in error) that Robles conceded Domino's due process argument by not squarely addressing it at the motion to dismiss stage. The relevant issue here is whether Domino's website and app comply with the ADA. Domino's due process argument is a defense to that issue. Domino's cites no authority holding that a plaintiff's failure to respond to a defense waives the plaintiff's cause of action (here, the ADA). Regardless, “an issue will generally be deemed waived on appeal if the argument was not raised sufficiently for the trial court to rule on it.” [In re Mercury Interactive Corp. Secs. Litig.](#), 618 F.3d 988, 992 (9th Cir. 2010) (internal quotation marks omitted). Here, the parties raised the matter sufficiently for the district court to dedicate four pages to this issue, and Robles did not waive his ability to respond to Domino's due process argument.
- 9 In [Village of Hoffman Estates](#), the Supreme Court explained: “The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action.” [455 U.S. at 498](#), [102 S.Ct. 1186](#) (internal footnotes omitted).

- 10 See, e.g., *Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1135 (9th Cir. 2012) (holding that, to provide “full and equal enjoyment,” public accommodations must “consider[] how their facilities are used by non-disabled guests and then take reasonable steps to provide disabled guests with a like experience”); *Fortyune v. American Multi-Cinema*, 364 F.3d 1075, 1085 (9th Cir. 2004) (interpreting “full and equal enjoyment” to require theater to provide wheelchair seating and adjacent seat for plaintiff’s wife); see also, e.g., *McGann v. Cinemark*, 873 F.3d 218, 223 (3d Cir. 2017) (holding that theater’s failure to provide deaf patron with sign language interpreter—an auxiliary aid or service—excluded him from services); *Argenyi v. Creighton Univ.*, 703 F.3d 441, 449 (8th Cir. 2013) (holding that university must provide reasonable auxiliary aids and services to partially deaf medical student to afford him opportunity equal to his nondisabled peers).
- 11 We also reverse the dismissal of Robles’ UCRA claims and remand for proceedings consistent with this opinion.

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