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No Regulations and Inconsistent Standards: How Website Accessibility Lawsuits Under Title III Unduly Burden Private Businesses

Lauren Stuy

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— Comment —

NO REGULATIONS AND INCONSISTENT
STANDARDS: HOW WEBSITE
ACCESSIBILITY LAWSUITS UNDER
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BUSINESSES

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INTRODUCTION

We live in a world of constant tweeting, social media posting, e-mail checking, fact Googling, Netflix binging, swiping right, and online shopping. In fact, most Americans spend as much time online as a full-time job; over forty hours are spent per week on their smartphones, desktops, laptops, and other streaming devices.¹ And while many people

1. On average, Americans spend 5.9 hours per day (or 41.3 hours per week) on their smartphones, desktops, laptops, and other streaming devices. Rob Marvin, *Tech Addiction by the Numbers: How Much Time We Spend Online*, PC MAG (June 11, 2018, 8:00 AM), <https://www.pcmag.com/>

take the Internet for granted, as many as 26.5 million Americans with visual or auditory disabilities face difficulties accessing the websites of private businesses.² Website accessibility for disabled persons has recently become a hotbed for litigation under the Americans with Disabilities Act (ADA), which requires certain businesses to comply with standards that allow disabled persons equal access to products and services. While businesses have clear guidance as to what those standards mean in the physical world, the ADA is silent on how, exactly, those standards translate to the digital world. In the absence of such clear standards, businesses are exposed to continuous liability for failure to comply with website accessibility. For businesses, those 26.5 million Americans with visual and auditory disabilities translates to 26.5 million potential plaintiffs who could bring a website accessibility action against them.

For a website to be accessible to an individual with a visual impairment, the website must be coded to integrate with the individual's screen reader.³ Deaf or hard-of-hearing individuals rely on closed captioning coding for audio files.⁴ In theory, this seems like a simple enough task. But the implementation of the ADA into the digital world has been fraught with confusion. The practical reality of making

article/361587/tech-addiction-by-the-numbers-how-much-time-we-spend-online [https://perma.cc/JR3L-H4KU].

2. Approximately 25.5 million adult Americans experience vision loss. *Facts and Figures on Adults with Vision Loss*, AM. FOUND. FOR THE BLIND, <http://www.afb.org/info/blindness-statistics/adults/facts-and-figures/235> [https://perma.cc/U7D9-GQMH] (last updated May 2018). The term "vision loss" encompasses a wide range of visual problems, from individuals who have trouble seeing even when using contact lenses or glasses, to individuals who are blind or unable to see at all. *Id.* Approximately one million Americans are functionally deaf. Ross E. Mitchell, *How Many Deaf People Are There in the United States? Estimates from the Survey of Income and Program Participation*, 11 J. OF DEAF STUD. AND DEAF EDUC. 112, 112 (2006). See Brief for National Federation of the Blind et al. as Amici Curiae Supporting Appellee at 8, *Winn Dixie Stores, Inc. v. Gil*, No. 17-13467 (11th Cir. Dec. 20, 2017), 2017 WL 6638243, at *8; see also Jonathan Lazar & Paul Jaeger, *Reducing Barriers to Online Access for People with Disabilities*, 27 ISSUES IN SCI. AND TECH. (2011), <https://issues.org/lazar/> [https://perma.cc/YB7L-BHQG].
3. A blind or visually impaired individual relies on a software application, called a screen reader, to take the information presented on a website and translate it into usable format, such as braille versions of the text or computer-synthesized speech output. Brief for National Federation of the Blind et al., *supra* note 2, at *10–11.
4. A deaf or hard-of-hearing individual relies on the website's coding to show closed captioning on audio files. Without the proper coding, a website will not integrate with an individual's software application or display closed-captioning. *Id.* at *10–11.

websites accessible to those with visual and auditory impairments is a legal minefield with unarticulated accessibility standards, a circuit court split, and significant financial costs for businesses.

When the ADA was passed in 1990, the Internet was in its infancy; Congress did not include regulatory guidance for websites as it did for physical structures.⁵ Websites are not mentioned anywhere in the ADA regulations and the Department of Justice (DOJ) has provided little guidance in this area of law. Now, plaintiff firms are storming the courtrooms in ever-increasing numbers to take advantage of the opportunity this gap in the current law presents.⁶ The number of website accessibility lawsuits hit at least 2,258 in 2018, a 177% increase from 814 such lawsuits in 2017.⁷ Without clear website accessibility standards in effect, this trend is unlikely to stop any time soon.⁸

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5. Since the ADA's passage, the DOJ has consistently stated that the ADA's accessibility requirements apply to websites belonging to private companies. *See, e.g., Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearing Before the H. Subcomm. on the Constitution of the H. Comm. on the Judiciary, 106th Cong. 2 (2000)* (statement of Rep. Canady, Chairman, Subcommittee on the Constitution) ("It is the opinion of the Department of Justice currently that the accessibility requirements of the Americans with Disabilities Act already apply to private Internet Web sites and services."); *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations*, 75 Fed. Reg. 43,460, 43,465 (proposed July 26, 2010) (to be codified at 28 C.F.R. pt. 35) ("The Department believes that title III reaches the Web sites of entities that provide goods or services that fall within the 12 categories of 'public accommodations,' as defined by the statute and regulations.").
 6. Plaintiffs' counsel have taken advantage of the lack of guidance from the DOJ to use the courts to develop this area of law. *See* Joshua Briones & Nicole Ozeran, *INSIGHT: A Mid-Year Review of the Current State of ADA Website Accessibility Lawsuits*, BLOOMBERG L. NEWS (Aug. 16, 2018), <https://www.bna.com/insight-midyear-review-n73014481764/> [<https://perma.cc/N4HS-ZSD9>]. In 2016, plaintiffs filed 240 federal ADA website compliance lawsuits. In 2017, plaintiffs filed 814 such lawsuits. *ADA Website Compliance Lawsuits: Recent and High-Profile*, LOVATA (Mar. 5, 2018), <https://lovata.com/blog/ada-website-compliance-lawsuits-recent-and-high-profile.html> [<https://perma.cc/5KQK-Q5VA>].
 7. Minh N. Vu, Kristina M. Launey, & Susan Ryan, *Number of Federal Website Accessibility Lawsuits Nearly Triple, Exceeding 2250 in 2018*, ADA TITLE III NEWS & INSIGHTS (Jan. 31, 2019), <https://www.adatitleiii.com/2019/01/number-of-federal-website-accessibility-lawsuits-nearly-triple-exceeding-2250-in-2018/> [<https://perma.cc/F5W9-9F7P>]. Plaintiffs filed these federal claims in fourteen states, with New York leading the pack with 1,564 such lawsuits. *Id.*
 8. *See* Samuel D. Levy & Martin S. Krezalek, *A Call for Regulation: The DOJ Ignored Website Accessibility Regulation and Enterprising Chaos Ensued*, N.Y.L.J. (Nov. 9, 2018, 2:35 PM), <https://www.law.com/newyorklawjournal/2018/11/09/a-call-for-regulation-the-doj-ignored-website->

As the website accessibility debacle has landed in the laps of federal judges, courts are tasked with two main questions. First, does a website of an ADA-covered business qualify as a “place of public accommodation” within Title III of the ADA? Answering this question is tricky, especially when addressing web-only businesses without a traditional storefront or physical location. Circuit courts are split over whether a website needs a nexus to a physical structure to qualify as a place of public accommodation under Title III of the ADA.

If the ADA does apply to the website, the next question is: does the website violate the ADA? Despite millions of Americans—on both sides of the “v”—being affected by this question, the DOJ has failed to issue formal website accessibility standards.⁹ Because there is not one official source of website accessibility standards, businesses that operate nationally or across several states are left with inconsistent obligations piecemealed together from the different jurisdictions.¹⁰

This Comment explores the tension between the burden that undefined website accessibility standards place on private businesses and the need for disabled Americans to have full access to websites. Part I provides an overview of Title III of the ADA and how Title III relates to website accessibility standards. Part II examines the circuit split on whether a plaintiff alleging a Title III violation on a website’s accessibility must demonstrate a nexus between the website and a physical location. Part III discusses the absence of clear website accessibility standards. Part IV explores the burden businesses face trying to comply with inconsistent standards, arguing that in light of

accessibility-regulation-and-enterprising-chaos-ensued/ [https://perma.cc/39PT-M2JP] (“Until the DOJ acts, the threat of surf-by lawsuits will continue to surge.”).

9. See, e.g., U.S. Dep’t of Just., Off. of Legis. Aff., Office of the Ass’t Att’y Gen., Opinion Letter on Website Accessibility for Public Accommodations Under the Americans with Disabilities Act (Sept. 25, 2018) (“[T]he Department is evaluating whether promulgating specific web accessibility standards through regulations is necessary and appropriate to ensure compliance with the ADA.”).
10. Companies who operate nationwide face liability in some jurisdictions but not others depending upon where a potential plaintiff lives or in which court the claim is brought. The online streaming service Netflix serves as an example of this issue. In *National Ass’n of the Deaf v. Netflix*, the United States District Court for the District of Massachusetts held that Netflix’s website is a place of public accommodation under Title III despite no physical location existing for these services. 869 F. Supp. 2d 196, 201–02 (D. Mass. 2012). But in *Cullen v. Netflix*, the United States District Court for the Northern District of California held the opposite—that Netflix’s website is *not* a place of public accommodation under Title III because it is solely a web-based service. 880 F. Supp. 2d 1017, 1024 (N.D. Cal. 2012).

the inconsistent standards across the country, businesses face an undue burden to attempt ADA compliance for their websites.

I. TITLE III OF THE ADA AND WEBSITE ACCESSIBILITY

A. ADA Background

In 1990, Congress passed the Americans with Disabilities Act (ADA) “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”¹¹ Congress later amended the Act in 2008 to broaden the coverage for individuals protected by the law.¹²

An individual with a disability alleging that a private business’s website is inaccessible would file suit under Title III of the ADA.¹³ To state a claim under Title III, a plaintiff must allege: (1) that she is disabled within the meaning of the ADA; (2) that the defendant owns, leases, or operates a place of public accommodation; and (3) that the defendant discriminated against the individual by denying her a full and equal opportunity to enjoy the services or goods that the defendant provides.¹⁴ Under the ADA, a successful plaintiff cannot recover damages, but the plaintiff may recover “reasonable attorneys’ fees.”¹⁵ Injunctive relief is also available if the discrimination includes “a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities . . . where such removal is readily achievable.”¹⁶

As a general rule, Title III requires “places of public accommodation,” or private businesses whose operations affect commerce, to provide individuals with disabilities equal access to and an equal opportunity to enjoy “goods, services, facilities, privileges,

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11. Pub. L. No. 101-336, 104 Stat. 327, 329 (1990) (codified as amended in 42 U.S.C. § 12101(b)(1) (2012)) (defining the intent of the ADA); *see also The Americans with Disabilities Act of 1990*, EEOC, <https://www.eeoc.gov/eeoc/history/35th/1990s/ada.html> [<https://perma.cc/9XTA-MLRR>] (last visited Feb. 13, 2019).
 12. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat 3553.
 13. *See, e.g.*, *Castillo v. Jo-Ann Stores, LLC*, 286 F. Supp. 3d 870, 872 (N.D. Ohio 2018) (“Castillo alleges that Jo-Ann has failed to make its website accessible to blind or visually impaired individuals and that such failure discriminates against her and other blind or visually impaired individuals in violation of Title III of the ADA.”); *Gil v. Winn Dixie Stores, Inc.*, 242 F. Supp. 3d 1315, 1316 (S.D. Fla. 2017) (“The Plaintiff, Juan Carlos Gil, sued Winn-Dixie Stores, Inc. . . . for injunctive relief under Title III of the Americans with Disabilities Act of 1990.”).
 14. *See, e.g.*, *Camarillo v. Carrols Corp.*, 518 F.3d 153, 156 (2d Cir. 2008).
 15. 42 U.S.C. §§ 12188(a), 12205.
 16. 42 U.S.C. §§ 12188(a)(2), 12182(b)(2)(A)(iv).

advantages, or accommodations.”¹⁷ Businesses covered by the ADA must employ fifteen or more individuals, be open to the public, and fall into at least one of the twelve broad categories enumerated in the ADA: hotels, restaurants, places of entertainment, public gathering locations, sales establishments, service establishments, public transportation locations, places of public display or collection, recreational facilities, educational facilities, social service centers, and exercise facilities.¹⁸ Notably, Congress did not list “websites” in any of the categories in the original Act or in the subsequent 2008 amendment.¹⁹

17. 42 U.S.C. § 12182(a); *see also Business Websites*, NAT’L ASS’N OF THE DEAF, <https://www.nad.org/resources/technology/internet-access-and-broadband/business-websites/> [https://perma.cc/246T-BSQT] (last visited Feb. 14, 2019).

18. 42 U.S.C. §§ 2000a-1, 12111, 12181(7).

19. Congress listed specific examples of the twelve categories:

A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

B) a restaurant, bar, or other establishment serving food or drink;

C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

D) an auditorium, convention center, lecture hall, or other place of public gathering;

E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

G) a terminal, depot, or other station used for specified public transportation;

H) a museum, library, gallery, or other place of public display or collection;

I) a park, zoo, amusement park, or other place of recreation;

J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

Congress defined discrimination in Title III as a “failure to take such steps” so a disabled individual is not treated differently than others or excluded because of the “absence of auxiliary aids and services.”²⁰ The business is exempt from compliance if the business can show that taking these steps would either “fundamentally alter” the nature of the “goods, service, facility, privilege, advantage, or accommodation” or result in an “undue burden.”²¹

The ADA delegates authority for implementing regulations to the DOJ.²² Federal regulations explain that the ADA obligates public accommodations to communicate with customers who have visual or hearing impairments.²³ Regulations also provide “examples” of “auxiliary aids and services” as a “screen reader software” and “other effective methods of making visually delivered materials available to individuals who are blind or have low vision.”²⁴

B. Businesses Victim to “Surf-By” Lawsuits Under Title III of the ADA

Website accessibility lawsuits, dubbed “surf-by” lawsuits, have risen in recent years.²⁵ But why? While the ADA does not allow plaintiffs to recover compensation, their attorneys can.²⁶ That financial

42 U.S.C. § 12181(7).

20. 42 U.S.C. § 12182(b)(2)(A)(iii).

21. *Id.*

22. 42 U.S.C. § 12186(b).

23. 28 C.F.R. § 36.303(c) (2018).

24. 28 C.F.R. § 36.303(b)(2).

25. These lawsuits are similar to traditional “drive-by” ADA lawsuits, where disabled individuals only need to drive by an establishment to spot traditional accessibility issues (for instance, a ramp that is too steep). The individual can then sue the establishment without any warning or opportunity to cure the defect even if the individual never visited the business before. *Surf-By Lawsuits: Is Your Company’s Website ADA Compliant?*, ARNALL GOLDEN GREGORY LLP (Aug. 8, 2017), <https://www.agg.com/Surf-By-Lawsuits-Is-Your-Companys-Website-ADA-Compliant-08-08-2017/> [<https://perma.cc/5M8M-DHDU>].

26. The attorney fee provision in the ADA allows the prevailing party, other than the United States, a “reasonable attorney’s fee, including litigation expenses, and costs.” 42 U.S.C. § 12205 (2012). While this appears fair to both parties, courts usually grant the prevailing plaintiff, but rarely the prevailing defendant, fees. This imbalance gives plaintiffs a strong advantage in any ADA lawsuit and pushes the majority of cases to early settlement. Richard M. Hunt, *Attorneys Fees in ADA and FHA Cases—It’s Time for Fairness*, ACCESSIBILITY DEFENSE (Jan. 22, 2014), <http://accessdefense.com/?p=595> [<https://perma.cc/6KTR-GM8P>]. Legal fees for ADA retaliation claims vary but may range from “\$25,000 to astonishing digits.” *ADA Website Compliance Lawsuits: Recent and High-*

motive encourages plaintiff firms to search for accessibility issues on businesses' website by "surfing" the web. These surf-by lawsuits parrot the classic ADA "drive-by" lawsuits, where disabled individuals drive from business to business in search of minor ADA violations to sue over. Instead of a car, however, plaintiff firms here use their mouse to click from page to page in hopes of finding an inaccessible website.

Not only are these website accessibility claims easy to identify, they are also easy to file. Most of these "surf-by" lawsuits include boilerplate complaints with cut-and-paste language.²⁷ These simple complaints cost the plaintiff firm minimal time and resources.²⁸ Between a circuit court split and a hodgepodge of standards from different district courts across the country, many defendant companies try to settle out of court to keep litigation costs down.²⁹ Ultimately, the costs of these lawsuits are passed on to consumers.³⁰

II. CIRCUIT SPLIT ON WHETHER A BUSINESS'S WEBSITE REQUIRES A PHYSICAL LOCATION TO BE A PLACE OF PUBLIC ACCOMMODATION UNDER THE ADA

Federal circuits disagree on whether a plaintiff alleging a website compliance violation under Title III must demonstrate a nexus between the website and a physical location for the ADA to apply.³¹ Courts in

Profile, LOVATA (Mar. 5, 2018), <https://lovata.com/blog/ada-website-compliance-lawsuits-recent-and-high-profile.html> [<https://perma.cc/5KQK-Q5VA>]. If these claims are brought as a class action lawsuit, attorneys' fees increase sharply due to the additional legal and administrative work required in these large, complex cases. Class action lawsuits drive fees "to go from what is often a few hundred or thousand dollars to millions." Edward F. Harold, *New Trend in Accessibility Lawsuits: The Class Action Complaint*, FISHER PHILLIPS NEWSLETTER (July 2, 2018), <https://www.fisherphillips.com/resources-newsletters-article-new-trend-in-accessibility-lawsuits-the-class> [<https://perma.cc/LY9X-TD27>] (explaining how one class action lawsuit against a national restaurant and retail chain over an inaccessible parking lot resulted in attorneys' fees of \$830,000); *see also* Denise Johnson, *Why Claims Under Americans with Disabilities Act Are Rising*, INSURANCE JOURNAL (Oct. 7, 2016), <https://www.insurancejournal.com/news/national/2016/10/07/428774.htm> [<https://perma.cc/HQ8V-2AEJ>] (explaining how settlement becomes a business decision as the "vast majority" of Title III lawsuits settle for less than what it would cost to file a motion to dismiss).

27. Levy & Krezalek, *supra* note 8.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Castillo v. Jo-Ann Stores, LLC*, 286 F. Supp. 3d 870, 877–78 (N.D. Ohio 2018); *see also Gil v. Winn Dixie Stores, Inc.*, 242 F. Supp. 3d 1315, 1318–20 (S.D. Fla. 2017), *appeal docketed*, No. 17-13467 (11th Cir. Aug. 1, 2017)

the First, Second, and Seventh Circuits have held that the ADA may apply to a website “independent of any connection between the website and a physical place.”³² In contrast, courts in the Third, Sixth, Ninth, and Eleventh Circuits have held that places of public accommodation covered by the ADA must: 1) be physical places; and 2) provide goods and services with a “sufficient nexus” to a physical location.³³ The DOJ has hinted that the Supreme Court may need to answer the question of Title III’s application to non-physical establishments in the future.³⁴

(observing that the First, Second, and Seventh Circuits have held that the ADA covers websites whether a physical locale exists or not, whereas the Third, Sixth, Ninth and Eleventh Circuits have held that a complaint must allege a sufficient connection between a physical location and the website).

32. *Gil*, 242 F. Supp. at 1318–19 (S.D. Fla. 2017) (citing, e.g., *Morgan v. Joint Admin. Bd.*, 268 F.3d 456, 459 (7th Cir. 2001)); *see also* Nat’l Fed’n of the Blind v. Scribd Inc., 97 F. Supp. 3d 565, 575–76 (D. Vt. 2015); Nat’l Ass’n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 202 (D. Mass. 2012); *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 393 (E.D.N.Y. 2017); *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New England*, 37 F.3d 12, 19 (1st Cir. 1994); *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 31 (2d Cir. 2000); *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 563 (7th Cir. 1999); *cf. Rendon v. Valleycrest Prods. Ltd.*, 294 F.3d 1279, 1283 (11th Cir. 2002) (noting that the plain language of Title III of the ADA covers both tangible, physical barriers as well as “intangible barriers” although the court did not address the specific issue of whether websites are public accommodations for purposes of the ADA).
33. *Gil*, 242 F. Supp. 3d at 1319, 1321 (citing *Earll v. eBay, Inc.*, 599 F. App’x 695, 696 (9th Cir. 2015)); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 614 (3d Cir. 1998) (“Accordingly, we do not find the term ‘public accommodation’ . . . to refer to non-physical access.”); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010–11 (6th Cir. 1997) (stating “a public accommodation is a physical place”). The Fourth Circuit recently dismissed a case for lack of standing that raised this issue. *See Griffin v. Dep’t of Labor Fed. Credit Union*, 912 F.3d 649, 657 (4th Cir. 2019) (“Standing doctrine will doubtless pose complicated questions as it is applied to Internet-based harms in the future, but the case before us today is straightforward and narrow . . . Under these specific circumstances there can be no injury in fact.”). The Tenth Circuit has not addressed this issue. LaLonnie Gray, *Are Websites Subject to the ADA?*, 47 COLO. LAW., Oct. 2018, at 42–43. The Court of Appeals for the Fifth Circuit has concluded that Title III applies to “actual, physical places” in the context of vending machines, but has only addressed this issue as it applies to websites at the lower court level. *See Magee v. Coca-Cola Refreshments USA, Inc.*, 833 F.3d 530, 534–35 (5th Cir. 2016), *cert denied*, 138 S. Ct. 55 (2017); *Zaid v. Smart Fin. Credit Union*, No. H-18–1130, 2019 WL 314732 (S.D. Tex. Jan. 24, 2019) (relying on *Magee* to hold that websites are not places of public accommodation).
34. Brief for the United States as Amicus Curiae at 16, *Magee v. Coca-Cola Refreshments USA, Inc.*, 138 S. Ct. 55 (2017) (No. 16–668) (“Several courts of appeals have disagreed about Title III’s application to non-physical places offering goods or services . . . [This case] does not

A. *The Independent Perspective: First, Second, and Seventh Circuits*

Courts in the First, Second, and Seventh Circuits interpret Title III's language broadly and ask whether a business offers any goods or services to the public. If so, then the ADA would apply to the business's website. Courts using this approach have concluded that Title III extends to purely online businesses without any connection to any physical structure.³⁵

Despite web-based services not existing when the ADA was passed in 1990, these courts point to three main reasons for their interpretation: legislative history, practicality, and Title III's plain meaning. First, courts explain that the legislative history indicates the ADA should adapt to technological advances such as websites.³⁶ Courts in these circuits point to Congress's intent that all members of the public enjoy the same goods, services, privileges, and advantages irrespective of disability.³⁷ Courts also highlight congressional reports that seemingly indicate that Congress did not intend to confine the ADA to the specific enumerated examples listed in each category of public accommodation.³⁸

implicate the question whether a Title III plaintiff must allege discrimination with a nexus to a physical location. . . . This case would therefore be an unsuitable vehicle for resolving the division over Title III's application to goods or services without a nexus to a physical place.”).

35. *See, e.g.*, Nat'l Ass'n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 200 (D. Mass. 2012) (“[E]xcluding businesses that sell services through the Internet from the ADA would run afoul of the purposes of the ADA.”) (internal quotations omitted) (quoting Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc., 37 F.3d 12, 20 (1st Cir. 1994)).
36. *Id.* at 200–01 (citing H.R. REP. NO. 101-485, pt. 2, at 108 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 381 (“[T]he Committee intends that the types of accommodation and services provided to individuals with disabilities, under all the titles of this bill, should keep pace with the rapidly changing technology of the times.”)).
37. *Gil*, 242 F. Supp. 3d at 1319; *see also* Nat'l Fed. of the Blind v. Scribd Inc., 97 F. Supp. 3d 565, 573 (D. Vt. 2015) (construing the language of Title III “to effectuate its [remedial] purpose of providing a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities”) (internal quotations and citations omitted).
38. *Netflix*, 869 F. Supp. 2d at 201 (citing S. REP. NO. 101-116, at 59 (1989)) (“[W]ithin each of these categories, the legislation only lists a few examples and then, in most cases, adds the phrase ‘other similar’ entities. The Committee intends that the ‘other similar’ terminology should be construed liberally consistent with the intent of the legislation . . . ”); H.R. REP. NO. 101-485, pt. 3, at 54 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 440, 494 (“A person alleging discrimination does not have to prove that the entity being charged with discrimination is similar to

Second, courts in these circuits have also taken a practical approach when examining the goal of the ADA. Given the “critical role” that the Internet occupies in Americans’ personal and professional lives, “excluding disabled persons from access to covered entities that use [the Internet] as their principal means of reaching the public would defeat the purpose of this important civil rights legislation.”³⁹

Third, these courts have concluded that the plain meaning of the text supports their broad interpretation.⁴⁰ Because the Title III language states that it covers services “of” a public accommodation rather than services “at” or “in” a public accommodation,⁴¹ establishments of public accommodation are not limited to actual physical structures.⁴² These courts have declared that differentiating between customers physically located in a store versus those located elsewhere—but purchasing the same services—would be absurd.⁴³ Because the statute’s plain language does not require physical structures for individuals to enter, courts cannot read that requirement into the statute.⁴⁴

B. The Nexus Perspective: Third, Sixth, Ninth, and Eleventh Circuits

Federal courts in the Third, Sixth, Ninth, and Eleventh Circuits interpret the Title III language more narrowly. These courts have concluded that places of public accommodation under the ADA must be physical structures because the statute’s twelve enumerated categories of public accommodations are all physical locations.⁴⁵ Under

the examples listed in the definition. Rather, the person must show that the entity falls within the overall category.”)).

39. *Scribd, Inc.*, 97 F. Supp. 3d at 575.
40. *See, e.g.*, Nat’l Fed’n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 953 (N.D. Cal. 2006) (“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.”).
41. 42 U.S.C. § 12182(a) (2012).
42. *Carparts Distrib. Ctr. v. Auto. Wholesaler’s Ass’n of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994).
43. *Id.* (“It would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result.”).
44. *Id.*
45. 42 U.S.C. § 12181(7) (2012); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000) (“Title III provides an extensive list of ‘public accommodations’ in § 12181(7) All the items on this list, however, have something in common. They are actual, physical places where goods or services are open to the public, and places

the principle of *noscitur a sociis*, the term “place of public accommodation” must be interpreted within the context of the surrounding words. Because the twelve enumerated categories of public accommodation are all physical locations, “some connection between the good or service complained of and an actual physical place is required.”⁴⁶ As such, these courts require that websites have a sufficient connection to the physical place to fall under the ADA.⁴⁷

Under this approach, a business’s website violates Title III when it prevents an individual with a disability from “full and equal enjoyment”

where the public gets those goods or services [T]his context suggests that some connection between the good or service complained of and an actual physical place is required.”); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010–11 (6th Cir. 1997) (“As is evident by § 12187(7), a public accommodation is a physical place and this Court has previously so held.”); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612 (3d Cir. 1998) (“The plain meaning of Title III is that a public accommodation is a place This is in keeping with the host of examples of public accommodations provided by the ADA, all of which refer to places.”); *Peoples v. Discover Fin. Servs., Inc.*, 387 F. App’x 179, 183 (3d Cir. 2010) (“Our court is among those that have taken the position that the term [public accommodation] is limited to physical accommodations.”).

46. *Weyer*, 198 F.3d at 1114.

47. *See, e.g.*, *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 388 (E.D.N.Y. 2017) (“Discrimination only exists if the discriminatory conduct has a ‘nexus’ to the goods and services of a physical location.”); *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898, 905 (9th Cir. 2019) (finding that the “inaccessibility of Domino’s website and app impede[d] access to the goods and services of its physical pizza franchises—which are places of public accommodation. . . . This nexus between Domino’s website and app and physical restaurants—which Domino’s does not contest—is critical to our analysis” and thus a nexus existed); *Haynes v. Dunkin’ Donuts LLC*, 741 F. App’x 752 (11th Cir. 2018) (declaring that Dunkin’ Donuts’s website could not discriminate because the website facilitated the use of Dunkin’ Donuts’s physical shops); *Robles v. Yum! Brands, Inc.*, No. 2:16-cv-08211-ODW(SS), 2018 WL 566781, at *3 (C.D. Cal. Jan. 24, 2018) (“The Ninth Circuit has held that to successfully assert a Title III claim, ‘some connection between the good or service complained of and an actual physical place is required.’”) (citing *Weyer*, 198 F.3d at 1114); *Ford*, 145 F.3d at 612 (“The plain meaning of Title III is that a public accommodation is a place This is in keeping with the host of examples of public accommodations provided by the ADA, all of which refer to places.”); *Peoples*, 387 F. App’x at 183 (“Our court is among those that have taken the position that the term [public accommodation] is limited to physical accommodations.”); *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1115 (N.D. Cal. 2011) (finding that Facebook was not a place of public accommodation and no nexus to a physical location existed). The Fifth Circuit has held that Title III applies to “actual, physical places where goods or services are open to the public, and places where the public gets those goods or services.” *Magee v. Coca-Cola Refreshments USA, Inc.*, 833 F.3d 530, 534 (5th Cir. 2016).

of the goods and/or services provided at that business's *physical* location.⁴⁸ But if a website does not prevent an individual from accessing goods and/or services available at the business's physical location, then the website cannot violate Title III.⁴⁹ Businesses with an exclusively online presence, therefore, do not fall under the ADA in these circuits and are essentially exempted from website accessibility compliance in these jurisdictions—at least for now.⁵⁰

III. THE ABSENCE OF WEBSITE ACCESSIBILITY STANDARDS

If Title III applies to a business's website, the next question becomes: what website accessibility standards apply? The short answer is: none.⁵¹ Neither the U.S. Supreme Court nor any U.S. Court of Appeal has answered this question.⁵² The DOJ, tasked with implementing ADA

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48. Nat'l Fed. of the Blind v. Target Corp., 452 F. Supp. 2d 946, 954–56 (N.D. Cal. 2006) (finding that plaintiffs sufficiently alleged their Title III claim when plaintiffs “alleged the inaccessibility of Target.com denie[d] the blind the ability to enjoy the services of Target stores”).
49. See, e.g., *Young*, 790 F. Supp. 2d at 1115 (“Facebook operates only in cyberspace, and is thus not a ‘place of physical accommodation.’”); *Gomez v. Bang & Olufsen Am., Inc.*, No. 1:16-cv-23801, 2017 WL 1957182, at *4 (S.D. Cal. Feb. 2, 2017) (“All the ADA requires is that, if a retailer chooses to have a website, the website cannot impede a disabled person’s full use and enjoyment of the brick-and-mortar store Because Plaintiff has not alleged that Defendant’s website impeded his personal use of [defendant’s] retail locations, his ADA claim must be dismissed.”).
50. See Joshua Briones & Nicole V. Ozeran, *INSIGHT: Ninth Circuit Delivers Bad News to Domino’s and ADA Website Accessibility Defendants*, BLOOMBERG L. (Jan. 24, 2019, 4:01 AM), <https://news.bloomberglaw.com/us-law-week/insight-ninth-circuit-delivers-bad-news-to-dominos-and-ada-website-accessibility-defendants> [<https://perma.cc/UJ8L-RN9Q>] (explaining that the Ninth Circuit’s decision in *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898 (9th Cir. 2019) “establishes a clear favorable rule for defendants who maintain an exclusively online presence” because the ADA would not apply).
51. *Robles v. Domino’s Pizza, LLC*, No. 16-06599, 2017 WL 1330216, at *8 (C.D. Cal. Mar. 20, 2017), *rev’d and remanded*, *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898 (9th Cir. 2019). (“Indeed, the Court, after conducting a diligent search, has been unable to locate a single case in which a court has suggested, much less held, that persons and entities subject to Title III that have chosen to offer online access to their goods or services must do so in a manner that satisfies a particular WCAG conformance level.”).
52. *Levy & Krezalek*, *supra* note 8. There is a case currently on appeal in the Eleventh Circuit which may address this question. See *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340 (S.D. Fla. 2017), *appeal docketed* No. 17-13467 (Aug. 1, 2017) (addressing whether the requested modifications to the defendant’s website are reasonable and readily achievable).

regulations,⁵³ has declined as of the date this Comment was sent for publication to promulgate specific regulations on what accessibility means in the digital context.

A. *DOJ's Failure to Address Website Accessibility Standards*

In July of 2010, the DOJ gave hope to the business community when it issued an Advanced Notice of Proposed Rulemaking (ANPR).⁵⁴ The ANPR explained that the DOJ was considering making a revision to the regulations implementing Title III to establish requirements for websites to be accessible to individuals with disabilities.⁵⁵ But the ANPR did not establish any regulations or guidelines; it merely articulated the DOJ's desire to eliminate "remaining uncertainty regarding the applicability of the ADA to Web sites of entities covered by title III" and "make clear to entities covered by the ADA their obligations to make their Web sites accessible."⁵⁶

Private companies waited patiently for the next seven years for the DOJ to take the next step and issue a Notice of Proposed Rulemaking (NPRM). But the NPRM never came. The Trump Administration put the ANPR on its list of "inactive" regulations in the summer of 2017.⁵⁷ A few months later, the DOJ withdrew the ANPR, although it claimed it will "continue to assess whether specific technical standards are

53. 42 U.S.C. § 12186(b) (2012).

54. Nondiscrimination on the Basis of Disability: Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43,460 (proposed July 26, 2010).

55. *Id.*

56. *Id.* at 43464. The ANPR covered the accessibility of websites for state and local government entities, covered under Title II, and public accommodations, under Title III. The DOJ subsequently bifurcated the rulemaking to address Title II and Title III separately. Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions, 82 Fed. Reg. 60,932 (Dec. 26, 2017) (to be codified at 28 C.F.R. pts. 35 and 36).

57. *2017 Inactive Regulations*, OIRA, https://www.reginfo.gov/public/jsp/eAgenda/InactiveRINs_2017_Agenda_Update.pdf [<https://perma.cc/Z2UL-B5M3>] (last visited Jan. 29, 2019); *see also* Minh N. Vu, *DOJ Places Website Rulemaking on the "Inactive" List*, ADA TITLE III NEWS & INSIGHTS (July 21, 2017), <https://www.adatitleiii.com/2017/07/doj-places-website-rulemaking-on-the-inactive-list/> [<https://perma.cc/KQ7K-4T3B>] ("Federal agencies typically provide public notice of the regulations that are under development twice a year in the Unified Regulatory Agenda. The first Agenda the Trump Administration issued, which went online July 20, 2017, contains some very noteworthy changes from the last such Agenda, issued by the Obama Administration The Agenda places the Department of Justice's rulemakings under Titles II and III of the ADA for websites . . . on this 2017 Inactive Actions list, with no further information.").

necessary and appropriate to assist covered entities in complying with the ADA.”⁵⁸

In June 2018, over one hundred bipartisan House members signed a letter to Attorney General Jeff Sessions asking for clarification on website accessibility standards under the ADA.⁵⁹ The letter noted that the “absence of statutory, regulatory, or other controlling language on this issue” has fueled the rise of website accessibility lawsuits.⁶⁰ The letter urged the DOJ to declare that these lawsuits are unfair and violate due process without clear statutory authority.⁶¹ The letter also requested a final ruling establishing website accessibility standards.⁶² Six senators sent a similar letter to the DOJ in September 2018 asking for clarification on website accessibility standards for businesses.⁶³

On September 25, 2018, the DOJ declined to respond to these requests. The DOJ punted the question back to Congress, “[g]iven Congress’ ability to provide greater clarity through the legislative process.”⁶⁴ The DOJ explained that it withdrew the ANPR because “the Department is evaluating whether promulgating specific web accessibility standards through regulations is necessary and appropriate to ensure compliance with the ADA.”⁶⁵

However, the DOJ did provide some guidance for businesses. The DOJ explained that the “absence of a specific regulation” does not justify noncompliance with a statute’s requirements.⁶⁶ In other words,

58. Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions, 82 Fed. Reg. at 60,932.

59. Letter from Members of Congress to Jeff Sessions, Att’y Gen. of the United States, DOJ (June 20, 2018), <https://www.adatitleiii.com/wp-content/uploads/sites/121/2018/06/ADA-Final-003.pdf> [<https://perma.cc/6HHK-MSJN>].

60. *Id.*

61. *Id.*

62. *Id.*

63. Levy & Krezalek, *supra* note 8; Letter from U.S. Senators Charles E. Grassley, M. Michael Rounds, Thom Tillis, Mike Crapo, John Cornyn, and Joni K. Ernst to Jeff Sessions, Att’y Gen. of the United States, DOJ (Sept. 4, 2018), <https://www.judiciary.senate.gov/imo/media/doc/2018-10-04%20Grassley,%20Rounds,%20Tillis,%20Crapo,%20Cornyn,%20Ernst%20to%20Justice%20Dept.%20-%20ADA%20Website%20Accessibility.pdf> [<https://perma.cc/R4YX-FKZP>] [hereinafter Letter from Senators to DOJ] (explaining that “for the ADA to be effective, it must be clear so that law abiding Americans can faithfully follow the law”).

64. Letter from DOJ to Rep. Ted Budd (Sept. 25, 2018), <https://www.adatitleiii.com/wp-content/uploads/sites/121/2018/10/DOJ-letter-to-congress.pdf> [<https://perma.cc/C65Z-DM7P>] [hereinafter Letter from DOJ].

65. *Id.*

66. *Id.*

just because the DOJ has not issued a rule on this matter does not excuse a private business's noncompliance with the "ADA's general requirements of nondiscrimination and effective communication."⁶⁷ But without "the adoption of specific technical requirements for websites through rulemaking," public accommodations have flexibility when determining how to comply with the ADA.⁶⁸ Therefore, a business's decision *not* to adopt a voluntary technical standard for website accessibility, such as the Web Content Accessibility Guidelines (WCAG), does not mean the business violated the ADA; businesses may decide how to make their websites comply with the ADA.⁶⁹ WCAG guidelines often appear in Title III website accessibility litigation and settlement documents. WCAG guidelines are private industry standards developed by the technology and accessibility experts from the Web Accessibility Initiative (WAI).⁷⁰ The WCAG set forth technical requirements of how to make a website accessible to people with a variety of disabilities.⁷¹ Three versions currently exist: 1.0, 2.0, and 2.1.⁷² Within each version, subsets of requirements further refine accessibility standards that represent different levels of accessibility within the overarching guideline. For example, WCAG 2.0 has three different compliance levels: A, AA, and AAA.⁷³ Level A is the most basic while level AAA is the most comprehensive.⁷⁴

B. Website Accessibility Standards Issued by Courts

For several years, the DOJ has required, in consent decrees and settlement agreements, that entities covered by the ADA comply with WCAG 2.0 level AA standards.⁷⁵ But the DOJ has not explained how

67. *Id.*

68. *Id.*

69. Letter from DOJ, *supra* note 64.

70. *See generally Web Accessibility Initiative*, W3C, <https://www.w3.org/WAI/> [<https://perma.cc/7SSS-AAL6>] (last visited Feb. 16, 2019)

71. *Id.*

72. The WAI published its latest update to its Web Content Accessibility Guidelines 2.1 on June 5, 2018. W3C, *Web Content Accessibility Guidelines (WCAG) 2.1, W3C Recommendation*, <https://www.w3.org/TR/WCAG21/> [<https://perma.cc/3224-7PTQ>] (last visited Feb. 16, 2019).

73. W3C, *How to Meet WCAG 2.0 (Quick Reference)*, WEB ACCESSIBILITY INITIATIVE, <https://www.w3.org/WAI/WCAG21/quickref/> [<https://perma.cc/AJV3-NH8K>] (last visited Feb. 16, 2019) [hereinafter W3C, *How to Meet WCAG 2.0*].

74. *Id.*

75. *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 902 n.1 (9th Cir. 2019); *see, e.g.*, Settlement Agreement Between the United States of America and Teachers Test Prep under the ADA, DJ 202-11-346, at ¶ 9 (c) (June 18, 2018), https://www.ada.gov/ttp_sa.html [<https://perma.cc/TYE7->

businesses can show their plan to remain compliant to moot future lawsuits post-remediation.⁷⁶ In private litigation over this matter, courts are still working to develop website accessibility standards.

At least one court has recognized that DOJ guidance would be helpful rather than attempting to create the appropriate level of standard ad hoc.⁷⁷ Despite the lack of federal regulatory guidance, some courts have ordered injunctive relief for defendants to comply with specific website accessibility standards.⁷⁸ Courts appear to favor the

5EH5] (mandating the defendant's captions comply with Web Content Accessibility Guidelines (WCAG) 2.0 AA Guideline under the terms of the settlement); *see, e.g.*, Consent Decree, Nat'l Fed. of the Blind v. HRB Digital LLC and HRB Tax Group, Inc., No. 1:13-cv-10799-GAO, 2014 WL 4999221, at ¶ 12 (a) (D. Mass. Mar. 3, 2014) (agreeing that defendants would "ensure that www.hrblock.com and the Online Tax Preparation Product conform to, at minimum, the Web Content Accessibility Guidelines 2.0 Level A and AA Success Criteria ('WCAG 2.0AA')"; Settlement Agreement Between the United States of America and Ahold U.S.A., Inc. and Peapod, LLC, DJ 202-63-169, at 16 (Nov. 14, 2014), <https://www.justice.gov/file/163956/download> [<https://perma.cc/P78E-7KUS>]; Consent Decree, United States v. Greyhound Lines, Inc., No. 16-67-RGA (D. De. Feb. 10, 2016), https://www.ada.gov/greyhound/greyhound_cd.html [<https://perma.cc/RD97-LZJF>].

76. Letter from DOJ, *supra* note 64.

77. *See Access Now, Inc. v. Blue Apron, LLC*, No. 17-cv-116-JL, 2017 WL 5186354, at *9 (D.N.H. Nov. 8, 2017) ("Uniform regulation in this area would, of course, be preferable to the case-by-case approach required by its absence.") (internal quotes and citations omitted).

78. *See Hindel v. Husted*, No. 2-15-cv-3061, 2017 WL 432839, at *7 (S.D. Ohio Feb. 1, 2017) (ordering the Ohio Secretary of State to make his website conform with the WCAG 2.0 Level A and AA Success Criteria); *Andrews v. Blick Art Materials, LLC*, 286 F. Supp. 3d 365, 370 (E.D.N.Y. 2017) (approving a settlement that the defendant brings its website(s) into "substantial conformance" with WCAG 2.0 AA, "which are hereby determined by the court to be an appropriate standard to judge whether Defendant is in compliance with any accessibility requirements of the ADA"). But other courts have deferred imposing any specific website accessibility standards onto defendants while at the motion to dismiss stage of litigation. *See, e.g.*, *Gorecki v. Hobby Lobby Stores, Inc.*, No. CV 17-1131-JFW(SKx), 2017 WL 2957736, at *6 (C.D. Cal. June 15, 2017) (noting in its denial of defendant Hobby Lobby's motion to dismiss that "Hobby Lobby will have ample opportunity to present evidence of an appropriate remedy" if plaintiff wins, and "[w]hen crafting a remedy, the Court will consider carefully what level of accessibility applies to Hobby Lobby's website") (internal quotes and citations omitted); *Access Now, Inc.*, 2017 WL 5186354, at *11 ("[The Court] will, if necessary, take up the question of the appropriate scope of the plaintiffs' proposed injunction [imposing WCAG 2.0 AA guidelines on Blue Apron's website] and whether it imposes an undue burden on Blue Apron . . . at the appropriate juncture.").

WCAG 2.0 level AA.⁷⁹ In June 2017, a Florida federal district court judge heard the first trial of an inaccessible website claim under Title III of the ADA.⁸⁰ In *Gil v. Winn-Dixie Stores, Inc.*,⁸¹ blind plaintiff Juan Carlos Gil alleged that the grocer's website was inaccessible to visually impaired customers.⁸² As a result, Gil could not download coupons, order prescriptions online, or find store locations.⁸³

At the conclusion of the bench trial, the judge ordered the grocery and pharmacy chain store to conform to the WCAG 2.0 Guidelines.⁸⁴ The injunction did not specify, however, which level of WCAG Guideline to implement (level A, AA, or AAA).⁸⁵ The DOJ has not determined which level of compliance may be required under Title III, leaving courts to decide which, if any, level to apply.⁸⁶ Likewise, no court has indicated which WCAG level would constitute sufficient accessibility under Title III as of the time this Comment was sent for publication.⁸⁷

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79. See, e.g., Levy & Krezalek, *supra* note 8 (“Neither the U.S. Supreme Court nor any U.S. Court of Appeal has addressed what constitutes ADA minimum ‘accessibility,’ nor has any court endorsed any standard other than acknowledging that WCAG 2.0 AA has emerged as a de facto standard.”); Gomez v. Gen. Nutrition Corp., 323 F. Supp. 3d 1368, 1379 n.3 (S.D. Fla. 2018) (“While declining to rule on this explicitly at this point, the Court finds *highly* persuasive the number of cases adopting WCAG 2.0 Success Level AA as the appropriate standard to measure accessibility.”).
80. Minh N. Vu, *First Federal Court Rules that Having an Inaccessible Website Violates Title III of the ADA*, ADA TITLE III NEWS & INSIGHTS (June 13, 2017), <https://www.adatitleiii.com/2017/06/first-federal-court-rules-that-having-an-inaccessible-website-violates-title-iii-of-the-ada/> [https://perma.cc/2AYW-NLNK].
81. 257 F. Supp. 3d 1340 (S.D. Fla. 2017).
82. *Id.* at 1342.
83. *Id.* at 1344–45.
84. *Id.* at 1350 (“Remediation measures in conformity with the WCAG 2.0 Guidelines will provide Gil and other visually impaired consumers the ability to access Winn-Dixie’s website and permit full and equal enjoyment of the services, facilities, privileges, advantages, and accommodations provided through Winn-Dixie’s website.”); see *supra* notes 70–74 and accompanying text.
85. *Id.* at 1350–51.
86. As the *Letter from DOJ* states, these guidelines are non-mandatory for private businesses. See *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations*, 75 Fed. Reg. 43,460, 43,465 (proposed July 26, 2010) (searching for feedback on what WCAG level the DOJ should adopt).
87. *Robles v. Domino’s Pizza, LLC*, No. 16-06599, 2017 WL 1330216, at *8 (C.D. Cal. Mar. 30, 2017) *rev’d and remanded*, *Robles v. Domino’s Pizza*,

A few months after *Winn-Dixie*, the Eastern District of New York heard a similar lawsuit by a blind person, Victor Andrews, who alleged that the website of Blick Art Materials was incompatible with his screen reader technology. As a result, Andrews could not access the company's website, which sells art supplies.⁸⁸ Andrews moved to withdraw the class action allegations initially raised, and both parties sought approval of a settlement agreement.⁸⁹

The court approved the settlement terms, which included making the defendant's website conform with the WCAG 2.0 Level AA guidelines.⁹⁰ The settlement also stated that the WCAG 2.0 Level AA guidelines were "determined by the court to be an appropriate standard to judge whether Defendant is in compliance with any accessibility requirements of the ADA. . . ."⁹¹ The settlement terms did leave the door open to modify these accessibility standards if the DOJ promulgated a final ADA Title III regulation on website accessibility standards in the future.⁹²

IV. BUSINESSES FACE UNFAIR BURDEN TO COMPLY WITH UNKNOWN WEBSITE ACCESSIBILITY STANDARDS

Defendants have been largely unsuccessful in getting surf-by lawsuits dismissed at the pleadings stage when the court finds that the website qualifies as a place of public accommodation.⁹³ Thus far, defendants' due process and primary jurisdiction arguments have largely failed.⁹⁴ For this reason, businesses defending themselves in these

LLC, 913 F.3d 898 (9th Cir. 2019) ("[T]he Court . . . has been unable to locate a single case in which a court has suggested, much less held, . . . that persons and entities subject to Title III that have chosen to offer online access to their goods and services must . . . satisf[y] a particular WCAG conformance level.").

88. *Andrews v. Blick Art Materials, LLC*, 286 F. Supp. 3d 365, 368–69 (E.D.N.Y. 2017).

89. *Id.* at 369.

90. *Id.* at 370.

91. *Id.*

92. *Id.*

93. *See, e.g., supra* notes 31–34.

94. *See, e.g., Robles v. Domino's Pizza, LLC*, 913 F.3d 898 (9th Cir. 2019) (reversing the district court's dismissal on due process grounds and remanding back to the district court); *Reed v. 1-800-Flowers.com, Inc.*, 327 F. Supp. 3d 539 (E.D.N.Y. 2018) (denying defendant's motion to dismiss by holding that no violation of due process occurred and declining to apply primary jurisdiction abstention); *Castillo v. Jo-Ann Stores, LLC*, 286 F. Supp. 3d 870 (N.D. Ohio 2018) (denying defendant's motion to dismiss because injunctive relief sought by customer did not violate the defendant's due process rights). The due process argument, however, may

lawsuits should focus their defense on the “undue burden” exception to ADA compliance.⁹⁵ Under the ADA, undue burden means “significant difficulty or expense.”⁹⁶

Because businesses do not have a clear, achievable metric against which to measure accessibility success, it is impossible for businesses to know if and when their websites have achieved sufficient accessibility under the ADA. This creates significant difficulty for businesses.

rise again. On March 4, 2019, Domino’s Pizza requested a sixty-day extension of time to file its petition for certiorari. Justice Kagan granted the request. As of the time this Comment was sent for publication, the petition was due June 14, 2019. Application for an Extension of Time within which to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898 (9th Cir. 2019); *see also* Minh N. Vu, ADA TITLE III NEWS & INSIGHTS, *Domino’s to Ask Supreme Court to Consider Whether ADA Website/Mobile App Accessibility Lawsuits Violate Due Process*, (Mar. 21, 2019) <https://www.adatitleiii.com/2019/03/dominos-to-ask-supreme-court-to-consider-whether-ada-website-mobile-app-accessibility-lawsuits-violate-due-process/> [<https://perma.cc/2NYN-DWAH>] (predicting Domino’s Pizza will petition the Supreme Court for certiorari).

95. *See* 28 C.F.R. § 36.303(a) (2016). Businesses largely have not raised this defense. *See, e.g.*, *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340, 1350 (S.D. Fla. 2017) (“Winn-Dixie has presented no evidence to establish that it would be unduly burdensome to make its website accessible to visually impaired individuals. To the contrary, its corporate representative unequivocally testified that modifying the website to make it accessible to the visual impaired was feasible.”). This is possibly because so few of these cases have gone to trial. *See supra* note 29 and accompanying text.

96. 28 C.F.R. § 36.104 (2012).

In determining whether an action would result in an undue burden, factors to be considered include[—]
(1) The nature and cost of the action needed under this part;
(2) The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site;
(3) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;
(4) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and
(5) If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

Id.

Additionally, plaintiffs can always “move the target”— while one plaintiff could ask for WCAG 2.0 Level AA compliance, the next could seek Level AAA, or WCAG 2.1 compliance. Likewise, a private interest group could issue another more exacting technical standard for new technology that has yet to be even fathomed by the court system. While businesses are left chasing the moving target of accessibility, they run the risk of financial ruin. This creates an undue burden.

A. *Unknown Financial Costs to Implement Accessibility Features*

Businesses regulated by the ADA face a significant financial cost to code their websites for screen reader technology both upfront and on an ongoing basis. Unfortunately, reliable data on the actual cost of implementing and maintaining website accessibility is scarce. A regulatory impact analysis from 2011 found that, for example, making an air travel website WCAG 2.0 compliant ranged from “\$31,200 for very small sites to \$225,000 for larger sites.”⁹⁷

The recent *Gil v. Winn-Dixie Stores, Inc.* case also provides some evidence about the potential cost of updating a company’s website.⁹⁸ In *Winn-Dixie*, a website accessibility expert testified that an initial audit of the grocery chain’s website would take three weeks and cost between \$9,000 and \$11,000.⁹⁹ Fixing the identified problems would then cost between \$16,000 and \$20,000.¹⁰⁰ Then a second audit would follow at the tune of an additional \$4,000 to \$6,000.¹⁰¹ All in all, the “ballpark estimate” to repair the accessibility issues totaled around \$37,000, although this was just a best guess until the audit actually began and issues could be identified;¹⁰² Winn-Dixie set aside \$250,000 for the repair.¹⁰³

97. Thomas B. Alleman, *Bank Websites Attract ADA Claims: A Survey of the Issues*, BLOOMBERG (Nov. 30, 2016), <https://www.bna.com/bank-websites-attract-n73014447888/> [<https://perma.cc/F2YM-6QXM>].

98. 257 F. Supp. 3d at 1346–47.

99. *Id.*

100. *Id.* at 1347 (“After identifying the problems through the audit, it would take 80 to 100 hours at a billable rate of \$200 per hour or \$16,000 to \$20,000.”).

101. *Id.*

102. *Id.*

103. *Id.* at 1345–47. The Court was unsympathetic to the financial burden implementing the accessibility changes placed on the defendant, stating that “whether the cost to modify the website is \$250,000 or \$37,000 is of no moment.” *Id.* at 1347. The court justified the potential quarter-million price tag because it “pale[d] in comparison to the \$2 million Winn-Dixie spent in 2015 to open the website and the \$7 million it spent in 2016 to remake the website for the [rewards] program.” *Id.*

What courts may not realize is that the costs do not stop just because the website is coded initially for accessibility. Every time a new photo, link, or page is added, additional coding is required.¹⁰⁴ Many business owners retain “digital accessibility consultants” to routinely audit website content and code.¹⁰⁵ Annual maintenance costs range from \$4,800 to \$23,400 per site, but these figures may not capture all the incremental costs of compliance.¹⁰⁶ Unlike making a structural fix, like a ramp, to allow accessibility, digital website compliance is an ongoing concern for businesses.

Without knowing which website accessibility standard is required for a website to be deemed “accessible” under the ADA, companies cannot know how much money to budget to absorb these compliance costs.¹⁰⁷ Under the WCAG, for example, there are three separate levels of accessibility standards for the 2.0 requirement: A, AA, AAA.¹⁰⁸ More advanced levels, such as the AAA standard, include more accessibility features than the lower levels.¹⁰⁹ These more thorough accessibility

104. Levy & Krezalek, *supra* note 8 (“Ensuring screen reader availability is fraught with technical challenges and high costs, leaving many businesses unable to launch new pages due to fear of being sued for noncompliance.”).

105. *Id.*

106. Alleman, *supra* note 97.

107. There is also a question over whether alternative accessibility methods, such as a telephone number that disabled individuals could call rather than use the business’s website, could satisfy the ADA’s accessibility requirements for websites. The DOJ has explained that “covered entities with inaccessible Web sites may comply with the ADA’s requirement for access by providing an accessible alternative, such as a staffed telephone line, for individuals to access the information, goods, and services of their Web site.” Nondiscrimination on the Basis of Disability: Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43,466 (proposed July 26, 2010). But courts seem dubious of this alternative without robust evidence of the telephone number’s effectiveness. *See, e.g.,* Gorecki v. Dave & Buster’s, Inc., CV 17-1138 PSG (AGRx), 2017 WL 6371367, at *1, 6 (C.D. Cal. Oct. 10, 2017) (denying summary judgment in favor of Dave & Buster’s “[b]ased on the scant evidence presented” on whether its website “guarantees ‘full and equal enjoyment’” of the company’s services despite the website having an “accessibility banner” that directs screen readers to a telephone number); Robles v. Domino’s Pizza, LLC, 913 F.3d 898, 903 n.4 (9th Cir. 2019) (“[The Court] believe[s] that the mere presence of the phone number, without discovery on its effectiveness, is insufficient to grant summary judgment in favor of Domino’s.”).

108. W3C, *How to Meet WCAG 2.0*, *supra* note 73.

109. *See, e.g.,* Ben Caldwell et al., *Web Content Accessibility Guidelines (WCAG) 2.0*, W3C (Dec. 11, 2008), <https://www.w3.org/TR/WCAG20/> [<https://perma.cc/LQ6M-2QAF>] (outlining the different accessibility standards for levels A, AA, and AAA).

standards likely cost more money to implement and maintain compared to lower standards.

As technology develops, the definition of compliance will likely evolve as well. The WAI updated the WCAG 2.0 standard in June 2018 and published the WCAG 2.1 standard, which extends website accessibility to mobile devices.¹¹⁰ As businesses attempt to keep pace with ever-evolving technology, the burden of maintaining compliance only continues to grow.

This financial burden falls more heavily on smaller businesses, which are less likely to have the financial reserves necessary for a website overhaul and continuing maintenance issues. And while larger companies may have in-house technology departments who can assist with the day-to-day managing of website accessibility requirements, small businesses often lack such internal resources. This would leave small businesses to contract with outside digital accessibility consultants on a permanent basis, incurring long-term costs.

Opponents may argue that these costs are ultimately passed to the consumer, so the business does not really shoulder the financial burden of website compliance. Or, they may argue that website compliance is merely the cost of doing business in the digital era or that these costs are largely unknown, so they cannot present an undue burden to businesses. But businesses need more certainty of what ADA compliance will cost so they may budget accordingly. Without knowing the required standard, however, getting a true estimate of cost is very difficult. As website accessibility standards remain unclear and unarticulated, businesses cannot plan for the true cost of what compliance is now or in the future. This leaves private companies on dubious financial ground.

B. Businesses Open to Liability Even if Currently Trying to Remediate

Businesses may try to pre-emptively conform to some version of the WCAG guidelines to prevent being sued over their websites' accessibility under the ADA. Even if a company is trying to comply with the fuzzy website accessibility technical standards, however, that good faith effort may not be enough to preclude a lawsuit, even if one has already been filed against the company for the same issue.

In *Haynes v. Hooters of America*,¹¹¹ the Eleventh Circuit reversed the United States District Court for the Southern District of Florida's

110. Although the W3C notes the "publication of WCAG 2.1 does not deprecate or supersede WCAG 2.0," it also "advises the use of WCAG 2.1 to maximize future applicability of accessibility efforts." See *Web Content Accessibility Guidelines (WCAG) 2.1*, W3C (June 5, 2018), <https://www.w3.org/TR/WCAG21/> [<https://perma.cc/Z49Q-8WN5>].

111. 893 F.3d 781 (11th Cir. 2018).

decision to dismiss a lawsuit against Hooters for mootness.¹¹² The blind plaintiff filed suit against Hooters in April 2017, alleging that Hooters' website was not accessible with his screen reader software.¹¹³ But in August 2016, a different plaintiff had already filed a separate, yet almost identical, lawsuit against Hooters.¹¹⁴ Less than three weeks later, the parties reached a settlement agreement and closed the case.¹¹⁵ As part of the settlement, Hooters agreed to bring its website accessibility in line with the WCAG 2.0 standards by September 29, 2018.¹¹⁶

Despite Hooters having already activated a remediation plan for its website, the Eleventh Circuit Court of Appeals found that the *Haynes* case was not moot for three main reasons.¹¹⁷ First, Hooters had not finished making its website accessible with screen reader technology. Second, a "live controversy" still existed over whether Haynes would receive an injunction to force Hooters to make its website ADA-compliant. Third, because Haynes was not a party to the earlier settlement agreement, Haynes would have no remedy against Hooters if Hooters failed to remediate its website.¹¹⁸ Plaintiffs will likely look to this case to justify why a business should remain open to liability even if that company is in the process of remediation.

Ongoing potential liability places an undue burden on companies due to the significant expense it creates. The *Haynes* decision leaves businesses exposed to continual liability while in the process of website remediation. This means that companies can be forced to hire legal counsel to defend themselves against separate, yet in all substantive matters identical, lawsuits while it is bringing its website into compliance.

This repeat liability can spell enormous expense for companies and may be ruinous for both large and small businesses if hit with multiple lawsuits during remediation. Companies would be struck with multiple fees at the same time. First, companies would have to pay their digital accessibility consultants for the implementation of website accessibility technology (and maintenance costs going forward). Second, these organizations would incur significant legal costs to defend website accessibility lawsuits filed against them before finalizing accessibility.

112. *Id.* at 785.

113. *Id.* at 782–83.

114. *Id.* at 783; *see also* Gomez v. Hooters of Am., LLC, No. 1:16-CV-23608-CMA (S.D. Fla. Aug. 22, 2016).

115. *Haynes*, 893 F.3d at 783.

116. *Id.*

117. *Id.* at 784.

118. *Id.*

And to add insult to injury, the courts have discretion to order defendants to pay the prevailing plaintiffs' attorneys' fees.¹¹⁹

CONCLUSION

Without an issued regulation from the DOJ on website accessibility standards, businesses are left to struggle on their own with how to make their websites ADA compliant. If the DOJ would promulgate one clear website accessibility technical standard, then businesses could divert their resources towards true compliance. It would allow businesses to invest meaningfully in serving their disabled customers, rather than paying money to plaintiff firms that do not have the interests of this disenfranchised community at heart.

If businesses knew what standard they needed to implement, then they could budget for that cost. Businesses also know that they stand to gain financially if they make their websites more accessible to the disabled community. They miss out on a potential customer segment—one with about \$645 billion in disposable income annually—when their websites cannot be utilized by this population.¹²⁰ Until a standard is promulgated, however, companies—especially small businesses and traditional “mom and pop” establishments—are at risk of making an investment that may later turn out to be insufficient and a waste of time and money.

Private companies cannot be expected to make sense of the myriad of legal frameworks and technical jargon defining Title III's website accessibility as it currently stands. Voluntary technical guidelines are highly complex with dozens of requirements.¹²¹ Courts require different accessibility standards, or none at all.¹²² And the DOJ has all but washed its hands of this issue.¹²³

The DOJ recognizes how difficult the website accessibility standard question is.¹²⁴ To date, however, the DOJ has failed to put the ADA's

119. Under the ADA, prevailing plaintiffs may recover reasonable attorney fees. *Supra* note 15 and accompanying text; *see also* 42 U.S.C. §§ 12188(a), 12205, 2000(a)-3(b) (2012).

120. This figure is an approximation based upon the data that approximately 20 percent of the U.S. population has some form of disability. *Web Accessibility Lawsuits: What's the Current Landscape?*, ESSENTIAL ACCESSIBILITY (July 27, 2018), <https://www.essentialaccessibility.com/blog/web-accessibility-lawsuits/> [<https://perma.cc/B8YK-RFRD>].

121. *Supra* notes 72–74.

122. *Supra* notes 86–87.

123. *Supra* notes 54–63.

124. In its ANPR, the DOJ stated that it sought “input from experts in the field of computer science, programming, networking, assistive technology, and other related fields” to address the “complexity” that this legal area

website accessibility puzzle together into a package that businesses can follow. This lack of action leaves the website accessibility puzzle broken and incomplete at the feet of private businesses. Why should America's businesses be forced to put together this puzzle without a clear picture of what it should look like in the end?

Lauren Stuy[†]

presents. Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43,464 (proposed July 26, 2010).

[†] J.D. Candidate, 2019, Case Western Reserve University School of Law. I would like to thank John B. Lewis, Partner at BakerHostetler, LLP, for his assistance in choosing to write about this topic and his guidance in the process of writing this Comment. I would also like to thank the Editors of Volume 69 for all of their hard work in preparing this piece for publication.