

Digital Discrimination: *Who's Excluded?*

By: Tyler Parker

How often do you order food online or with an app? Probably often. The United States is one of the most prominent delivery markets in the world.¹ Since the COVID-19 pandemic, online orders have skyrocketed.² For many these services provide great convenience, but for customers like Guillermo Robles, these “services” create steep disadvantages.³

Along with seven million other people in the United States, Mr. Robles is visually disabled.⁴ A few years ago, he opened the Domino’s app to order a customized pizza.⁵ To complete his order, Mr. Robles needed access to screen-reading software.⁶ Because Domino’s did not provide the software for disabled customers, Mr. Robles could not complete the simple task of ordering a pizza.⁷

Since 1990, the Americans with Disabilities Act (ADA) prohibits discrimination on the basis of disability.⁸ Title III of the ADA expressly prohibits disability discrimination in “any place of public accommodation.”⁹ It states, in part:

No 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.¹⁰

Federal appellate courts have disagreed on whether websites and apps are places of accommodation under the Act.¹¹ If businesses are not places of accommodation, they are not legally obligated to accommodate disabled customers attempting to use their website or app.¹² But, because the United States Supreme Court has declined to address this question, there is no clear answer.¹³

¹ *Global Food Delivery Trends 2018 vs. 2021*, EDISON TRENDS (Sep. 22, 2021)<https://trends.edison.tech/research/global-food-delivery-2021.html>.

² *COVID-19 Has Changed Online Shopping Forever, Survey Shows*, UNCTAD (Oct. 8, 2020)<https://unctad.org/news/covid-19-has-changed-online-shopping-forever-survey-shows>.

³ *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898, 902 (9th Cir. 2019).

⁴ NATIONAL FEDERATION OF THE BLIND, BLINDNESS STATISTICS (Last visited Jan. 2019) <https://nfb.org/resources/blindness-statistics>.

⁵ *Robles*, 913 F.3d at 902.

⁶ *Id.*

⁷ *Id.*

⁸ 42 U.S.C.A. § 12182 (West).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Robles*, 913 F.3d at 905; *Gil v. Winn-Dixie Stores, Inc.*, 993 F.3d 1266, 1284 (11th Cir. 2021).

¹² 42 U.S.C.A. § 12182 (West).

¹³ *Domino’s Pizza, LLC v. Robles*, 140 U.S. 122 (2019).

In March, the Department of Justice (DOJ) under the Biden Administration released guidance on website accessibility measures to provide direction to businesses.¹⁴ Assistant Attorney General Kristen Clarke stated, “We have heard the calls from the public on the need for more guidance on web accessibility, particularly as our economy and society become increasingly digitized.”¹⁵

Despite the attempt to provide some clarity, legal scholars criticized the DOJ’s guidance for failing to set a clear standard for online websites and apps.¹⁶ Instead, the guidance only provided *information* about common online barriers for people with disabilities including poor color contrast, lack of text-alternative images, no captions, and inaccessible online forms.¹⁷

As we enter a more digitalized society, Americans need a clear answer from the U.S. Supreme Court on whether websites and apps are places of accommodation under the ADA. Until then, online job applications, online bill payments, and even online shopping may be wholly unfeasible for Mr. Robles and millions of others excluded from today’s digital society.¹⁸

¹⁴ Office of Public Affairs, *Justice Department Issues Web Accessibility Guidance Under the Americans with Disabilities Act* (U.S. DEP’T OF JUST. Mar. 18, 2022).

¹⁵ *Id.*

¹⁶ *DOJ Issues Web Accessibility Guidance, but Falls Short of Setting Specific Standards*, MCAFEE & TAFT (March 21, 2022) <https://www.mcafeetaft.com/doj-issues-web-accessibility-guidance-but-falls-short-of-setting-specific-standards/>; *Despite New DOJ Guidance, Many Organizations Haven’t Adopted Accessible Web Design*, BUREAU OF INTERNET ACCESSIBILITY (July 7, 2022) <https://www.boia.org/blog/despite-new-doj-guidance-many-organizations-havent-adopted-accessible-web-design>.

¹⁷ *Id.*

¹⁸ 42 U.S.C.A. § 12182 (West).