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16 **UNITED STATES DISTRICT COURT**
 17 **NORTHERN DISTRICT OF CALIFORNIA**
 18 **SAN FRANCISCO DIVISION**

19 NATIONAL FEDERATION OF THE
 20 BLIND, the NATIONAL FEDERATION OF
 21 THE BLIND OF CALIFORNIA, on behalf of
 22 their members, and Bruce F. Sexton, on behalf
 of himself and all others similarly situated,

23 Plaintiffs,

24 v.

25 TARGET CORPORATION,

26 Defendant.

Case No.: C 06-01802 MHP

CLASS ACTION

**PLAINTIFFS' OPPOSITION TO
 DEFENDANT TARGET
 CORPORATION'S MOTION TO
 DISMISS**

Hearing Date: July 24, 2006

Time: 2:00 p.m.

Judge: The Honorable Marilyn Hall
 Patel

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1 **I. INTRODUCTION**

2 Plaintiffs, the blind of California and the United States, have brought this action against
 3 Target Corporation (“Target”) because they are being denied full and equal access to target.com.
 4 Target.com is an internet website which provides a variety of services, many relating to Target
 5 retail stores. The website is entirely inaccessible to the blind, who use screen reading software to
 6 navigate the internet. Plaintiffs’ Amended Complaint (“Complaint”) states claims under Title III
 7 of the Americans with Disabilities Act (“ADA”) as well as California’s Unruh Civil Rights Act
 8 (“Unruh Act”) and California’s Disabled Persons Act (“DPA”).¹ The principal animating theory
 9 of plaintiffs’ Complaint is that target.com is a *service* of a place of public accommodation
 10 (Target’s stores) in the case of the ADA and DPA, and a *service* of a business establishment
 11 (Target Corporation) in the case of the Unruh Act.² Amended Complaint (“Compl.”) ¶¶40, 49,
 12 56.

13 Target’s motion to dismiss depends in great part on misconceiving the actual Complaint
 14 as premised entirely on the argument that target.com is itself a business establishment or a public
 15 accommodation. *See, e.g.*, Target’s Memorandum of Points and Authorities in support of its
 16 motion to dismiss (“Def. Mem.”) at 11 (“Does the term ‘business establishment’ include a
 17 retailer’s website?”). In fact, that is just one alternative basis for one cause of action (the DPA
 18 claim). The core of the Complaint is that target.com is a service provided by Target Corporation
 19 – a service which is linked to Target’s brick and mortar stores. Target does not even address
 20 these allegations of the Complaint and thus ignores the primary thrust of the case. Target also
 21 ignores established rules of statutory construction. Rather than looking to the plain meaning and
 22 intent of the statutes at issue, Target creates a wholly new and unrecognized rule wherein a
 23 statute may not apply to conduct on the internet until the statute has first been amended. Finally,
 24 Target offers an interpretation of the interstate commerce clause that would have the
 25 unprecedented effect of making the internet a haven from all state laws of general application
 26 that address matters of traditional state concern, from fraud to malpractice, so long as the

27 _____
 28 ¹ 42 U.S.C. §§12101, *et seq.*; Cal. Civ. Code §§51, *et seq.*; Cal. Civ. Code §§54, *et seq.*

² The various statutes speak of services, privileges, advantages and accommodations. For brevity’s sake, the argument will refer to “service” to encompass the entire litany.

1 conduct occurred on the internet. None of these arguments warrants dismissing the Complaint.

2 **II. FACTUAL ALLEGATIONS**

3 Target is one of the country’s largest retail companies, operating over 1400 stores in 47
4 states with 205 stores in California. Target owns, operates, and maintains target.com.

5 Target.com is a commercial website that offers products and services for online sale and home
6 delivery that are available in Target retail stores. The online store allows the user to browse
7 products, product descriptions and prices; view sale items and discounts for online shopping;
8 print coupons for use in Target retail stores; purchase items for home delivery; order pharmacy
9 items and have prescriptions filled for pickup at Target retail stores; find retail store locations;
10 and perform a variety of other functions. Target.com provides many features that are related to
11 and integrated with the physical stores. Compl. ¶¶20-23. These include:

- 12 • a store locator, allowing persons who wish to shop at a Target store to learn its
13 location, hours, and phone numbers;
- 14 • an online pharmacy, allowing a customer to order a prescription refill online for
15 pickup at a Target store;
- 16 • an online photo shop, allowing a customer to order photo prints for pickup at a
17 Target store;
- 18 • weekly ads, allowing a customer to know what items are on sale at a particular
19 Target store location;
- 20 • coupons for groceries, eyeglasses and portrait photos, among others, that may be
21 redeemed at Target stores;
- 22 • online wedding and baby registries to allow shoppers at a Target store to purchase
23 a gift for a target.com user;
- 24 • information about Target’s REDcardSM program and other financial products and
25 services offered by Target;
- 26 • information about Target Corporation’s employment opportunities, investor
27 information and company policies; and
- 28 • sale of many of the products and services available at Target stores.

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1 Compl. ¶23. However, Target has failed and refused to make target.com available to blind
2 people. Target refuses to put the well-recognized and readily achievable coding on the website
3 which is necessary for blind people to access the site with their screen access software. Compl.
4 ¶¶ 27-29.

5 By way of background, blind persons use screen access software to access internet
6 websites. This software converts information on a computer screen to verbal speech through a
7 voice synthesizer. Screen access software allows blind persons access to websites only if
8 website designers and operators comply with widely known and available website programming
9 guidelines. These include the use of alternative text (“alt-text”) for graphics to allow screen-
10 readers to recognize the graphical image, the provision of accessible image-maps, the labeling of
11 form fields, the use of HTML markup headings for navigational purposes, and the accessibility
12 of the functions of the website through a keyboard. Compl. ¶¶27-34. Target’s website contains
13 pervasive barriers that make the website unusable by blind persons:

14 Target.com contains access barriers that prevent free and full use by blind persons
15 using keyboards and screen reading software. These barriers are pervasive and
16 include, but are not limited to: lack of alt-text on graphics, inaccessible image
maps, the lack of adequate prompting and labeling; the denial of keyboard access;
and the requirement that transactions be performed solely with a mouse.

17 Compl. ¶29. These access barriers deny the blind full and equal access to, and enjoyment of,
18 Target stores’ goods and benefits. Compl. ¶36.

19 The NFB notified Target of the access barriers existing on its website on May 5, 2005.
20 The parties entered into a standstill/tolling agreement executed on September 1, 2005. Because
21 the parties did not resolve the matter in structured negotiations, they allowed the agreement to
22 expire. Compl. ¶37. Target’s website remains inaccessible to the blind. Compl. ¶¶24-36.

23 Plaintiffs assert four causes of action against Target: (1) violation of the California Unruh
24 Civil Rights Act, Cal. Civ. Code §§51, *et seq.*; (2) violation of the California Disabled Persons
25 Act, Cal. Civ. Code §§54, *et seq.*; (3) violation of Title III of the Americans With Disabilities
26 Act, 42 U.S.C. §§12101, *et seq.*; and (4) declaratory relief based on the violation of federal and
27 state law. Compl. ¶¶39-60.

28 Plaintiffs’ claim under Title III of the ADA alleges that “Target stores are sales

1 establishments and public accommodations within the definition of Title III of the ADA. 42
 2 U.S.C. §§12181(7)(E). Target.com is a service, privilege or advantage of Target stores.
 3 Target.com is a service that is by and integrated with these stores.” Compl. ¶56. “Patrons of
 4 Target stores who are blind have been denied full and equal access to target.com, have not been
 5 provided services that are provided to other patrons through target.com who are not disabled,
 6 and/or have been provided services that are inferior to the services provided to non-disabled
 7 patrons.” Compl. ¶60. The Complaint does not allege that target.com is itself a place of public
 8 accommodation for the purposes of the ADA.

9 For their Unruh Act claim, plaintiffs allege that Target Corporation is a business
 10 establishment within the meaning of the Unruh Act, as it owns and operates 205 stores in
 11 California as well as selling goods and providing valuable services through its website to
 12 California citizens. Plaintiffs further allege that Target violates the Unruh Act by denying blind
 13 citizens full and equal access to and the use and enjoyment of one of its major services –
 14 target.com and, consequently, a myriad of other goods, services and advantages readily available
 15 to sighted customers on target.com. Target’s conduct is intentional in that Target has constructed
 16 and maintained an inaccessible website even after being notified of its inaccessibility and the
 17 discrimination caused by such inaccessibility. Compl. ¶¶40-41.

18 Plaintiffs’ DPA claim alleges two theories of liability: (1) target.com is a public place
 19 within the meaning of the DPA to which Target denies the blind full and equal access; and (2)
 20 target.com is a service “provided by and integrated with” Target’s brick and mortar stores, a
 21 service which is inaccessible to the blind. Compl. ¶¶48-49.

22 **III. ARGUMENT**

23 On a motion to dismiss for failure to state a claim, the court must assume the truth of all
 24 factual allegations in the complaint, and must construe them in the light most favorable to
 25 plaintiffs. *See, e.g., Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir. 1996). The Complaint, fairly
 26 construed, establishes that target.com is a service of a statutorily regulated entity well within the
 27 contemplation of constitutional statutes. Accordingly, the motion must fail.

A. Plaintiffs Properly State A Claim Under Title III Of The Americans With Disabilities Act.

Title III of the ADA states, “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.” 42 U.S.C. §12182(a) (emphasis added).

Plaintiffs’ Complaint is clear: “Target stores are sales establishments and public accommodations within the definition of Title III of the ADA. 42 U.S.C. §12181(7)(E). *Target.com is a service, privilege or advantage of Target stores.* Target.com is a service that is by and integrated with these stores.” Compl. ¶56 (emphasis added). Target, however, treats the Complaint as though it asserted that under the ADA websites are places of public accommodation. Though websites are in fact covered entities under Title III, this case does not involve a retailer that only exists in cyberspace, and is not the occasion to litigate that issue. Thus, Target’s discussion of cases addressing what can and cannot be places of public accommodation under the ADA fails to address the actual basis of the Title III claim in this case.

1. Target Is Denying Full and Equal Access to A Service, Privilege And Advantage Of Target Stores.

Plaintiffs’ claim under Title III of the ADA rests comfortably within the recognized contours of the statute. Target’s physical stores throughout the country are clearly places of public accommodation governed by Title III. Title III of the ADA generally prohibits a covered entity from denying an individual or class of individuals an opportunity “to participate in or benefit from the goods, services, privileges, advantages, or accommodations of an entity.” 42 U.S.C. §12182(b)(1)(A)(i). This opportunity must be equal to that afforded non-disabled individuals. 42 U.S.C. §12182(b)(1)(A)(ii). Title III further specifically obligates a covered entity to: (1) remove communication barriers where such removal is readily achievable; (2) modify its policies and practices where such modification would not cause a fundamental alteration; and (3) provide auxiliary aids and services to the extent this would not be an undue

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1 burden. 42 U.S.C. §§12182(b)(2)(A)(ii)-(iv). Target’s refusal to remedy the barriers on
2 target.com violates these prohibitions.

3 Contrary to defendant’s assertion that Title III is limited to physical barriers, Title III
4 applies where, as here, the barrier to access is intangible or even off-site from the public
5 accommodation. Courts have thus held that Title III applies to intangible barriers to a service
6 that has a nexus with a physical place of public accommodation. In *Rendon v. Valleycrest*
7 *Productions*, 294 F.3d 1279 (11th Cir. 2002), for example, the barrier to a public
8 accommodation (a televised game show) consisted of an automated telephone contestant
9 selection process that was not fully accessible. *Rendon*, 294 F.3d at 1280. The court
10 explained that,

11 [a] reading of the plain and unambiguous statutory language at issue reveals
12 that the definition of discrimination provided in Title III covers both tangible
13 barriers, that is, physical and architectural barriers that would prevent a
14 disabled person from entering an accommodation's facilities and accessing its
15 goods, services and privileges...and intangible barriers, such as eligibility
requirements and screening rules or discriminatory policies and procedures
that restrict a disabled person's ability to enjoy the defendant entity's goods,
services and privileges.

16 *Rendon*, 294 F.3d at 1283 (internal citations omitted). Moreover, the Eleventh Circuit explained,
17 a place of public accommodation cannot discriminate against persons with disabilities simply
18 because the discrimination occurs off site. *Id.* at 1284-85. So, too, Target has erected intangible
19 barriers that deny the blind an equal opportunity to receive and participate in many of the
20 services and advantages provided to sighted customers of Target stores through Target’s website.

21 In challenging plaintiffs’ ADA cause of action, defendant’s motion relies on several
22 inapplicable cases. Defendant cites *Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d
23 1312 (S.D. Fla. 2002), where the court held that a website – southwest.com – is not a place of
24 public accommodation. While plaintiffs belief that case was wrongly decided, it has nothing to
25 do with the issues at hand. Plaintiffs, again, have not alleged that target.com is a place of public
26 accommodation within the meaning of Title III.

27 Defendant also cites *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9th Cir.
28 2000), where the Ninth Circuit held that an employee insurance policy is not a place of public

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1 accommodation within the meaning of Title III. *Weyer*, 198 F.3d at 1114-15. The court stated
 2 that, “The principle of *noscitur a sociis* requires that the term, ‘place of public accommodation,’
 3 be interpreted within the context of the accompanying words, and this context suggests that some
 4 connection between the good or service complained of and an actual physical place is required.”
 5 *Id.* at 1114. This connection is precisely what plaintiffs in this case allege in detail. See Compl.
 6 ¶¶20-23.

7 In addition, defendant cites *Chabner v. United of Omaha Life Ins. Co.*, 225 F.3d 1042
 8 (9th Cir. 2000), where the court distinguished between access to and the content of goods and
 9 services. *Chabner*, 225 F.3d at 1047. The court’s holding that Title III does not compel
 10 insurance companies to modify the content of their policies is much like a bookstore not being
 11 obligated to provide Braille books to its blind customers. Here plaintiffs are simply seeking
 12 access to the same goods, services and privileges that Target makes available to the general
 13 public.

14 Finally, defendant cites *Torres v. AT&T Broadband, LLC*, 158 F. Supp. 2d 1035 (N.D.
 15 Cal. 2001), where plaintiff alleged that a digital cable program guide which assists a viewer in
 16 finding information on and watching programs on a home television was a place of public
 17 accommodation. Plaintiff in that case argued that the television became “a place of exhibition
 18 and entertainment” and that the digital cable box was a “facility” within the meaning of Title III.
 19 *Torres*, 158 F. Supp. 2d at 1037-38. Plaintiffs’ allegations in this case are in no way comparable
 20 to the allegations in *Torres*. Target stores, and not the website, are the relevant places of public
 21 accommodation under the Title III claim in this case. The website here is indisputably a service,
 22 privilege, and/or advantage that is related to and integrated with those brick and mortar stores.
 23 Compl. ¶¶20-23, 56-60.

24 **2. Congress Intended Title III To Apply To All Services Of A Public**
 25 **Accommodation, Including Newly Emerging Forms of Services.**

26 Target has suggested that the failure of Congress to amend the ADA means that a private
 27 retailer’s website necessarily falls outside its scope and points, cryptically, to Congress’ decision
 28 to require the federal government to utilize accessible software. 29 U.S.C. §794d. The Supreme

1 Court has stated, however, that “[a]s a general matter, we are reluctant to draw inferences from
 2 Congress’ failure to act.” *Brecht v. Abrahamson*, 507 U.S. 619, 632 (1993) (internal citations
 3 omitted). Moreover, there has been no reason for Congress to amend the ADA to cover websites
 4 such as target.com since such websites already fall within the statute as a service, privilege,
 5 facility, advantage or accommodation of a public accommodation.³ Indeed, the same term
 6 “services,” which appears also in Title II of the ADA, 42 U.S.C. §12132, dealing with public
 7 entities, has already been held broad enough to cover the website of a public entity where the
 8 website provided route and scheduling information for public transit. *Martin v. Metro. Atlanta*
 9 *Rapid Transit Auth.*, 225 F. Supp. 2d 1362, 1377 (N.D. Ga. 2002).

10 Target also points to a Congressional oversight hearing entitled *Applicability of the*
 11 *Americans With Disabilities Act (ADA) to Private Internet Sites: Hearing Before the Subcomm.*
 12 *on the Constitution of the House Comm. on the Judiciary*, 106th Cong. 65-010 (2000)
 13 (“Hearing”).⁴ The hearing was scheduled after the NFB brought suit against America Online
 14 (AOL) for accessibility. Def. Mem. at 5; *see also* H.R. REP. 106-1048, at 210 (2001) (noting
 15 that one of the developments leading to the hearing was that on November 2, 1999, the NFB
 16 filed a class action lawsuit against AOL). Target suggests, without any authority, that the
 17 Committee believed that the ADA did not yet apply to private websites. To the contrary,
 18 members of Congress noted that it was the opinion of the Department of Justice that the ADA
 19 applied to private websites and acknowledged that the state of the law was unsettled. Hearing at
 20 7-9 (opening statement of Chairman Charles T. Canady). While some witnesses testified that the
 21 ADA needed to be amended to exclude the internet, Congress ultimately declined to enact such
 22 an exception to the statute’s broad and far-reaching language. *Id.* at 7-163.

23 The typical judicial approach to statutory construction is to begin with the words of the
 24 statute, then consider, if necessary, congressional materials. *Blum v. Stenson*, 465 U.S. 886, 896

25
 26 ³ The ADA bar of discrimination in a public accommodation’s “goods, services, facilities, privileges, advantages, or
 27 accommodations,” has been broadly construed. *See, e.g., Rothman v. Emory University*, 828 F. Supp. 537, 541
 (N.D. Ill. 1993) (a law school’s recommendation to the bar is an ADA-covered service and privilege offered by a
 law school).

28 ⁴ The referenced portions of the legislative history for this Committee hearing are submitted herewith in Plaintiffs’
 Request for Judicial Notice.

1 (1984) (“Where, as here, resolution of a question of federal law turns on a statute and the
2 intention of Congress, the court should look first to the statutory language and then to the
3 legislative history if the statutory language is unclear.”). Here, Target has not only eschewed
4 consideration of why a website cannot be a service of a public accommodation, but has pointed
5 to a subsequent committee hearing whose significance is ambiguous at best.

6 Target’s overly restrictive approach to the interpretation of the ADA stands in stark
7 contradiction to Congress’s intent. The purpose of the ADA, as stated in the statute itself, was:

8 (1) to provide a clear and *comprehensive* national mandate for the elimination of
discrimination against individuals with disabilities;

9 ...

10 (4) to invoke the sweep of congressional authority...in order to address *the major
areas of discrimination faced day-to-day* by people with disabilities.

11 42 U.S.C. §12101(b) (“Purpose”) (emphasis added).

12 Congress’s stated goal in enacting the ADA was to extend broad civil rights protections
13 to people with disabilities, thus eliminating the need for further legislation in this area. H.R.
14 REP. NO. 101-485, pt. 3, at 26 (1990). Congress’s ultimate intent in enacting Title III was to
15 provide persons with disabilities the right to participate fully in everyday life.⁵

16 The legislative record is also clear that Congress intended the ADA to apply to new and
17 emerging technologies. The committee report states:

18 Indeed, the Committee intends that the types of accommodation and services
19 provided to individuals with disabilities, under all of the titles of this bill, should
20 keep pace with the rapidly changing technology of the times. This is a period of
tremendous change and growth involving technology assistance and the
Committee wishes to encourage this process.

21 H.R. REP. NO. 101-485, pt. 2, at 108 (1990). Furthermore, Congress explicitly intended to
22 remove barriers to information exchange. *Id.*⁶

23 _____
24 ⁵ See remarks of Sen. John Kerry, 135 CONG REC. S4984, S4997 (1990) (“Talking on the telephone, following a
sports game on television, or operating a word processor are all activities that most of us take for granted, yet they
25 too are needlessly unavailable to many of the disabled.”).

26 ⁶ The U.S. Department of Justice, the entity charged with issuance of the regulations under Title III, has thus found
that Title III applies to internet websites such as target.com whether or not there is a nexus to a physical store. See
27 Brief of the United States Department of Justice as Amicus Curiae in Support of Appellant, *Hooks v. OKBridge,
Inc.*, 232 F.3d 208 (5th Cir. 2000) (available at <http://www.usdoj.gov/crt/briefs/hooks.htm>); see also Letter from the
Assistant Attorney-General for Civil Rights to Senator Tom Harkin (September 9, 1996) (10 NDLR 240 available at
28 <http://www.usdoj.gov/crt/foia/cltr204.txt>). See also *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir.
1999) (“The core meaning of [42 U.S.C. §12182(a)], plainly enough, is that the owner or operator of a store, hotel,
restaurant, dentist’s office, travel agency, theater, *Web site* or other facility (whether in physical space or electronic

1 Application of Title III to Target’s website service is well within the scope of the statute,
 2 consistent with applicable caselaw, and necessary to implement Congressional intent.
 3 Accordingly, defendant’s motion to dismiss the ADA Title III cause of action should be denied.

4 **B. Plaintiffs Properly State A Claim Under The Unruh Act**

5 As a business establishment that operates in California, Target Corporation is required to
 6 abide by the Unruh Act, which guarantees that persons with disabilities “are entitled to the full
 7 and equal accommodations, advantages, facilities, privileges, or services in all business
 8 establishments of every kind whatsoever.” Cal. Civ. Code §51(b). Thus, to state an independent
 9 claim under the Unruh Act, plaintiffs need only allege facts showing that (1) Target Corporation
 10 is a business establishment, (2) target.com is one of the “accommodations, advantages, facilities,
 11 privileges, or services” of Target Corporation, and (3) the blind lack “full and equal” access to
 12 target.com. The Complaint clearly does so. Compl. ¶40.

13 The motion to dismiss shoots wide of the mark and focuses instead on the proposition
 14 that a retailer’s website is not itself a “business establishment.” Def. Mem. at 11-14. The
 15 Complaint alleges that Target Corporation is the business establishment in that Target is a for-
 16 profit corporation conducting business at its 205 stores in California and through target.com.
 17 Compl. ¶11. The Complaint further alleges that the website, target.com, is an accommodation,
 18 advantage, facility, privilege, or service of a business establishment – to wit, Target Corporation.
 19 The terms “accommodations, advantages, facilities, privileges and services of a business
 20 establishment” are clearly meant to encompass all the benefits which a business establishment
 21 offers. *See, e.g., Rotary Club of Duarte v. Bd. of Dir. of Rotary Club Int’l*, 178 Cal. App. 3d
 22 1035, 1059 (Ct. App. 1986) (finding that benefits of Rotary Club membership included
 23 membership itself, receipt of the organization’s magazine and publications, the right to wear the
 24 Rotary emblem and the opportunity to attend “business relation conferences”). The Complaint
 25 delineates the obvious benefits of target.com to Target’s customers. Compl. ¶¶22-23.

26
 27 space) . . . that is open to the public cannot exclude disabled persons from entering the facility and, once in, from
 28 using the facility in the same way that the nondisabled do.”) (emphasis added). The argument about whether Title
 III covers a website business that has no connection to a physical place of public accommodation, however, must
 await another case on another day. As discussed above, the complaint here concerns a website service which is
 extensively linked to and integrated with Target’s physical stores.

1 Target's approach is a novel and ultimately unsatisfactory approach to statutory
 2 construction. The proper starting point is the text of the statute and a determination as to whether
 3 target.com can be fairly said to be an accommodation, advantage, facility, privilege, or service of
 4 Target Corporation. Target has not and cannot argue otherwise. Since target.com is clearly a
 5 service of Target Corporation, and since the benefits of that service are being denied to the blind
 6 due to the pervasive access barriers, the claim should proceed.

7 **1. Target Corporation Is A Business Establishment That Unlawfully**
 8 **Discriminates Against The Blind**

9 The California Supreme Court has repeatedly held that the Unruh Act should be liberally
 10 construed to apply to the full gamut of business entities. *See Burks v. Poppy Const. Co.*, 57 Cal.
 11 2d 463, 468-469 (1962); *Warfield v. Peninsula Golf & Country Club*, 10 Cal. 4th 594, 621
 12 (1995); *O'Connor v. Village Green Owners Ass'n*, 33 Cal. 3d 790, 795 (1983). For example, in
 13 *O'Connor v. Village Green Owners Association*, the Supreme Court reasoned:

14 The Legislature used the words "all" and "of every kind whatsoever" in referring
 15 to business establishments covered by the Unruh Act (Cal. Civ. Code § 51), and
 16 the inclusion of these words without any exception and without specification of
 17 particular kinds of enterprises, leaves no doubt that the term "business
 18 establishments" was used in the broadest sense reasonably possible... The word
 "establishment," as broadly defined, includes not only a fixed location, such as
 the "place where one is permanently fixed for residence or business," but also *a*
permanent "commercial force or organization" or "a permanent settled position
 as in life or business."

19 *O'Connor*, 33 Cal. 3d at 795 (quoting *Burks*, 57 Cal. 2d at 468) (emphasis added). The Ninth
 20 Circuit reached the same conclusion. *See Chabner*, 225 F.3d at 1050 (holding that an insurance
 21 company is a business establishment within the meaning of the Unruh Act). Target Corporation
 22 is a business establishment in the most traditional sense: a for-profit, publicly traded corporation
 23 conducting a substantial retail business with California residents in California every day of every
 24 year. Target Corporation is clearly a permanent commercial force and organization within
 25 California.

26 Defendant's reliance on *Curran v. Mt. Diablo Council of the Boy Scouts of America*, 17
 27 Cal. 4th 670 (1998), and *Ingels v. Westwood One Broadcasting Services, Inc.*, 129 Cal. App. 4th
 28 1050 (2005), is misplaced. In *Curran*, the court decided that the internal membership policies of

1 a non-profit organization fall outside the purview of the Unruh Act. *Curran*, 17 Cal. 4th at 697-
2 98. The court stated,

3 The record establishes that the Boy Scouts is an organization whose primary
4 function is the inculcation of a specific set of values in its youth members, and
5 whose recreational facilities and activities are complementary to the
6 organization's primary purpose. Unlike membership in the Boys' Club of Santa
Cruz, Inc., membership in the Boy Scouts is not simply a ticket of admission to a
recreational facility that is open to a large segment of the public and has all the
attributes of a place of public amusement.

7 *Id.* Target Corporation is nothing like the Boy Scouts. Rather, it is in every sense the traditional
8 type of business that the California Supreme Court has found falls within the Act – a large-scale
9 retailer without any function other than to profit from the sales of goods and services to the
10 general public. *Ingels* is similarly inapplicable. In that case, the plaintiffs alleged that a talk
11 show violated the Unruh Act by berating an on-air caller for their age. The court found that the
12 Unruh Act could not be extended so as to violate the defendant's constitutional free-speech
13 rights. *Ingels*, 129 Cal. App. 4th at 1072. Target cannot seriously assert that removal of the
14 barriers which deny the blind access to its website would interfere with protected speech.

15 Target also claims that the Unruh Act does not cover websites because the statute has not
16 been amended to specifically mention websites. Target fails to explain, however, why any such
17 amendment is necessary. The terms “advantages, facilities and privileges” have been in the
18 statute since 1905 and have not been further refined, even though websites are but one of the
19 many advantages, facilities and privileges that did not exist in 1905. Indeed in 1959, the
20 language “all business establishments of any kind whatsoever” was substituted for the previous
21 specific list of business establishments in order to ensure that the scope of the statute's coverage
22 is comprehensive. There are many kinds of businesses today that did not exist in 1959. There is
23 no rule of law that the legislature must determine every session what new services and what new
24 business establishments have been created and amend the statute accordingly. Indeed, such an
25 approach would be contrary to the Act's comprehensive intent. The Unruh Act, after all, “is to
26 be liberally construed with a view to effectuating the purposes for which it was enacted,”
27 purposes which include interdicting “all arbitrary discrimination by a business enterprise.”
28 *Rotary Club*, 178 Cal. App. 3d at 1046-47.

1 Target also argues that it cannot be held liable for violation of the Unruh Act because (i)
 2 no court has previously held that the Act applies to internet services such as target.com (the issue
 3 has not previously been addressed), and (ii) the Act contains a damage remedy along with the
 4 injunctive relief remedy. Under this reasoning, the Unruh Act could never be applied to cover a
 5 new type of business enterprise. The undisputed facts are that Target, a \$52 billion-per-year
 6 business enterprise, was put on notice by plaintiffs that Target's website illegally excluded the
 7 blind, that Target refused to rectify this violation, and that Target now seeks to be excused from
 8 compliance with any state or federal access obligations concerning its inaccessible website
 9 service. Due process surely does not extend so far as to be a license to discriminate in the
 10 provision of goods and services by a major business establishment such as Target. None of the
 11 cases cited by defendant support such a proposition.

12 Finally, the Unruh Act has been amended to incorporate defendant's obligations under
 13 the ADA. *See* Cal. Civ. Code §51(f). Defendant's violation of Title III of the ADA (see
 14 discussion above) thus also subjects defendant to liability for injunctive relief and damages under
 15 the Unruh Act.

16 **2. If Intentional Discrimination Is An Element Of An Unruh Act Claim,**
 17 **Target's Knowing Refusal To Remove Barriers Demonstrates Intent.**

18 Target's insistence that the Unruh Act claim must be dismissed for want of a
 19 discriminatory intent fails on three grounds: (1) under Rule 9(b), Fed. R. Civ. P., intent may be
 20 generally averred; (2) disability discrimination claims do not require a discriminatory animus;
 21 and (3) the Complaint alleges specific facts amounting to intentional discriminatory conduct by
 22 Target.

23 In *Presta v. Peninsula Corridor Joint Powers Bd.*, 16 F. Supp. 2d 1134 (N.D. Cal. 1998),
 24 Judge Henderson of this District held that a plaintiff "need not demonstrate that defendants
 25 harbored discriminatory intent as an element of her claim of disability discrimination under the
 26 Unruh Civil Rights Act." *Presta*, 16 F. Supp. 2d at 1136. The Ninth Circuit has also rejected the
 27 suggestion that intentional discrimination is an element of all Unruh Act claims. *Lentini v. Cal.*
 28 *Ctr. for the Arts*, 370 F.3d 837, 847 (9th Cir. 2004) ("We find that... no showing of intentional

1 discrimination is required where the Unruh Act violation is premised on an ADA violation”). As
 2 Judge Henderson reasoned in *Presta*,

3 often the most damaging instances in which rights of persons with disabilities are
 4 denied come not as the result of malice or discriminatory intent, but rather from
 5 benevolent inaction when action is required. Such discrimination may only be
 fought by a statute that prescribes liability without reference to an actor's intent.

6 *Presta*, 16 F. Supp. 2d at 1136.⁷ It may be that the Act requires intentional conduct in most
 7 cases that do not involve disability discrimination. *See, e.g., Harris v. Capital Growth Investors*
 8 *XIV*, 52 Cal. 3d 1142, 1175 (1991) (upholding dismissal of sex discrimination claim pled under
 9 disparate impact theory and holding that plaintiffs would have needed to plead intent to state
 10 Unruh Act claim). However, this case clearly alleges disability discrimination and not just from
 11 benevolent inaction but also from a deliberate disregard after a defendant was specifically put on
 12 notice of the discrimination, yet chose to continue to exclude the blind from the benefits of its
 13 services.⁸

14 Accordingly, even if the Unruh Act requires that Target acted intentionally, plaintiffs
 15 easily meet their burden. Intentional discrimination under California law simply means that the
 16 defendant has unlawfully engaged in wrongful and discriminatory conduct with “knowledge of
 17 the effect [its conduct] was having on [] disabled persons.” *Hankins v. El Torito Restaurants,*
 18 *Inc.*, 63 Cal. App. 4th 510, 518 (1998). In *Hankins*, the court found intentional discrimination
 19 where plaintiff alleged that the defendant had “‘wrongfully and unlawfully denied accessible
 20 restroom facilities to physically handicapped persons,’ that it acted with ‘knowledge of the effect
 21 [its conduct] was having on physically disabled persons,’ and that [the plaintiff] was
 22 ‘discriminated against on the sole basis that he was physically disabled and on crutches.’” *Id.* In
 23 the case at hand, plaintiffs notified Target on May 5, 2005 that Target’s website is inaccessible to
 24

25 ⁷ Judge Henderson also reasoned that the Unruh Act’s incorporation of the ADA as a floor for liability belies any
 26 construction of the statute which would require an intent to discriminate, given that the ADA does not require such
 27 intent. *Presta*, 16 F. Supp. 2d at 1135-1136. This is further confirmed by the fact that the “California courts have
 28 clearly and repeatedly held that the Unruh Act is to be interpreted ‘in the broadest sense reasonably possible,’ so as
 to achieve its purpose of combating discrimination in all its forms.” *Id.* (citing *Isbister v. Boys’ Club of Santa Cruz*,
 40 Cal. 3d 72, 76 (1985)).

⁸ For this reason, the two cases Target cites, *Koebke v. Bernardo Heights Country Club*, 36 Cal. 4th 824 (2005) and
Harris, 52 Cal. 3d 1142 (1991), are inapplicable, as neither involves disability discrimination.

1 the blind and that the site’s access barriers discriminate against and exclude the blind from the
2 benefits of that service. Plaintiffs unsuccessfully attempted to convince Target to make its
3 website accessible. Compl. ¶¶37. The site remains inaccessible to the blind even now. Compl.
4 ¶¶29-34. This certainly suffices for an allegation of intent under California law – if such a
5 showing were necessary.

6 **3. Plaintiffs’ Claim Does Not Require Any Structural Construction Or**
7 **Modification Of A Physical Structure.**

8 Defendant relies on Cal. Civ. Code §51(d), which states in pertinent part:

9 Nothing in this section shall be construed to require any construction, alteration,
10 repair, structural or otherwise, or modification of any sort whatsoever, beyond
11 that construction, alteration, repair, or modification that is otherwise required by
other provisions of law, to any new or existing establishment, facility, building,
improvement, or any other structure...

12 By its own terms, this provision applies solely to the alteration of physical structures, specifically
13 establishments, facilities and buildings. Target’s reliance on this provision is nothing less than
14 ironic, given that it takes great pains to argue elsewhere that target.com is not a physical
15 structure. In any event, the section simply does not purport to apply to the modification,
16 alteration or repair of a service, privilege, accommodation or advantage. California courts have
17 recognized that this provision does not bar Unruh Act claims relating to policies, practices and
18 procedures such as those asserted by plaintiffs in this case. See *Hankins*, 63 Cal. App. 4th at 519-
19 520.

20 **C. Plaintiffs Have Properly Stated A Claim Under The Disabled Persons Act.**

21 The Disabled Persons Act states that, “Individuals with disabilities shall be entitled to full
22 and equal access, as other members of the general public, to accommodations, advantages,
23 facilities . . . and privileges of . . . places of public accommodation . . . or other places to which
24 the general public is invited.” Cal. Civ. Code §54.1(a)(1).

25 Plaintiffs have properly stated a claim under the DPA for three reasons. First, the DPA
26 (like the Unruh Act) incorporates the ADA by reference and the Plaintiffs have, as articulated
27 above, properly pled a violation of the ADA. Cal. Civ. Code §54.1(d). Second, target.com is
28 properly understood as an “accommodation, advantage, facility and privilege” of a place of

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1 public accommodation – to wit, Target stores in California. Third, although the Court need not
 2 reach this issue to deny the motion to dismiss, target.com is itself, under California law, a
 3 “place” to which the general public is invited.

4 Target contends that the DPA cannot apply to a website. Def. Mem. at 19-21. Again the
 5 authority Target cites does not in fact support this proposition. California Civil Code §§54.1(a),
 6 *et seq.*, reflects “...a legislative intent to afford broad protection.” *Hankins*, 63 Cal. App. 4th at
 7 523. In the *Hankins* case, the court explicitly held that the DPA prohibits a covered entity from
 8 maintaining a policy or practice “unrelated to any structural impediment, which results in a
 9 denial of full and equal access by a disabled individual to a public accommodation.” *Id.* That is
 10 precisely the type of situation presented here – target.com is a service provided by and linked to
 11 Target’s physical stores. Target’s decision to make this website usable only by sighted
 12 customers results in a denial of full and equal access by blind customers to the services of these
 13 physical stores.

14 Target also cites to two building code architectural barriers cases that simply have no
 15 relevance here. In *Marsh v. Edwards Theatres Circuit, Inc.*, 64 Cal. App. 3d 881 (1976), the
 16 court addressed whether a pre-existing structure had to be modified to allow accessibility when
 17 existing building codes did not so require. *Marsh*, 64 Cal. App. 3d at 886. Likewise, the court in
 18 *Arnold v. United Artists Theatre Cir., Inc.*, 158 F.R.D. 439 (N.D. Cal. 1994) simply found that
 19 violation of the building code applicable at the time of construction or alteration constituted a
 20 violation of the DPA. *Arnold*, 158 F.R.D. 439 at 446-47. *Arnold* said nothing about whether the
 21 DPA’s application is limited only to building code requirements. In this case, Target’s policies
 22 and practices, not its conformance with building codes, are at issue.

23 By using the words “other places to which the public is invited,” in §54.1(a)(1), the
 24 legislature demonstrated an intent for the DPA to encompass all types of business enterprises
 25 which serve the general public. In *Hankins*, 63 Cal. App. 4th at 523, the court noted that
 26 §§54.1(a), *et seq.*, reflects “...a legislative intent to afford broad protection.” Target.com is
 27 surely a “place” where the public is “invited”. Open twenty-four hours a day, seven days a
 28 week, target.com sells products and services and provides information to the general public.

1 Compl. ¶¶20-23. Essentially, target.com extends Target’s physical stores into cyberspace.⁹

2 The public policy underlying the DPA applies with equal force to Target’s stores and
3 website. Increasingly, the internet plays a central role in the commercial life of our state and
4 nation. The DPA seeks to ensure that people with disabilities have an equal opportunity to
5 participate in this commercial life. To give effect to the legislative intent to afford “broad
6 protection,” the DPA must encompass websites such as target.com.

7 Accordingly, the DPA count should be permitted to proceed not only because target.com
8 is a service related to Target stores under the ADA and the DPA, but because target.com is itself
9 a place to which the general public is invited for the purposes of the DPA.

10 **D. The Commerce Clause Does Not Bar Application Of Plaintiffs’ State Law**
11 **Claims.**

12 Target argues that to the extent the Unruh Act and DPA apply to discrimination on the
13 internet against blind Californians, they are *per se* unconstitutional burdens on interstate
14 commerce, and insists that “any regulation of the Internet must be instituted at the national
15 level.” Def. Mem. at 23. This argument, if accepted, would immunize a breathtaking range of
16 conduct ordinarily regulated by or violative of state law – as long as it occurred on the Internet.
17 However, the Internet is not, as Target would have it, a haven from compliance with state laws
18 directed to traditional subjects of state concern, even when those laws incidentally affect
19 interstate commerce. Moreover, the Unruh Act and DPA are legitimate exercises of state powers
20 whose benefits far exceed their effect on commerce and, as such, do not run afoul of the
21 restrictions the Commerce Clause imposes on the states.

22
23
24
25 _____
26 ⁹ Target quite literally invites the public to visit its website for the purpose of purchasing goods and services. The
27 sign-in page for target.com invites “New Guests” to enter and set up an account, and asks “Returning Guests” to
28 sign in with their account number. See <http://www.target.com> (home page) and <http://www.target.com/gp/flex/sign-in.html>, attached hereto as Exhibits 1 and 2. Even though this matter is before the court on a motion to dismiss, it may consider the contents of Target’s web page without converting the motion to one for summary judgment. See *Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir. 1994), *overruled on other grounds* by *Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002) **Error! Bookmark not defined.**; *Van Winkle v. Allstate Ins. Co.*, 290 F. Supp. 2d 1158, 1162 n.2 (C.D. Cal. 2003).

1 **1. The Unruh Act and DPA Are Constitutional Because They Are Civil**
 2 **Rights Laws of General Application Which Do Not Conflict with the**
 3 **Laws of Other States and Which Have Local Benefits That Outweigh**
 Whatever Incidental Burdens on Interstate Commerce That May
 Theoretically Exist.

4 In asserting that California’s civil rights acts unconstitutionally burden interstate
 5 commerce, Target eschews the traditional framework by which courts analyze such a contention.
 6 When these laws are considered in that context, it is clear that they meet constitutional
 7 requirements.

8 The Commerce Clause of the United States Constitution, U.S. Const. art. I, §8, cl. 3,
 9 grants Congress the power to regulate interstate and foreign commerce. By implication the
 10 Clause also limits “the power of the States to enact laws imposing substantial burdens on such
 11 commerce.” *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984). This
 12 “dormant” Commerce Clause “prohibits economic protectionism – that is, regulatory measures
 13 designed to benefit in-state economic interests by burdening out-of-state competitors.” *New*
 14 *Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-74 (1988); see *Fort Gratiot Sanitary Landfill,*
 15 *Inc. v. Mich. Dep’t of Natural Resources*, 504 U.S. 353, 359 (1992). As the Ninth Circuit
 16 explained in *S.D. Myers, Inc. v. City of San Francisco*, 253 F.3d 461 (9th Cir. 2001):

17 The “central rationale” of the dormant Commerce Clause “is to prohibit state or
 18 municipal laws whose object is local economic protectionism, laws that would
 19 excite those jealousies and retaliatory measures the Constitution was designed to
 20 prevent The Commerce Clause is concerned with the free flow of goods and
 services through the several states; it is the economic interest in being free from
 trade barriers that the clause protects.”

21 *S.D. Myers*, 253 F.3d at 466, 471 (quoting *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S.
 22 383, 390 (1994)). It follows that legislation that affects but does not discriminate against out-of-
 23 state interests and does not unduly burden interstate commerce passes constitutional muster. The
 24 framers “never intended to cut the States off from legislating on all subjects relating to the
 25 health, life, and safety of their citizens, though the legislation might indirectly affect the
 26 commerce of the country.” *Sherlock v. Alling*, 93 U.S. 99, 103 (1876). A “state law may not be
 27 struck down on the mere showing that its administration affects interstate commerce in some
 28 way. ‘State regulation, based on the police power, which does not discriminate against interstate

1 commerce or operate to disrupt its required uniformity, may constitutionally stand.” *Head v.*
 2 *N.M. Bd. of Examiners*, 374 U.S. 424, 429 (1963) (citing *Huron Portland Cement Co. v. City of*
 3 *Detroit*, 362 U.S. 440, 448 (1960)).

4 In *S.D. Myers*, the Ninth Circuit set out the analytical framework for determining when a
 5 state statute must be struck down as an infringement on Congress’s powers over interstate
 6 commerce:

7 When a state statute directly regulates or discriminates against interstate
 8 commerce or when its effect is to favor in-state economic interests over out-of-
 9 state interests, we have generally struck down the statute without further inquiry.
 10 When, however, a statute has only indirect effects on interstate commerce and
 regulates evenhandedly, we have examined whether the State’s interest is
 legitimate and whether the burden on interstate commerce clearly exceeds the
 local benefits.

11 *S.D. Myers*, 253 F.3d at 466 (citing *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*,
 12 476 U.S. 573, 579 (1986)); see *Valley Bank of Nev. v. Plus System, Inc.*, 914 F.2d 1186 (9th Cir.
 13 1990). The Unruh Act and DPA do not fall within the scope of the first test, as they are not
 14 direct regulations of commerce: the Acts contain “no language explicitly or implicitly targeting
 15 either out-of-state entities or entities engaged in interstate commerce.” *S.D. Myers*, 253 F.3d at
 16 468-70. Even if they were direct regulations, Target “must either present evidence that
 17 conflicting, legitimate legislation is already in place or that the threat of such legislation is both
 18 actual and imminent.” *Id.* at 469. No such evidence – that other states require discriminatory
 19 websites – has been presented. See Section III.D.2 *infra*.

20 Because the Acts do not discriminate against interstate commerce and only indirectly
 21 affect it, they are measured by the second test articulated in *S.D. Myers*: the Court should
 22 invalidate them only if the State’s interest in such legislation is illegitimate and the burdens they
 23 impose on interstate commerce clearly exceed the local benefits. *S.D. Myers*, 253 F.3d at 471;
 24 *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). States have a compelling interest in prohibiting
 25 discrimination; such laws protect “the State’s citizenry from a number of serious social and
 26 personal harms.” *Roberts v. United States Jaycees*, 468 U.S. 609, 610 (1984). The Unruh Act
 27 “is this state’s bulwark against arbitrary discrimination.” *Isbister v. Boys’ Club of Santa Cruz,*
 28 *Inc.*, 40 Cal. 3d. 72, 75 (1985). The Disabled Persons Act, too, is an expression of the State’s

1 legitimate interests in protecting the rights and dignity of disabled Californians and ensuring that
 2 California benefits from their wide participation in the political, economic and cultural life of the
 3 State. Target does not cite, and Plaintiffs are not aware of, a single case striking down a state
 4 disability access or other equal protection law on the basis that it would somehow violate the
 5 Commerce Clause.

6 Target has offered but one fact to support its claim of burden: that the nature of the
 7 internet is such that target.com would be subject to the most stringent standard imposed by any
 8 State. Def. Mem. at 24. That claim is insufficient as a matter of law: Target “must either
 9 present evidence that *conflicting*, legitimate legislation is already in place or that the threat of
 10 such legislation is both actual and imminent.” *S.D. Myers*, 253 F.3d at 469-70 (emphasis added).
 11 By contrast, the local benefits of freeing California’s blind from discrimination in the services
 12 provided by a major retailer are substantial.

13 **2. The Unruh Act and DPA may address conduct that occurs on the**
 14 **Internet.**

15 Because of the protean nature of the internet, a host of activities normally within the
 16 purview of state regulation now occur online as well: advertising, consumer transactions,
 17 consumer credit transactions, banking, prescription refills, firearm sales, insurance, even legal
 18 advice, to name but a few.¹⁰ According to Target, however, a state is powerless to use its civil or
 19 criminal laws to address information privacy, false advertising, unfair competition, consumer
 20 fraud, usury, illegal firearm transactions, unlicensed insurance sales, prescription drug abuse,
 21 malpractice and violations of professional conduct, not to mention discrimination, when the
 22 conduct occurs on the internet. A libel online would not be actionable, apparently, unless and
 23 until Congress passes a federal libel law.

24 To understand the breathtaking scope of Target’s argument, consider that, if accepted,
 25 California would be powerless to regulate the practice of law by California lawyers who
 26 advertise or give advice over the internet. This is no hypothetical: legal advice is now available

27
 28 ¹⁰ See, e.g., <https://www.google.com/adsense/success>; <http://www.target.com>; <http://www.ditech.com>;
<https://bankus.etrade.com>; <http://www.medsforless.com>; <http://www.bushmaster.com>;
<http://www.federatedinsurance.com>; <http://www.freeadvice.com>.

1 on the web.¹¹ If the website contains improper advertising under State law; if unlicensed persons
 2 offer legal advice online; if confidential information conveyed online is disclosed; or if online
 3 advice breaches standards of care; then, if Target is correct, no State has the authority to address
 4 these issues. Only Congress, Target's argument suggests, may legislate standards of professional
 5 responsibility for legal websites. The decision of the California Bar Association that attorney
 6 websites are subject to California's law governing deceptive advertising¹² and that the
 7 confidentiality of information disclosed in online attorney-client conferences are subject to its
 8 disciplinary rules¹³ is, according to Target's argument, an unconstitutional burden on interstate
 9 commerce because it is a regulation of the internet.

10 Defendant's argument that conduct normally within a state's power to regulate enters a
 11 lawless enclave when it occurs on the internet, while ill-considered, is not novel. At issue in
 12 *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493 (5th Cir. 2001), was the application to an
 13 internet site called "The Showroom," from which Ford offered to sell used automobiles in
 14 violation of a Texas law requiring that automobile dealers be licensed and prohibiting
 15 manufacturer-owned dealerships. Ford claimed, as does Target, that applying state laws to
 16 websites unduly burdens interstate commerce, because e-commerce is one of those types of
 17 commerce that demand national regulation. *Ford Motor Co.*, 264 F.3d at 504-05. While this
 18 assertion is worthy of consideration with respect to statutes that directly regulate internet activity,
 19 the Fifth Circuit recognized that it was "absurd" to apply that argument whenever the internet
 20 was used to violate state law: "It would allow corporations or individuals to circumvent
 21 otherwise constitutional state laws and regulations simply by connecting the transaction to the
 22 internet." *Id.* at 505.

23 In *People v. Hsu*, 82 Cal. App. 4th 976 (2000), and *Hatch v. Superior Court*, 80 Cal. App.
 24 4th 170 (2000), defendants who used the internet to send material intended to seduce a child
 25 have twice made Target's argument with respect to a California statute that penalized sending
 26

27 ¹¹ See, e.g., <http://www.freeadvice.com>.

28 ¹² Cal. Bus. & Prof. Code §6157.1.

¹³ State Bar of Calif. Stdg Comm. On Prof. Responsibility & Conduct, Formal Op. #2005-168; State Bar of California Stdg Comm. On Prof. Responsibility & Conduct, Formal Op. # 2001-155.

1 such materials “by any means.” In both instances, the court concluded that logging on to the
 2 internet does not put a defendant beyond the reach of California law. *Hsu*, 82 Cal. App. 4th at
 3 984-85; *Hatch*, 80 Cal. App. 4th at 194-95.¹⁴ Moreover, both concluded that there was no
 4 protected right of commerce at issue. *Hsu*, 82 Cal. App. 4th at 985; *Hatch*, 80 Cal. App. 4th at
 5 196. As stated in *Hsu*, “it is difficult to conceive of any legitimate commerce that would be
 6 burdened by penalizing the transmission of harmful sexual material to known minors in order to
 7 seduce them.” *Hsu*, 82 Cal. App. 4th at 984. So, too, it is hard to conceive of any legitimate
 8 commerce that is burdened by requiring that commercial websites be accessible to the blind.

9 For its extraordinary proposal that all conduct on the internet is beyond the reach of state
 10 law, Target cites as its sole authority *American Library Ass’n v. Pataki*, 969 F. Supp. 160
 11 (S.D.N.Y. 1997), which struck down as a burden on interstate commerce a statute making it a
 12 crime to use the internet to disseminate obscene materials to minors and which concluded that
 13 “the Internet is one of those areas of commerce that must be marked off as a national preserve to
 14 protect users from inconsistent legislation.” *Id.* at 169. As observed, however, in *Ford Motor*
 15 *Co.*, *Hsu* and *Hatch*, whatever force of logic *Pataki* may have when applied to statutes directly
 16 regulating the internet, it has none with respect to statutes that only indirectly affect the
 17 internet.¹⁵ Moreover, *Pataki* has met with less than universal acceptance, as other courts in
 18 California and elsewhere have upheld state “anti-spam” statutes in the face of interstate
 19 commerce challenges. *See, e.g., Ferguson v. Friendfinders, Inc.*, 94 Cal. App. 4th 1255 (2002);
 20 *MaryCLE, LLC v. First Choice Internet, Inc.*, 890 A.2d 818 (Md. 2006); *State v. Heckel*, 24 P.3d
 21 404 (Wash. 2001), *cert. denied*, 534 U.S. 997 (2001).

22 Target, however, argues that if it made its website accessible to comply with the Unruh
 23 Act and DPA, then those statutes would be controlling conduct beyond the boundaries of
 24

25 ¹⁴ Other courts have reached similar conclusions concerning “luring” statutes of other states that are violated by
 26 conduct on the internet. *See Cashatt v. State*, 873 So. 2d 430, 436 (Fla. Dist. Ct. App. 2004); *State v. Backlund*, 672
 N.W.2d 431, 438 (N.D. 2003); *State v. Snyder*, 801 N.E.2d 876, 886 (Ohio Ct. App. 2003); *People v. Foley*, 731
 N.E.2d 123 (NY. 2000).

27 ¹⁵ The *Pataki* court labored under the misapprehension that state laws applying to railroads, trucks and highways are
 28 *per se* violations of the interstate commerce clause. Rather, such laws are subject to the same balancing test as any
 other state law addressed to traditional state law concerns. *See, e.g., Kassel v. Consol. Freightways Corp. of Del.*,
 450 U.S. 662 (1981); *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959).

1 California. Citing a case that struck down a state statute that *directly* regulated interstate
 2 commerce, *Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989), Target posits that all state statutes that
 3 have the effect of controlling conduct beyond the state’s boundaries are *per se* unconstitutional.
 4 Def. Mem. at 7-8 (citing *Healy*, 491 U.S. at 336). That proposition is factually and legally
 5 unsound.

6 In *Healy*, the Court struck down a state beer pricing statute which in essence required
 7 beer shippers to seek permission from on State with regard to the prices of beer being sold in
 8 other states, with the practical effect of creating “price gridlock” across the several states. *Id.* at
 9 333, 337-339. Nothing of the kind is occurring here. Compliance with the Unruh Act and
 10 Disabled Persons Act does not impermissibly burden, and need not even impact, Target’s
 11 conduct in other states. For example, Target’s website already uses a similar method to comply
 12 with another state law, California’s privacy law: it has created a link on its home page to a page
 13 advising California’s residents of their privacy rights.¹⁶ Similarly, no barrier appears to exist to
 14 Target creating a link to a duplicate, fully accessible site that would allow purchases to be made
 15 by consumers whose billing or shipping address was in California. In that manner, if Target
 16 insisted on continuing to exclude blind people in other States, Californians could use a fully
 17 accessible target.com and Target would be free to force everyone else to use the existing
 18 inaccessible site. Wholly out-of-state transactions would thus be unaffected by compliance with
 19 the Unruh Act and DPA.¹⁷

20 But even if Target could only comply by creating a single accessible site for all users, no
 21 constitutional vice would attach to California’s anti-discrimination laws. Many state statutes
 22 whose practical effect is to regulate conduct outside its borders have survived judicial scrutiny.
 23 For example, in *Head*, 374 U.S. 424, the Supreme Court upheld a New Mexico law that
 24 prohibited a New Mexico radio station and a newspaper that also served parts of Texas from

26 ¹⁶ See <http://www.target.com> (home page) and http://sites.target.com/site/en/spot/page.jsp?title=privacy_policy_ca
 27 (California privacy page), attached hereto as Exhibits 1 and 3. As noted above, the court may consider the contents
 28 of Target’s web page without converting the motion to one for summary judgment. See *Branch*, 14 F.3d at 453-54;
Van Winkle, 290 F. Supp. 2d at 1162 n.2.

¹⁷ So, too, Ford Motor Co. could have changed its web page to indicate that Texas consumers wishing to buy from
 “the Showroom” must do so through a Texas dealer.

1 advertising a Texas optometrist's eyeglass prices. The Court readily acknowledged that the
 2 application of New Mexico's law affected commercial transactions wholly outside the state, but
 3 explained that "[a] state law may not be struck down on the mere showing that its administration
 4 affects interstate commerce in some way." *Id.* at 429.

5 Indeed, in *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), the Supreme Court
 6 acknowledged that it had repeatedly upheld state law restrictions on the weight and size of
 7 trucks, even when those laws could require an interstate motor carrier "to replace all equipment
 8 or keep out of the state." *Bibb*, 359 U.S. at 526. While complying with the most onerous state
 9 size and weight regulation would necessarily affect a truck's activity in other states, the Court
 10 saw no constitutional defect, because by meeting the most demanding requirement of any state,
 11 the trucking company could "pass muster" in all. *Id.* The constitutional line is only crossed,
 12 when, as in *Bibb*, compliance with one state's law is a violation of another's. *See S. D. Myers*,
 13 253 F.3d at 469-70 (plaintiff must present evidence of conflicting legislation to establish an
 14 unconstitutional burden on interstate commerce).

15 The Supreme Court has long emphasized this distinction in the context of state
 16 discrimination laws. In *Colo. Anti-Discrimination Comm'n v. Cont'l Air Lines, Inc.*, 372 U.S.
 17 714 (1963), the Court concluded that a state anti-discrimination law, when applied to the hiring
 18 of pilots for a national airline, did not create a practical interference with commerce, because no
 19 other states could bar pilots based on their color. *Cont'l Air Lines*, 372 U.S. at 721. Target has
 20 pointed to no statute of another state that requires websites to discriminate against the disabled.
 21 Thus, even if the Unruh Act and DPA are the most stringent of state statutes applicable to the
 22 internet and even if compliance with the most stringent statutes necessarily affects conduct
 23 wholly within another state, the statutes are not thereby unconstitutional.¹⁸

24
 25
 26
 27 ¹⁸ Thus, the State Bar concluded that a law firm's website may be subject to regulation by all states in which the law
 28 firm is located or members of the firm are licensed, thus requiring the website to conform to whichever state's rules
 against deceptive advertising were the most stringent. State Bar of California Stdg Comm. on Prof. Responsibility
 & Conduct, Formal Op. # 2001-155.

1 IV. CONCLUSION

2 For all the foregoing reasons, defendant’s motion should be denied.

3 DATED: June 12, 2006

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EXHIBIT 1



CART MY ACCOUNT REDCARDS HELP

TARGET PHOTO STORE LOCATOR WEEKLY AD

CLUB WEDD REGISTRY TARGET BABY REGISTRY WISH LIST GIFT FINDER GIFTCARDS

- Women ▾
- Men ▾
- Baby ▾
- Kids ▾
- Home ▾
- Bed + Bath ▾
- Furniture ▾
- Patio + Garden ▾
- Sports ▾
- Toys ▾
- Electronics ▾
- Entertainment ▾

Can we help you find something? Search GO ▶

> Sign in | New guest? > Start here

This Week at Target.com

Furniture Collections ▶

Free shipping on select styles.

Women's Clothing + Shoes ▶

Spend \$50, get free shipping.

Get 10% Off In Store ▶

Plus 10% off online when you are approved for a REDcard.™

Weekly Ad ▶

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Gift Finder ▶

Season's Picks ▶

Red Hot Shop ▶
Home ▶

- ▶ Bedding
- ▶ Kitchen + Housewares
- ▶ Patio + Garden
- ▶ Home Décor
- ▶ Lighting
- ▶ Rugs
- ▶ Window Coverings
- ▶ Slipcovers
- ▶ Appliances
- ▶ Bath
- ▶ Dining
- ▶ Home Improvement
- ▶ Health + Beauty
- ▶ Pets
- ▶ See All

Furniture ▶

- ▶ Bedroom
- ▶ Living Room
- ▶ Kitchen + Dining
- ▶ Home Office
- ▶ See All

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Video Games ▶

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Free shipping* in Women's on orders over \$50.

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- [Wedges](#)
- [Flats](#)
- [See All >](#)

Baby >

- > Furniture
- > Nursery
- > Baby Gear
- > See All

Kids >

- > Girls' Clothing
- > Boys' Clothing
- > Kids' Room
- > See All

Women >

- > Clothing
- > Maternity
- > Shoes
- > Jewelry
- > See All

Men

- > Pants
- > Shirts
- > See All

Electronics >

- > Digital Cameras
- > Audio
- > Televisions
- > Home Office
- > Video Games
- > See All

Sports >

- > Exercise + Fitness
- > Outdoor Sports
- > Camping
- > See All

Toys >

- > Sports + Outdoor Play
- > Learning Toys
- > Shop by Age
- > See All

Entertainment >

- > DVD Movies
- > Music
- > Books
- > See All




Gift Finder >

Party Supplies >




See All Departments >

Clearance >

Home. Free shipping* on select items: Free shipping details >

 <p>\$39.99 Chicago Cutlery 10-pc. Set ></p> <p>Shop All Kitchen from \$14.99 ></p>	 <p>\$39.99 Hamilton Beach Electric Slicer ></p> <p>Shop All Appliances from \$19.99 ></p>	 <p>\$22.99-\$279.99 Ultra Woven Rug - Desert Tan ></p> <p>Shop All Rugs from \$29.99 ></p>
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Kids. Find sunny deals on summer-fun essentials.

 <p>Outdoor Toys ></p> <ul style="list-style-type: none"> ● Riding Toys from \$24.99 ● Playhouses + Climbers from \$69.99 ● Swingsets + Gyms from \$119.99 ● Inflatable Bouncers from \$19.99 ● See All > 	 <p>Kids' Sports ></p> <ul style="list-style-type: none"> ● Bikes from \$59.99 ● Baseball + Teeball from \$9.99 ● Manual Scooters from \$29.99 ● Water Toys from \$12.99 ● See All > 	 <p>Kids' Clothing</p> <ul style="list-style-type: none"> ● Girls' Clothing from \$7.99 ● Boys' Clothing from \$7.99 ● Kids' Shoes from \$12.99
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The REDcardsSM



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- > Return an Item
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- > Product Recalls
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Target Stores

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- > Grocery Coupons
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EXHIBIT 2



CART MY ACCOUNT REDCARDS HEL

TARGET PHOTO STORE LOCATOR WEEKLY A

CLUB WEDD REGISTRY TARGET BABY REGISTRY WISH LIST GIFT FINDER GIFTCARD

Women Men Baby Kids Home Bed + Bath Furniture Patio + Garden Sports Toys Electronics Entertainment

Can we help you find something? Search

All Products



Shop All Departments

Sign in or create a Target.com account.

Returning Guests

If you have an account with Target.com, please sign in.

I want to sign in with my:

- Target.com account.
- Amazon.com account. ([Learn more](#))

Your e-mail address:

Your password:

New Guests

If you don't have an account with Target.com, please create one.



Sign In



Create a New Account

- > Forgot your [password](#)?
- > Has your [e-mail address](#) changed since your last order?
- > Having trouble signing in? You can use our [unsecured standard server](#).

You don't need a credit card to create an account. Payment information isn't required until you make a purchase.

Your shopping experience is safe with us. Read the [Target.com Safe Shopping Guarantee](#).

Redeeming an e-GiftCard or promotional code? You'll be asked to enter it on the Review and Purchase page.

Having difficulties? We're here to help. [E-mail us](#) or call (800) 591-3869.

EXHIBIT 3



TARGET.

CART | MY ACCOUNT | REDCARDS | HELP

TARGET PHOTO | STORE LOCATOR | WEEKLY AD

CLUB WEDD REGISTRY | TARGET BABY REGISTRY | WISH LIST | GIFT FINDER | GIFTCARDS

Women | Men | Baby | Kids | Home | Bed + Bath | Furniture | Patio + Garden | Sports | Toys | Electronics | Entertainment

Can we help you find something? Search All Products [Shop All Departments](#)

Target : [Privacy](#) : **California Privacy Rights**

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California Privacy Rights



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anywhere.
anytime.

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For purposes of this opt-out option:

- "Target" means Target Stores and the Target website, and
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 - a business that is outside the Target family, and
 - a Target Corporation business (Target National Bank, Target Bank, Target Stores and Target.com)

If you choose to opt out, Target will not disclose your personal information to a Third Party for marketing purposes. As a result, you will not receive direct mail, telephone or e-mail solicitations for products or services from:



1. a business outside the Target family
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- Tell the telephone rep that you would like to opt out of Target sharing your information with a third party AND that you would like to opt out of receiving direct mail, telephone and e-mail solicitations from Target Corporation.

Your opt out request will be processed within 30 days of the date it was received. Once you have opted out, you do not need to do so again.

For more information about the Target.com online privacy policy, [click here](#).
For more information about the Target National Bank privacy policy, [click here](#).

<p>The REDcardsSM</p>  <p>> Apply for a Card</p> <p>> Target Business Card</p>	<p>Help</p> <p>? > Shipping Rates + Policies</p> <p>> Track an Order</p> <p>> Update an Order</p> <p>> Return an Item</p> <p>> Product Rebates</p> <p>> Product Recalls</p> <p>> Contact Us</p> <p>> Shopping Directory</p> <p>More>></p>	<p>Target Stores</p>  <p>> Store Locator</p> <p>> Grocery Coupons</p> <p>> Photo Center</p> <p>> Portrait Studio</p> <p>> Weekly Ad</p> <p>> Optical</p> <p>> Pharmacy</p> <p>> Promotions</p> <p>More>></p>
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