

PLACES OF PUBLIC ACCOMMODATION: AMERICANS WITH DISABILITIES AND THE BATTLE FOR INTERNET ACCESSIBILITY

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“Our entire society has been inadvertently structured in a way that unnecessarily denies innumerable opportunities, great and small, to people with disabilities, in ways that are never even noticed by most Americans. Simple daily tasks, like visiting the grocery store or the bank, going to a restaurant or a movie, using the telephone to report an emergency, taking the bus to the doctor, or even getting in and out of one’s own home, can become monumental tasks or impossible barriers to overcome not due to the actual physical and mental conditions of disabled Americans, but due to prejudice, fears, and unnecessary obstacles which have been placed in their paths.”¹

“The internet is transforming our economy and culture, and the question whether it is covered by the ADA—one of the landmark civil rights laws in this country—is of substantial political importance.”²

ABSTRACT

Despite the enactment of the Civil Rights Act of 1964, today many Americans still lack equal rights. This includes the disabled community, which totals 56.7 million people. Although the passage of the Americans with Disabilities Act of 1990 was a step in the right direction for disabled Americans, many people with disabilities are left

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1. *Americans with Disabilities Act of 1988: J. Hearing on S. 100-926 Before the Subcomm. on the Handicapped of the S. Comm. on Labor & Human Res. and the Subcomm. on Select Educ. of the H.R. Comm. on Educ. & Labor*, 100th Cong. 14 (1988) [hereinafter *Hearing 100-926*].

2. *Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324, 1335 (11th Cir. 2004).

in the dark when it comes to internet accessibility. Title III of the ADA specifically provides for equal access and enjoyment of goods and services offered to the public. This Note argues that websites should fall within the ADA's definition of "place of public accommodation" and thus be subject to Title III ADA regulations. Currently the circuit courts are split in their understandings of whether a website falls within Title III's regulations, and Congress has remained silent on the issue. This Note will provide background to the passage of the ADA, discuss the ongoing circuit split, explain the role of the U.S. Department of Justice in effecting this necessary change, propose and analyze an appropriate solution, and elaborate on what implementation of successful web accessibility standards would look like.

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INTRODUCTION

"The question presented is whether a large retail store chain with an online presence must ensure that its website is accessible to the visually impaired. It reveals problems that have dogged

American society: discrimination, access to public accommodations, and how technology has the power to both ameliorate and exacerbate barriers to integration.”³

Jake Mullen⁴ was born in 1994 with apraxia—a rare neurological condition affecting an individual’s speech and motor skills.⁵ In addition to Jake’s unique personality and positive outlook on life, this diagnosis results in Jake being labeled as “disabled.” Although this term is relative in its scope, Jake is faced with daily hardships not applicable to a non-disabled person. In discussing with Jake what it means to be disabled, he stated, “I’m just a normal person, but it’s just hard for me to do certain things.” These “certain things” include difficulties reading, handling personal finances, using independent transportation, meeting new people, and finding employment opportunities. Although these categories seem expansive, they have one common nucleus: they can all be accomplished through use of the internet. Imagine the times you engage in the activities Jake listed above. What do you do? Maybe you access your online banking, call an Uber or Lyft, hop onto Facebook or Tinder, or run a Google search to find employers or job listings. Now, imagine you were born with apraxia as Jake was. Imagine trying to navigate and use the internet without the ability to adequately see, hear, or read. Accessibility is a common struggle for Americans with disabilities—Americans like Jake. Despite these daily challenges, Jake has defied society’s expecta-

3. *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 385 (E.D.N.Y. 2017).

4. Jake Mullen is the brother of the author. Born in 1994, Jake is twenty-four years old and was born with apraxia, a rare chromosomal disorder affecting Jake’s speech and fine motor skills. The facts presented in Part I were gained through conversations with Jake and the author’s observations growing up with Jake. The author is personally familiar with Jake’s experiences as he witnessed Jake face adversity and barriers to access in all aspects of life. This Note’s purpose is to focus on the barriers to access people with disabilities face when attempting to use the internet. As such, the facts relayed in the Introduction are taken directly from Jake, an American citizen with a disability, and his personal experiences facing barriers to access using the internet.

5. *Childhood Apraxia of Speech*, AM. SPEECH-LANGUAGE-HEARING ASS’N, <http://www.asha.org/public/speech/disorders/Childhood-Apraxia-of-Speech/> (last visited Apr. 8, 2019).

tions. Jake is a high school graduate, an avid horse rider, animal lover, valued employee, and beloved brother. However, many other Americans born with disabilities struggle to find strong support groups, employment, and a sense of social value.

Jake is just one of the 56.7 million people in the United States registered as having a disability.⁶ The number of citizens with disabilities is so great that were the disabled community to be recognized as a minority group it would “represent the largest minority group in this nation.”⁷ The 2010 U.S. Census breaks disabilities into three categories: communicative, mental, and physical.⁸ Communicative disabilities include difficulties seeing, hearing, and having speech understood.⁹ Mental disabilities include learning disabilities, developmental disabilities, Alzheimer’s disease, senility, dementia, and “other mental or emotional condition[s] that seriously interfere[] with everyday activities.”¹⁰ Physical disabilities include use of a “wheelchair, cane, crutches, or walker”; difficulty walking long distances, lifting or grasping items, or moving from bed; and other types of arthritis, back or bone problems, heart trouble, paralysis, or other conditions contributing to activity limitation.¹¹

Due to the staggering number of American citizens with disabilities, the first version of the Americans with Disabilities Act (ADA) was introduced in 1988.¹² In line with the Civil Rights Act of 1964, the Act aimed to provide equality for all American citizens regardless of their individual characteristics.¹³ During the congressional hearings, numerous witnesses

6. *Nearly 1 in 5 People Have a Disability in the U.S.*, *Census Bureau Reports*, U.S. CENSUS BUREAU (July 25, 2012), <https://www.census.gov/newsroom/releases/archives/miscellaneous/cb12-134.html>.

7. *Hearing 100-926*, *supra* note 1, at 22.

8. MATTHEW W. BRAULT, U.S. CENSUS BUREAU, *AMERICANS WITH DISABILITIES: 2010: HOUSEHOLD ECONOMIC STUDIES 2* (2012), http://www.includevt.org/wp-content/uploads/2016/07/2010_Census_Disability_Data.pdf.

9. *Id.*

10. *Id.*

11. *Id.*

12. Arlene Mayerson, *The History of the Americans with Disabilities Act: A Movement Perspective*, DREDF (1992), <https://dredf.org/about-us/publications/the-history-of-the-ada/>.

13. *See id.*

with a wide range of disabilities testified to the barriers to equality and instances of discrimination that citizens with disabilities face.¹⁴ Spearheaded by Senator Tom Harkin and Representative Tony Coelho, the Senate voted 76 to 8 to move the bill to the House of Representatives in 1989.¹⁵ The ADA¹⁶ protects individuals with mental or physical disabilities against discrimination and mandates reasonable accommodation standards that businesses and public places must meet.¹⁷ The Act contains five titles covering employment, public entities, public accommodations, telecommunications, and miscellaneous provisions.¹⁸ As Senator Weicker correctly predicted in his statement to Congress in 1988, “[i]f there is silence now, there will be silence later. If there is indifference to discrimination now, there will be indifference later.”¹⁹

President George H.W. Bush signed the ADA into law in 1990, and it was later amended in 2008 by President George W. Bush.²⁰ Yet, as society continues to evolve, the battle for equal rights remains at the forefront of current events. Unfortunately, the disabled community has historically been the last group accommodated when it comes to the continued struggle for equality.²¹ Hardships that Americans with disabilities face include barriers to effective education, obtaining employment, finding means of transportation, banking, and generally all aspects of life that the non-disabled community often takes for

14. *Id.* See generally *Hearing 100-926*, *supra* note 1 (transcripts from senators’ and representatives’ experiences with disabilities outlining why the ADA is so important to the American public).

15. Mayerson, *supra* note 12.

16. See 42 U.S.C. § 12182 (2017).

17. *What Is the Americans with Disabilities Act (ADA)?*, ADA NAT’L NETWORK, <https://adata.org/learn-about-ada> (last updated Apr. 2019).

18. *Id.*

19. *Hearing 100-926*, *supra* note 1, at 2 (Senator Weicker’s statements reiterating the importance of passing the ADA).

20. Andrew Glass, *George H.W. Bush Signed Americans with Disabilities Act, July 26, 1990*, POLITICO (July 26, 2010, 4:32 AM), <https://www.politico.com/story/2010/07/george-hw-bush-signed-americans-with-disabilities-act-july-26-1990-040205>.

21. Mayerson, *supra* note 12 (“Before the ADA, no federal law prohibited private sector discrimination against people with disabilities . . .”).

granted.²² The gap in accommodation may be due to the unfortunate reality that the disabled cannot always advocate for themselves, and the delay in accommodation continues to be an issue as societal norms evolve.

Many provisions of the ADA have already become outdated as society has become more technologically advanced. Specifically, Title III of the ADA, which covers accessibility regulations for places of “public accommodation,”²³ has become a point of contention,²⁴ as use of the internet is an integral part of everyday life.²⁵ Imagine the daily challenges that would be presented if you, the reader, faced significant barriers when using the internet. Evolving social norms, such as the everyday use of technology, are not necessarily a bad thing. Yet, as far as ADA regulations are concerned, the shift in technology has left those with disabilities behind, while the steps necessary to accommodate those with disabilities have never been easier.²⁶

Due to the recent business trend of companies shifting from traditional brick-and-mortar structures to a click-and-mortar focus,²⁷ people with disabilities are often left in the dark, unable

22. See ADA NAT'L NETWORK, THE AMERICANS WITH DISABILITIES ACT: QUESTIONS AND ANSWERS, at i (2013), https://adata.org/sites/adata.org/files/files/ADANN_FAQbooklet_2013vupdated-5-15.pdf. As of the 2010 Census of Household Economic Studies, only 41.1% of adults with a disability aged twenty-one to sixty-four have employment, compared to 79.1% of adults without disabilities. BRAULT, *supra* note 8, at 5. Similarly, adults with disabilities report median monthly earnings of \$1961, compared to adults without disabilities who earned a median of \$2724 a month. *Id.* at 12. Over 12 million Americans with disabilities struggle to complete “instrumental activities of daily living.” *Id.* at 4. These activities include “going outside of the home, managing money and bills, preparing meals, doing light housework, taking prescription medicine, or using the telephone.” *Id.* at 3.

23. 42 U.S.C. § 12181(7) (2017).

24. See Section I.B (examining the existing circuit split regarding whether private websites must adhere to Title III of the ADA).

25. To illustrate, there were 290 million internet users in the United States as of 2016. *Internet Usage in the United States—Statistics & Facts*, STATISTA, <https://www.statista.com/topics/2237/internet-usage-in-the-united-states/> (last visited Apr. 23, 2019).

26. See NAT'L COUNCIL ON DISABILITY, WHEN THE AMERICANS WITH DISABILITIES ACT GOES ONLINE: APPLICATION OF THE ADA TO THE INTERNET AND THE WORLDWIDE WEB 15 (2003), https://ncd.gov/rawmedia_repository/960de0db_0548_4c4c_b000_6f1eabb0f84a.pdf.

27. Alexandra Twin, *Click and Mortar*, INVESTOPEDIA, https://www.investopedia.com/terms/c/click_and_mortar.asp (last updated Apr. 10, 2019).

to access products and services offered for sale online.²⁸ As of the 2010 Census, of the 56.7 million people in the United States registered with a disability, 8.1 million people have difficulty seeing and 7.6 million people have difficulty hearing.²⁹ These statistics illustrate the current “‘digital divide’ between the disabled and nondisabled.”³⁰ Currently, the circuit courts are split in determining whether “‘places of public accommodation’ include online resources, specifically websites.”³¹ While most cases have focused on blind and deaf persons, individuals with other disabilities, such as apraxia or cerebral palsy, may also be unable to fully utilize the internet.³² For this reason, as well as many more discussed below, it is essential that the Department of Justice (DOJ) alter its definition of “‘places of public accommodation’ in 42 U.S.C. § 12181(7) to include websites.”³³ This simple, yet powerful legislative change will provide the disabled community with equal access to the internet.

This Note advocates for adoption of the First and Seventh Circuits’ approach, namely, that websites fit within the definition of “‘places of public accommodation’ and are thus subject to ADA regulation. Not only does this approach further the original purpose of the ADA—providing Americans with disabilities equal access to goods and services—but it also promotes equal civil rights for a significant portion of the American population. As a leader in promoting human rights, Congress should remedy this civil rights violation by amending the ADA’s definition of “‘places of public accommodation’ to include websites.

28. See Lewis Wiener & Alexander Fuchs, *Trending: ADA Website Accessibility Lawsuits*, LAW360 (Dec. 15, 2016, 12:46 PM), <https://www.law360.com/articles/871491/trending-ada-website-accessibility-lawsuits>.

29. *Nearly 1 in 5 People Have a Disability in the U.S.*, *supra* note 6.

30. Shani Else, Note, *Courts Must Welcome the Reality of the Modern World: Cyberspace Is a Place Under Title III of the Americans with Disabilities Act*, 65 WASH. & LEE L. REV. 1121, 1127 (2008).

31. Ryan C. Brunner, Note, *Websites as Facilities Under ADA Title III*, 15 DUKE L. & TECH. REV. 171, 174–75 (2017) (describing the federal circuit split).

32. Else, *supra* note 30, at 1128.

33. 42 U.S.C. § 12181(7) (2017).

This Note will describe the process of implementing the necessary adjustment to the DOJ's definition of "places of public accommodation." Part I introduces the importance of the issue of internet accessibility for the disabled community, elaborates upon the original purpose of the Act, and analyzes the scope of Title III of the ADA and the ongoing circuit split. Part II establishes why websites should be included within the definition of a "place of public accommodation," and notes technological advances which could be utilized to resolve this issue. Finally, Part III again summarizes the issue and explains why it is essential that action is taken to resolve the current circuit split. It is critical that all websites fall within the definition of "places of public accommodation" as defined by the First and Seventh Circuits in order to provide Americans with disabilities equal access to the internet, and ensure that the fundamental civil rights of all American citizens are honored and protected.³⁴

I. DEFINING PLACES OF PUBLIC ACCOMMODATION UNDER THE ADA

A. *Enacting the ADA*

As stated above, the ADA was enacted in 1990 and was the country's first comprehensive legislative act addressing the needs of the disabled community.³⁵ While the Civil Rights Act of 1964 was broad in scope and made significant progress toward eliminating segregation and discrimination, it did not protect individuals with disabilities.³⁶ The first legislation pro-

34. Although beyond the scope of this Note, I would be remiss not to mention the systematic discrimination used by some businesses which use the internet to exclude people with disabilities from employment opportunities or increased prices for services. See Bradley Allan Areheart & Michael Ashley Stein, *Integrating the Internet*, 83 GEO. WASH. L. REV. 449, 462 (2015); Jonathan Lazar et al., *Investigating the Accessibility and Usability of Job Application Web Sites for Blind Users*, 7 J. USABILITY STUD. 68, 84 (2012).

35. *The Americans with Disabilities Act of 1990*, EEOC, <https://www.eeoc.gov/eeoc/history/35th/1990s/ada.html> (last visited Apr. 29, 2019).

36. *History of the ADA*, MID-ATLANTIC ADA CTR., <http://www.adainfo.org/content/history-ada> (last visited Apr. 29, 2018).

protecting the disabled community was enacted in 1973 under § 504 of the Rehabilitation Act, which banned federal funding recipients from discriminating against individuals with disabilities.³⁷ While the Rehabilitation Act was progress for disabled Americans seeking equal rights, the legislation did not protect individuals from discrimination in employment, places of public accommodation, or the private sector.³⁸ Thus, the ADA was introduced to fill the gaps in the Rehabilitation Act and allow for people with disabilities to have the same rights and opportunities to access and enjoy goods and services as all other American citizens.³⁹

The ADA's fundamental mission is to protect Americans with disabilities from discrimination in employment, public entities, places of public accommodation, telecommunication, and additional miscellaneous areas.⁴⁰ The Act's purpose is "to provide a clear and comprehensive [n]ational mandate for the elimination of discrimination against persons with disabilities" by allowing individuals with disabilities to fully participate as independent and "economic[ally] self-sufficien[t]" citizens.⁴¹

While the enactment of the ADA was a tremendous step in the right direction for providing American citizens with disabilities equal rights, due to the advancement of technology, it is critical the Act is amended to adapt to social trends. In 2016, the United Nations recognized access to information and technology, specifically the internet, as a basic human right.⁴² Because the United States holds itself to be a leader in setting a standard for providing human rights,⁴³ the nation should insist that the ADA's reach be extended to website accessibility.

37. 29 U.S.C. § 794 (2017); see *History of the ADA*, *supra* note 36.

38. See *History of the ADA*, *supra* note 36.

39. See *id.*

40. *What Is the Americans with Disabilities Act (ADA)?*, *supra* note 17.

41. *Hearing 100-926*, *supra* note 1, at 97.

42. Human Rights Council Res. 32/13, U.N. Doc. A/HRC/32/L.20 (June 27, 2016); Tim Sandle, *UN Thinks Internet Access Is a Human Right*, BUS. INSIDER (July 22, 2016, 11:57 PM) ("Due to the lack of access and suppressive tactics by certain governments, the United Nations . . . declared that 'online freedom' is a 'human right,' and one that must be protected.").

43. *Human Rights*, U.S. DEP'T ST., <https://www.state.gov/j/drl/hr/> (last visited Apr. 29, 2019) (declaring that "[t]he protection of fundamental human rights was a foundation stone in the

B. Title III of the ADA

Title III of the ADA provides people with disabilities the full range of access and enjoyment of goods and services offered to the public.⁴⁴ The regulations within Title III apply to both private and public businesses,⁴⁵ and require that places of public accommodation make reasonable modifications to their “policies, practices, or procedures and . . . provide auxiliary aides and services” to ensure equal access for disabled individuals.⁴⁶ Determining the scope of the Act’s definition of “places of public accommodation” is therefore critical to assessing the rights of people with disabilities.

The ADA regulations define a “place of public accommodation” as “a facility operated by a private entity whose operations affect commerce” and fall under one of several enumerated categories, including hotels, restaurants, museums, places of entertainment, stores, transportation hubs, and gyms.⁴⁷ Section 12181(7) sets forth the twelve specific categories of places deemed “places of public accommodation.”⁴⁸ The regulations also define a “facility” as “all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.”⁴⁹

Websites do not inherently fit within this definition of a “facility,” and there are currently no uniform ADA regulations regarding website accommodation for people with disabilities. Nevertheless, uniformity with regard to websites is necessary if the ADA is to fulfill its purpose of protecting the rights of

establishment of the United States . . . a central goal of U.S. foreign policy has been the promotion of respect for human rights”).

44. 42 U.S.C. § 12182(a) (2017).

45. See 28 C.F.R. § 36.102(a) (2018); see also *Public Accommodations and Commercial Facilities (Title III)*, ADA.GOV, https://www.ada.gov/ada_title_III.htm (last visited Apr. 29, 2019).

46. Richard E. Moberly, *The Americans with Disabilities Act in Cyberspace: Applying the “Nexus” Approach to Private Internet Websites*, 55 MERCER L. REV. 963, 969 (2004).

47. 28 C.F.R. § 36.104.

48. 42 U.S.C. § 12181(7).

49. 28 C.F.R. § 36.104.

disabled individuals. Under § 36.303(a) of the ADA regulations, the availability of “auxiliary aides and services” in places of public accommodation is required unless the entity can show that the implementation of such devices would “result in an undue burden, i.e., significant difficulty or expense.”⁵⁰ Implementation of services such as auxiliary aids are essential to expanding internet access to people with disabilities because without such services the disabled are deprived of the equal enjoyment of places of public accommodation.⁵¹

The ADA regulations list examples of acceptable auxiliary aids and services, including braille, screen reader software, audio recordings, and video text displays.⁵² Other available technologies include assistive listening devices, closed captioning, real-time captioning, text telephones, telephones compatible with hearing aids, and video remote interpreting services.⁵³ In addition to the simple fact that providing people with disabilities equal access to the internet is the right thing to do, the number of lawsuits challenging the scope of Title III are increasing exponentially. Industry studies have concluded that the number of federal lawsuits brought under Title III have risen significantly since 2013.⁵⁴ In 2017 alone there were 7663 Title III lawsuits filed in federal court, including “at least 814 federal lawsuits about allegedly inaccessible websites.”⁵⁵

The courts have determined that to bring a claim under Title III of the ADA, a plaintiff “must allege (1) that she is disabled

50. *Id.* § 36.303(a).

51. *See* *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279, 1283 n.7 (11th Cir. 2002) (“The statute also recognizes that an intangible barrier may result as a consequence of a defendant entity’s failure to act, that is, when it refuses to provide a reasonable auxiliary service that would permit the disabled to gain access to or use its goods and services.”).

52. 28 C.F.R. § 36.303(b).

53. *Id.*

54. *See* Kristina M. Launey et al., *ADA Title III Lawsuits Increase by 16% in 2017 Due Largely to Website Access Lawsuits; Physical Accessibility Legislative Reform Efforts Continue*, SEYFARTH SHAW: ADA TITLE III (Feb. 1, 2018), <https://www.adatitleiii.com/2018/02/ada-title-iii-lawsuits-increase-by-14-percent-in-2017-due-largely-to-website-access-lawsuits-physical-accessibility-legislative-reform-efforts-continue/>.

55. *Id.*; Minh N. Vu & Susan Ryan, *2017 Website Accessibility Lawsuit Recap: A Tough Year for Businesses*, SEYFARTH SHAW: ADA TITLE III (Jan. 2, 2018), <https://www.adatitleiii.com/2018/01/2017-website-accessibility-lawsuit-recap-a-tough-year-for-businesses/>.

within the meaning of the ADA; (2) that defendants own, lease or operate a place of public accommodation; and (3) that defendants discriminated against her by denying her a full and equal opportunity to enjoy the services defendants provide.”⁵⁶ The circuits are currently split, however, on the issue of whether a website constitutes a “place of public accommodation.” The circuit courts have adopted one of three approaches: (1) a narrow interpretation, finding only physical structures are places of public accommodation, (2) a “nexus” approach, requiring some connection between the website and a physical structure, and (3) a broad interpretation, finding places of public accommodation do not need to be physical structures.

1. *The narrow interpretation*

The Third and Sixth Circuits have interpreted “places of public accommodation” narrowly, concluding that Title III of the ADA only applies to physical places such as shops, parks, or gymnasiums.⁵⁷ In *Ford v. Schering-Plough Corp.*, for instance, the Third Circuit held that a plaintiff who received different insurance benefits due to her mental disability did not have a claim under Title III of the ADA against the insurance company.⁵⁸ The court found that while an insurance company’s physical office would constitute a place of public accommodation under Title III, an insurance policy offered by the office would not.⁵⁹ The court held that “[t]he plain meaning of Title III is that a public accommodation is a place,”⁶⁰ and it applied this same rationale in *Peoples v. Discover Financial Services, Inc.*⁶¹ In *Peoples*, the plaintiff—a blind man—sued a credit card company alleging fraud after using his credit card for a prostitute’s

56. *Camarillo v. Carrols Corp.*, 518 F.3d 153, 156 (2d Cir. 2008).

57. *Parker v. Metro. Life. Ins. Co.*, 121 F.3d 1006, 1014 (6th Cir. 1997) (“The clear connotation of the words in § 12181(7) is that a public accommodation is a physical place. Every term listed in § 12181(7) . . . is a physical place open to public access.”).

58. 145 F.3d 601, 612–14 (3d Cir. 1998).

59. *Id.* at 612.

60. *Id.*

61. 387 F. App’x 179 (3d Cir. 2010).

services at her in-home business, resulting in her allegedly overcharging him and the card company refusing to credit his account for the disputed amounts.⁶² The Third Circuit held that although the card was used within the prostitute's home—a physical place—there was no loss of equal enjoyment within a place of public accommodation on the part of the credit card company because the company itself did “not own, lease or operate th[e] location[.]” where the transaction occurred.⁶³

More recently, however, a Pennsylvania district court went against the prior precedent established in the Third Circuit. In *Gniewkowski v. Lettuce Entertain You Enterprises, Inc.*, two blind plaintiffs were denied equal access to services provided by a bank.⁶⁴ Defendant's website was alleged to be incompatible with screen reading software.⁶⁵ The court held that this case was distinguishable from both *Ford* and *Peoples* because here, “the alleged discrimination [took] place on property that [defendant] owns, operates and controls—the [defendant's] website.”⁶⁶ This decision, involving a company's website over which it maintained control, may signal a change in rationale regarding the Third Circuit's precedent in defining “places of public accommodation.”

The Sixth Circuit's controlling precedent was recorded in *Parker v. Metropolitan Life Insurance Co.*, where again an employee suffering from a mental disability received shorter term insurance benefits than employees with physical disabilities.⁶⁷ The court here looked to the definitions of both “place” and “facility” under the ADA regulations.⁶⁸ By interpreting the definition of “place of public accommodation” as a strictly “physical place,” the court found that the plaintiff did not have a claim under Title III of the ADA.⁶⁹ The court elaborated that “Title III

62. *Id.* at 184.

63. *Id.*

64. 251 F. Supp. 3d 908, 913 (W.D. Pa. 2017).

65. *Id.*

66. *Id.* at 918.

67. 121 F.3d 1006, 1008 (6th Cir. 1997).

68. *Id.* at 1011 (citing 28 C.F.R § 36.104 (2018)).

69. *Id.* at 1014.

regulates the availability of the goods and services” offered by the place of public accommodation.⁷⁰ The court further stated, “To interpret these terms as permitting a place of accommodation to constitute something other than a physical place is to ignore the text of the statute.”⁷¹

In both the Third and Sixth Circuits, the courts have held firm in interpreting a “place of public accommodation” to mean strictly a physical place.⁷² This interpretation requires plaintiffs’ causes of action to be related to the physical property controlled or operated by the defendants.⁷³ Under this narrow understanding of a “place of public accommodation,” disabled Americans are without equal access to the internet.

2. The “nexus” test

The Second, Ninth, and Eleventh Circuits have implemented a “nexus” test when evaluating whether particular websites qualify as places of public accommodation under the ADA. The nexus test looks for some sort of connection between the goods or services being offered online and an actual, physical place.⁷⁴ Thus, the Second Circuit has found a place of public accommodation exists not only within a physical place but also where there is a relationship between a physical place and the “goods” and “services” provided by the physical location.⁷⁵ In *Palozzi v. Allstate Life Insurance Co.*, the court found that because Title III of the ADA specifically lists an “insurance office” as a place of public accommodation, it must correlate that insurance policies—the goods and services provided by such compa-

70. *Id.* at 1012.

71. *Id.* at 1014.

72. *Peoples v. Discover Fin. Servs., Inc.*, 387 F. App’x 179, 183 (3d Cir. 2010); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612–14 (3d Cir. 1998); *Parker*, 121 F.3d at 1014.

73. *See Peoples*, 387 F. App’x at 183–84 (rejecting plaintiff’s claim “because [defendant’s] alleged discrimination . . . in no way relates to the equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations on physical property that [defendant] . . . owns, leases, or operates”).

74. *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000).

75. *See Palozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 31 (2d Cir. 2000) (finding Title III regulates the sale of insurance policies as there is a direct relation between an insurance office and the sale of insurance policies as “goods” and “services”).

nies—are also covered by the Act.⁷⁶ District courts have applied circuit precedent; in *Markett v. Five Guys Enterprises LLC*, for example, the district court relied upon Second Circuit precedent in finding a plausible claim for a Title III violation where a blind woman was unable to use the Five Guy’s website to order a burger online.⁷⁷ The court noted that the defendant’s website fell within the ADA regulation “either as its own place of public accommodation or as a result of its close relationship as a service of defendant’s restaurants.”⁷⁸

Like the Second Circuit, the Ninth Circuit also requires “some connection between the good or service complained of and an actual physical place.”⁷⁹ This circuit has interpreted “nexus” narrowly when evaluating places of public accommodation.⁸⁰ In *Earll v. eBay, Inc.*, a deaf plaintiff filed an ADA complaint against eBay when the plaintiff was unable to register as an eBay seller because eBay’s telephonic identity verification system could not accommodate deaf users.⁸¹ The district court dismissed the claim in favor of the defendant, and the Ninth Circuit evaluated the claim on appeal.⁸² The circuit court affirmed the district court, finding that the plaintiff’s ADA claim failed “[b]ecause eBay’s services are not connected to any ‘actual, physical place.’”⁸³ Similarly, in *Cullen v. Netflix, Inc.*, a deaf plaintiff brought an ADA claim against Netflix when its streaming program did not provide closed captioning subtitles.⁸⁴ In affirming dismissal of the plaintiff’s ADA claim, the circuit court concluded that “[b]ecause Netflix’s services are not con-

76. *Id.* (citing 42 U.S.C. § 12181(7)(F) (2017)).

77. *See* No. 17-cv-788 (KFB), 2017 WL 5054568, at *1–2 (S.D.N.Y. July 21, 2017) (citing *Palozzi*, 198 F.3d at 32–33).

78. *Id.* at 2.

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

80. *See id.*; *Earll v. eBay, Inc.*, 599 F. App’x 695, 695 (9th Cir. 2015); *Cullen v. Netflix, Inc.*, 600 F. App’x 508, 509 (9th Cir. 2015) (each finding that no nexus existed for plaintiffs’ claims).

81. *See* No. 5:11-CV-00262-EJD, 2012 WL 6652444, at *1 (N.D. Cal. Dec. 20, 2012), *aff’d*, 599 F. App’x 695 (9th Cir. 2015).

82. *Id.* at 4.

83. *Earll*, 599 F. App’x at 696.

84. *See* No. 5:11-CV-01199-EJD, 2013 WL 140103, at *1–2 (N.D. Cal. Jan. 10, 2013), *aff’d*, 600 F. App’x 508 (9th Cir. 2015).

nected to any 'actual, physical place,' Netflix is not subject to the ADA."⁸⁵

In both the *Earll* and *Cullen* opinions, the Ninth Circuit was rather dismissive and frankly unapologetic in providing little to no explanation for its decisions beyond relying on the precedent established by *Weyer v. Twentieth Century Fox Film Corp.* The *Weyer* case involved an employer-provided disability plan for which the plaintiff brought a claim under Title III.⁸⁶ As the facts of the case were similar to those in the Sixth Circuit case *Parker*, described above, the Ninth Circuit applied the reasoning of the Sixth Circuit,⁸⁷ finding that the plaintiff could not prevail against the defendant insurance company because there was no nexus between the services offered by the insurance company and its physical office.⁸⁸ Conversely, the Ninth Circuit's *Earll* and *Cullen* decisions directly involved a website, which seemingly would require a unique precedent for the circuit. Unfortunately, in both decisions the court was impenitent in not recognizing the unique circumstances at hand and punted on an opportunity to address Title III's specific application to websites.

The Eleventh Circuit likewise requires a nexus between the website in question and a physical place of public accommodation. In *Access Now, Inc. v. Southwest Airlines Co.*, a visually impaired plaintiff brought an ADA claim against Southwest Airlines after finding that its website was not compatible with plaintiff's screen reader.⁸⁹ The court ruled that because the plaintiff failed to argue that a nexus existed before the district court, he was unable to subsequently allege on appeal that such a nexus existed.⁹⁰ Dismissal was therefore granted in favor of Southwest.⁹¹ Nevertheless, the court noted that the issue before it was one of utmost importance.⁹² The court explained, "The

85. *Cullen*, 600 F. App'x at 509.

86. 198 F.3d 1104, 1114 (9th Cir. 2000).

87. *Id.* at 1115.

88. *Id.*

89. 385 F.3d 1324, 1326 (11th Cir. 2004).

90. *Id.* at 1328.

91. *Id.* at 1335.

92. *Id.*

Internet is transforming our economy and culture, and the question whether it is covered by the ADA—one of the landmark civil rights laws in this country—is of substantial public importance.”⁹³ Recently, the Eleventh Circuit had an opportunity to revisit this issue with a factually similar case.⁹⁴ A blind plaintiff brought an ADA claim against Dunkin’ Donuts when its website was not compatible with screen reading software.⁹⁵ The court here remanded the case, finding that the plaintiff alleged a “plausible claim for relief under the ADA” because Dunkin’ Donuts’ website offered the same goods and services as its physical stores.⁹⁶

3. *A broad interpretation*

The First and Seventh Circuits have broadly interpreted the statutory language of the ADA, acknowledging that “places of public accommodation” can be more than just physical structures. In *Carparts Distribution Center, Inc. v. Automotive Wholesaler’s Ass’n*—a case of first impression—the First Circuit concluded that the statutory language regarding the definition of “places of public accommodation” was ambiguous.⁹⁷ Due to this ambiguity, the court evaluated the language of the statute, specifically noticing “travel service” was included as a place of public accommodation under 42 U.S.C. § 12181(7)(F).⁹⁸ The court found that including travel services, which typically “do not require a person to physically enter an actual physical structure,” exhibited Congress’s intent for “places of public accommodation” to be construed broadly.⁹⁹ Further, the court found its interpretation “consistent with the legislative history [and purpose] of the ADA.”¹⁰⁰ The court here also specifically

93. *Id.*

94. *See* Haynes v. Dunkin’ Donuts LLC, 741 F. App’x 752, 752–54 (11th Cir. 2018).

95. *Id.*

96. *Id.* at 754.

97. 37 F.3d 12, 19 (1st Cir. 1994).

98. *Id.*

99. *Id.*

100. *Id.*

mentioned that many goods and services are sold via the phone or by mail, similar to the later developed internet.¹⁰¹

More recently, the district courts within the First Circuit have heard two cases regarding the same issue but dealing specifically with websites. The first, *National Ass'n of the Deaf v. Netflix, Inc.*, evaluated whether Netflix's failure to caption its streaming collection violated Title III of the ADA.¹⁰² Plaintiff argued that because Netflix operates as an internet-based business, the decision in *Carparts* should apply, and thus, Netflix's website should constitute a place of public accommodation.¹⁰³ The court established that a plaintiff must show "only that the web site falls within a general category listed under the ADA."¹⁰⁴ Further, the court determined that "[t]he ADA covers the services 'of' a public accommodation, not services 'at' or 'in' a public accommodation."¹⁰⁵ In other words, the Act was implemented to provide Americans with disabilities equal access to the goods and services offered to the public regardless of where they are offered. Similarly, although not expressly stated in the definition of "places of public accommodation," services which are provided in the home "such as plumbers, pizza delivery services, or moving companies," all fall within the ADA definition.¹⁰⁶ Therefore, following the rationale of *Carparts*, the court determined that websites offering services do fall under ADA regulation.¹⁰⁷

In the second case, *Access Now, Inc. v. Blue Apron, LLC*, the plaintiff sued because the defendant's website was inaccessible as it was not compatible with screen reading technology.¹⁰⁸ The court followed its prior precedent, stating that "a website alone may amount to a 'place of public accommodation.'"¹⁰⁹ Again,

101. *Id.* at 20.

102. 869 F. Supp. 2d 196, 198, 200 (D. Mass. 2012).

103. *Id.* at 200.

104. *Id.* at 201.

105. *Id.*

106. *Id.*

107. *Id.* at 202.

108. No. 17-cv-116-JL, 2017 WL 5186354, at *3 (D.N.H. Nov. 8, 2017).

109. *Id.* at *2, *3-4.

the court found that a plaintiff need only show “that the web site falls within a general category listed under the ADA.”¹¹⁰ This court also grappled with the difficult task of filling the gap regarding the “standards that places of public accommodations must comply with under the ADA.”¹¹¹ The court, in evaluating the plaintiff’s claim, stressed the need for Congress or the DOJ to implement some sort of guidelines due to the statutory confusion.¹¹² Ultimately, the court denied the defendant’s motion to dismiss, as the plaintiff was able to show that an injunction was necessary to prevent continued unequal access to the services offered by defendant.¹¹³

Similarly, in construing the purpose of Title III of the ADA, Judge Richard Posner of the Seventh Circuit stated,

The core meaning of [Title III of the ADA], 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 in electronic space) that is open to the public cannot exclude disabled persons from . . . using the facility in the same way that the nondisabled do.¹¹⁴

Judge Posner echoed the same position in *Morgan v. Joint Administration Board*, a case determining whether a physical site is necessary to constitute a place of public accommodation.¹¹⁵ In response to the plaintiff’s claim that a discriminatory insurance plan constituted a “place of public accommodation” under Title III of the ADA, Judge Posner explained: “The site of the sale is irrelevant to Congress’s goal of granting the disabled equal access to sellers of goods and services. What matters is that the

110. *Id.* at *4 (quoting Nat’l Ass’n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 201 (D. Mass. 2012)).

111. *Id.* at *8.

112. *Id.* at *8–9.

113. *Id.* at *10–11.

114. *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999) (citation omitted).

115. *See* 268 F.3d 456, 459 (7th Cir. 2001).

goods or service be offered to the public.”¹¹⁶ Judge Posner’s statement accurately echoes the underlying purpose of the ADA because, “[i]n drafting Title III, Congress intended that people with disabilities have equal access to the array of goods and services offered by private establishments.”¹¹⁷

Thus, both the First and Seventh Circuits place emphasis on the original purpose of the ADA, rather than limiting its scope by narrowly interpreting “place of public accommodation.” These circuits have looked to the purpose of the ADA as a whole when evaluating the facts of each individual case to determine whether a plaintiff is deprived access to the goods or services offered to the public. Specifically, district courts within the First Circuit have noted the shift in more goods and services offered without association to a physical location.¹¹⁸ By finding that such goods and services qualify as “places of public accommodation,” these courts align their decisions with the original purpose of the ADA and provide Americans with disabilities equal access to the internet. Similarly, the Seventh Circuit, finding that the ADA covers all goods and services offered to the public, allows for a broad application of ADA regulations.¹¹⁹ By broadening their understanding and application of what constitutes a “place of public accommodation,” these circuits have helped Americans with disabilities achieve equal access to goods, services, and information.

116. *Id.*

117. *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n*, 37 F.3d 12, 19 (1st Cir. 1994) (citing S. Rep. No. 116, 101st Cong., 1st Sess. at 2–3 (1989)).

118. *See, e.g., Nat’l Ass’n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 200 (D. Mass. 2012) (“In a society in which business is increasingly conducted online, excluding businesses that sell services through the Internet from the ADA would ‘run afoul of the purposes of the ADA’” (quoting *Carparts Distrib. Ctr., Inc.*, 37 F.3d at 20)).

119. *See Morgan*, 268 F.3d at 459.

II. CURRENT WEBSITE GUIDELINES AND THE ROLE OF THE DOJ

Title III is both regulated and enforced by the DOJ,¹²⁰ and since 1996, the DOJ has released supplemental guidance letters explaining that “web pages” are encompassed within Title III ADA regulation.¹²¹ However, the DOJ waited until 2010 to issue a proposed rule governing web pages, titled “Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations.”¹²² This proposed rule was developed to apply Title III of the ADA to private websites, regardless of any “nexus,” and it was opened to the public for comment.¹²³ The rule discussed implementing the Website Content Accessibility Guidelines (WCAG) to commercial websites, improving internet accessibility for the disabled community.¹²⁴ The WCAG, developed by the World Wide Web Consortium (W3C), were designed to make web content more accessible to people with disabilities.¹²⁵

Although first proposed by the DOJ in 2010, little has been done as far as development or implementation—an unfortunate result of our nation’s partisan political climate. While some had suggested that the updated DOJ guidelines would be published in 2018,¹²⁶ it appears unlikely any updated regulations will be

120. 42 U.S.C. § 12186(b) (2017) (giving attorney general authority to issue regulations concerning all non-transportation aspects of the ADA); *id.* § 12188(b) (giving attorney general authority to enforce the Act’s provisions).

121. See Letter from Deval L. Patrick, Assistant Attorney Gen., Civil Rights Div., to Tom Harkin, Senator, U.S. Senate (Sept. 9, 1996), <https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/tal712.txt>.

122. 75 Fed. Reg. 43460 (proposed July 26, 2010) (to be codified at 28 C.F.R. pts. 35 & 36).

123. See *id.* at 43463 (“[T]he ADA mandate for ‘full and equal enjoyment’ requires nondiscrimination by a place of public accommodation in the offering of all goods and services, including those offered via Web sites.”).

124. See *id.* at 43463–64.

125. See *Introduction to Web Accessibility*, W3C, <https://www.w3.org/WAI/fundamentals/accessibility-intro/> (last updated Jan. 9, 2019). W3C, spearheaded by Tim Berners-Lee, inventor of the World Wide Web, is a community of industry leaders in the technology and web development industries. *Facts About W3C*, W3C, <https://www.w3.org/Consortium/facts.html> (last visited Apr. 30, 2019).

126. See, e.g., Jamie LaPlante, *Website Accessibility Regulations Delayed Until 2018 but Businesses Should Not Table the Issue Until Then*, EMPLOYER L. REP. (Dec. 4, 2015), <https://www.employerlaw.com>.

promulgated in the near future.¹²⁷ In late 2017, the Trump administration added “Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of Public Accommodations” to a list of “inactive” regulatory actions,¹²⁸ and the proposal was withdrawn by the DOJ on December 26, 2017.¹²⁹ As long as these proposed regulations are in limbo, the courts will continue to ineffectively and inconsistently enforce the ADA. The DOJ stated the withdrawal was a result of a need to further evaluate and research the issue¹³⁰—this is ludicrous. Both the disabled community and businesses are harmed by the withdrawal of this proposal, as this action will likely result in increased litigation due to conflicting opinions of the judiciary.

In the interim, several commentators have suggested that as the volume of lawsuits—and settlements—increases, the DOJ may adopt WCAG 2.0.¹³¹ WCAG 2.0, the successor to the initial

employerlawreport.com/2015/12/articles/eo/website-accessibility-regulations-delayed-until-2018-but-businesses-should-not-table-the-issue-until-then/.

127. See Christine A. Samsel & Jonathan C. Sandler, *Is Your Website a Place of Public Accommodation Under the ADA? The Plaintiffs' Bar Says "Yes," the Circuits Are Split, and the DOJ Is Unlikely to Provide Guidance Any Time Soon*, BROWNSTEIN HYATT FARBER SCHRECK (Aug. 9, 2017), <https://www.bhfs.com/Templates/media/files/Is%20Your%20Website%20a%20Place%20of%20Public%20Accommodation%20under%20the%20ADA.pdf>.

128. Dep't of Justice, *2017 Inactive Actions*, REGINFO.GOV https://www.reginfo.gov/public/js/eAgenda/InactiveRINs_2017_Agenda_Update.pdf (last visited May 6, 2019).

129. 82 Fed. Reg. 60932 (proposed Dec. 26, 2017) (to be codified at 28 C.F.R. pts. 35 & 36); Minh N. Vu, *DOJ Nixes All Pending ADA Rulemakings, Including Website Access Rules*, SEYFARTH SHAW: ADA TITLE III (Dec. 22, 2017), <https://www.adatitleiii.com/2017/12/doj-nixes-all-pending-ada-rulemakings-including-website-access-rules/>.

130. 82 Fed. Reg. at 60932.

131. See LEWIS S. WIENER & AMY XU, WEBSITES AS PUBLIC ACCOMMODATIONS: THE CIRCUIT SPLIT ON WHETHER WEBSITES CONSTITUTE PLACES OF PUBLIC ACCOMMODATION 6 (2016), <https://us.eversheds-sutherland.com/portalresource/lookup/poid/Z1tOI9NPluKPtDNIqLMRV56Pab6TfzcRXncKbDtRr9tObDdEo4JDpa3!/fileUpload.name=/Websites%20as%20Public%20Accommodations%20-%20The%20Circuit%20Split%20on%20Whether%20Websites%20Constitute%20Places%20of%20Public%20Accommodation.pdf>; Michael Miller, *Are Websites Operated by Public Accommodations Subject to the Americans with Disabilities Act (ADA)?*, BRIGGS: MINN. EMPLOYER (Jan. 9, 2014), <https://minnesotaemployer.com/2014/01/09/are-websites-operated-by-public-accommodations-subject-to-the-americans-with-disabilities-act-ada/>; see also Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Justice Department Enters Consent Decree with National Tax Preparer H&R Block Requiring Accessibility of Websites and Mobile Apps Under Americans with Disabilities Act (Mar. 6, 2014), <https://www.justice.gov/opa/pr/justice-department-enters-consent-decree-national-tax-preparer-hr-block-requiring> [hereinafter H&R Block Press Release] (detailing the consent decree entered by H&R Block, in which H&R Block agreed to adhere to the WCAG 2.0 Level AA and pay a penalty); Press Release, U.S. Dep't of

WCAG,¹³² is a global initiative developed by leaders of the technology industry, consisting of suggested guidelines of technical standards which would make websites more accessible to the disabled community.¹³³ These guidelines are issued through statements, technical reports, and supplemental material developed by individuals and organizations, all with a common goal—web accessibility for all.¹³⁴ The guidelines define “Web accessibility” to mean that people with disabilities “can perceive, understand, navigate, and interact with the Web,” as well as “contribute to the Web.”¹³⁵ Websites can be made to fit the meaning of accessibility by making slight coding adjustments during the design process, providing alternative text for images, keyboard input, transcripts for audio, and flexible text size.¹³⁶

Various courts have deemed compliance with the WCAG 2.0 guidelines to be an equitable remedy when entities’ websites are in violation of the Act.¹³⁷ The current uncertainty among the circuits has not only disadvantaged those with disabilities by leaving them without access to the internet, but has also left businesses, both large and small, in the dark as to necessary website accommodations, rendering these businesses especially

Justice, Office of Pub. Affairs, Justice Department Reaches Agreement with Carnival Corp. over ADA Violations by Carnival Cruise Line, Holland America Line and Princess Cruises (July 23, 2015), <https://www.justice.gov/opa/pr/justice-department-reaches-agreement-carnival-corp-over-ada-violations-carnival-cruise-line> [hereinafter Carnival Corporation Press Release] (detailing the settlement agreement between the DOJ and Carnival Corporation, in which Carnival agreed to make cabins more accessible, appoint an ADA compliance officer, pay damages, and comply with WCAG 2.0 Levels A and AA for company websites and mobile applications).

132. WEB CONTENT ACCESSIBILITY GUIDELINES (WCAG) 2.0: W3C RECOMMENDATION 2, 4, <https://www.w3.org/WAI/WCAG20/versions/guidelines/wcag20-guidelines-20081211-letter.pdf> (“WCAG 2.0 succeeds Web Content Accessibility Guidelines 1.0 . . . [It] builds on WCAG 1.0 and is designed to apply broadly to different Web technologies now and in the future . . .”).

133. See *Web Content Accessibility Guidelines (WCAG) Overview*, W3C, <https://www.w3.org/WAI/standards-guidelines/wcag/> (last updated June 22, 2018); see also Miller, *supra* note 131.

134. See *Web Content Accessibility Guidelines (WCAG) Overview*, *supra* note 133.

135. *Introduction to Web Accessibility*, *supra* note 125.

136. *Id.*

137. See, e.g., *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898, 907 (9th Cir. 2019).

susceptible to litigation.¹³⁸ Additionally, law firm publications have also suggested adopting the WCAG 2.0 until new, less ambiguous legislation is adopted.¹³⁹ Clearly, the DOJ is overdue in taking regulatory action regarding the uncertainty that surrounds whether websites fit within “places of public accommodation” as defined by the ADA, resulting in unnecessary frustration for businesses and unjust treatment of people with disabilities. Part III of this Note proposes a solution to this dire problem.

III. WHY WEBSITES ARE PLACES OF PUBLIC ACCOMMODATION IN ACCORDANCE WITH THE FIRST AND SEVENTH CIRCUITS’ INTERPRETATION OF THE ACT

A. *Where Do We Go from Here?*

As stated previously, this Note suggests that either the DOJ or Congress can solve the issue of unequal internet access and remedy the current circuit split by simply amending the definition of “places of public accommodation” to include websites. While Congress originally delegated authority to the DOJ to regulate the ADA,¹⁴⁰ the DOJ has yet to issue binding supplemental guidance to address whether websites constitute “places of public accommodation” and is unlikely to do so in the near future, as it has abandoned its rulemaking on the subject.¹⁴¹ Therefore, Congress should create a thirteenth carve-out for what constitutes a place of public accommodation by amending § 12181(7) to include § 12181(7)(M), “websites.” Although the twelve categories of places of public accommodation were initially meant to be exhaustive,¹⁴² the definition as it currently stands fails to achieve the desired result of the Act—to provide

138. See LaPlante, *supra* note 126.

139. See, e.g., Samsel & Sandler, *supra* note 127 (“Because the DOJ and plaintiffs’ counsel often deem websites to be ADA-compliant if they conform to WCAG-2.0, Level AA, ensuring that your business websites are compliant with those standards may be the best option to avoid becoming a lawsuit target.”).

140. See 42 U.S.C. § 12186(b) (2017).

141. See *supra* notes 121–22, 126–30 and accompanying text.

142. H.R. REP. NO. 101-485, pt. 2, at 100 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 383.

full and equal enjoyment of goods and services to all Americans. Further, as noted by the DOJ, at the time the Act was enacted, “the [i]nternet as we know it today . . . did not exist.”¹⁴³

Implementing this small change would solve the current circuit split and improve the lives of millions of disabled Americans. By amending the statute in this way, Congress would further the original purpose of the ADA “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities”¹⁴⁴ by “assur[ing] equality of opportunity, full participation, independent living, and economic self-sufficiency.”¹⁴⁵

The First and Seventh Circuits take the correct approach in determining whether websites fit within “places of public accommodation.” The broad and inclusive approach taken by these circuits is the only approach that advances the fundamental mission of the ADA. Indeed, one of the underlying factors in both the First and Seventh Circuits’ holdings is in furtherance of the Act’s original purpose: to provide equal access to accommodations and services.¹⁴⁶ The courts note that the underlying rationale for applying Title III of the ADA to websites is to increase inclusivity and accessibility for Americans with disabilities,¹⁴⁷ which is in keeping with Congress’ original purpose in enacting the ADA.

Subsequently, the “narrow interpretation” applied by the Third and Sixth Circuits is inadequate, as it fails to advance the ADA’s purpose of providing equal access to Americans with disabilities. The “narrow interpretation” results in the continued discrimination against Americans with disabilities by barring them from equal access to the internet and its abundance

143. 75 Fed. Reg. 43460, 43461 (proposed July 26, 2010) (to be codified at 28 C.F.R. pts. 35 & 36).

144. 42 U.S.C. § 12101(b)(1).

145. *Id.* § 12101(a)(7).

146. See *Morgan v. Joint Admin. Bd.*, 268 F.3d 456, 459 (7th Cir. 2001); *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n*, 37 F.3d 12, 19–20 (1st Cir. 1994); *Nat’l Ass’n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 200–01 (D. Mass. 2012).

147. See *Morgan*, 268 F.3d at 459; *Carparts Distrib. Ctr., Inc.*, 37 F.3d at 19–20; *Nat’l Ass’n of the Deaf*, 869 F. Supp. 2d at 200–01.

of services. Both of these circuits interpret the statute on its face as applying to physical locations only.¹⁴⁸ This is flawed, as both Congress and the DOJ have acknowledged that these twelve categories, and the Act as a whole, should be applied broadly.¹⁴⁹ Such acknowledgements have been made in the form of DOJ rulemaking briefs¹⁵⁰ and congressional hearings.¹⁵¹ Chairman of the Subcommittee on the Constitution, Charles Canady, stated during one such congressional hearing, “[I]t 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.”¹⁵²

Further, the “nexus test” is also an insufficient solution to resolving the issue of website accessibility. The “nexus test” is ineffective because without a legislative amendment, courts will continue to inconsistently determine when websites function and do not function as “places of public accommodation.”¹⁵³ This inconsistency is evidenced in a decision of a Second Circuit district court which refused to dismiss a blind plaintiff’s claim against Five Guys when the plaintiff was unable to navigate the defendant’s website.¹⁵⁴ Here, the court found a “close relationship” between the defendant’s website and the services offered, and therefore deemed the plaintiff’s

148. *E.g.*, *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612–13 (3d Cir. 1998); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010–12 (6th Cir. 1997).

149. *See* 75 Fed. Reg. 43460, 43463 (proposed July 26, 2010) (to be codified at 28 C.F.R. pts. 35 & 36) (“[T]he Department stated in the preamble to the original 1991 ADA regulations that the regulations should be interpreted to keep pace with developing technologies.”).

150. *See, e.g., id.* at 43465 (“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.”).

151. *See, e.g., Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearing on H.R. 65-010 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 116th Cong. 8 (2000) (statement of Charles Canady, Chairman, Subcomm. on the Constitution).

152. *Id.*

153. *Compare Cullen v. Netflix, Inc.*, 600 F. App’x 508, 509 (9th Cir. 2015) (dismissing plaintiff’s claim by finding no connection between defendant and a physical location), *with Markett v. Five Guys Enters. LLC*, No. 17-cv-788 (KBF), 2017 WL 5054568, at *1–2 (S.D.N.Y. July 21, 2017) (denying defendant’s motion to dismiss plaintiff’s claim, as plaintiff sufficiently showed a connection existed between defendant’s website and the goods offered for sale).

154. *Markett*, 2017 WL 5054568, at *2–3.

claim for relief valid.¹⁵⁵ Meanwhile, the Ninth Circuit, in a rather blunt opinion, dismissed a deaf plaintiff's claim that Netflix lacked sufficient subtitled content simply because Netflix has no connection to an "actual physical place."¹⁵⁶

Such inconsistency is absurd, especially considering that a district court of the First Circuit found Netflix to meet the definition of a "place of public accommodation."¹⁵⁷ Further supporting this, the Ninth Circuit in *Robles v. Domino's Pizza, LLC*, recently reversed and remanded the district court's dismissal of a matter involving a visually impaired plaintiff being unable to access the defendant's website and mobile app.¹⁵⁸ The lower court punted the issue of whether public websites should be considered a place of public accommodation, refusing to uphold the plaintiff's claims until the DOJ or Congress act on the matter.¹⁵⁹ However, the Ninth Circuit, in finding that a nexus existed, held that the district court erred in dismissing the claim on the grounds that imposing liability would violate Domino's right to due process.¹⁶⁰ By perpetuating this cycle of uncertainty and refusing to take action, Congress is continuing the systemic discrimination against individuals with disabilities.

If both the DOJ and Congress refuse to take action, the Supreme Court should agree to hear a case involving website accessibility and Title III of the ADA. Although Congress and the

155. *Id.* at *2.

156. *Cullen*, 600 F. App'x at 509.

157. Carly Schiff, Note, *Cracking the Code: Implementing Internet Accessibility Through the Americans with Disabilities Act*, 37 CARDOZO L. REV. 2315, 2317–18 (2016) ("[I]n the summer of 2012, two district courts had to determine if Netflix's streaming service was a place of public accommodation. In *National Association of the Deaf v. Netflix*, the District Court of Massachusetts, bound by the First Circuit precedent of *Carparts*, held that the Netflix streaming service was a place of public accommodation. However, in *Cullen v. Netflix*, the District Court for the Northern District of California, bound by Ninth Circuit precedent, held that Netflix's streaming service was not a place of public accommodation. Both cases concerned the same streaming service, yet the two holdings were inconsistent." (citations omitted)); see *supra* notes 102–07 and accompanying text.

158. 913 F.3d 898, 902 (9th Cir. 2019).

159. *Robles v. Domino's Pizza, LLC*, No. CV 16-06599 SJO (SPx), 2017 WL 1330216, at *23–26 (C.D. Cal. Mar. 20, 2017), *rev'd*, 913 F.3d 898 (9th Cir. 2019).

160. *Robles*, 913 F.3d at 909.

DOJ are in the best position to address this issue, in the interim, until the DOJ issues an official final rule or Congress amends the Act, a Supreme Court ruling would end the flow of increasing litigation, improve civil rights, and further the original purpose of the ADA. The ongoing circuit split results in courts misapplying the ADA in refusing to consider websites as places of public accommodation. Therefore, Congress should amend the Act to include websites as places of public accommodation or the DOJ should issue a rule establishing Title III's application to websites, and should neither of these ideal solutions occur, then the Supreme Court should address the issue so the circuit split is resolved.

B. *Insufficient Proposals to Date*

While the need for inclusion and equal rights for all may seem obvious in the twenty-first century, some scholars have addressed this issue by proposing solutions which continue to limit access to the internet. Some scholars support the "nexus approach," while many others have suggested broadening the test to make it more inclusive. Among these broader approaches are the "commerce- and character-based test,"¹⁶¹ the "storefront approach,"¹⁶² and the "content test."¹⁶³ These approaches propose broadening the "nexus test" in some variation to include any website which either has a connection to commerce or to the categories listed under § 12181(7).

The "commerce- and character-based test" suggests courts should apply their individual discretion in evaluating the "commerciality and character of a given website."¹⁶⁴ The court would evaluate whether the website provides for commercial activity, whether the character of such commercial activity re-

161. Nikki D. Kessler, Comment, *Why the Target "Nexus Test" Leaves Disabled Americans Disconnected: A Better Approach to Determine Whether Private Commercial Websites Are "Places of Public Accommodation,"* 45 HOUS. L. REV. 991, 1024–28 (2008).

162. Trevor Crowley, Comment, *Wheelchair Ramps in Cyberspace: Bringing the Americans with Disabilities Act into the 21st Century,* 2013 BYU L. REV. 651, 680, 683–90 (2014).

163. Schiff, *supra* note 157, at 2345–50.

164. Kessler, *supra* note 161, at 1024, 1026.

lates to the twelve categories listed in § 12181(7), and whether such conduct has denied an individual “‘the full and equal enjoyment’ of the website’s goods or services.”¹⁶⁵ In such a case, the court should find the website to be a place of public accommodation.¹⁶⁶ Likewise, the “storefront approach” also recommends resolving the issue at the judicial level.¹⁶⁷ This approach would subject any website acting “as a storefront for an entity that offers a substantial amount of its goods or services from a physical facility” to Title III regulations if it falls within a category enumerated in § 12181(7).¹⁶⁸ Similarly, the “content test” looks to the nature of the website’s content and the material provided by the website, then determines whether the content of the website falls within an existing § 12181(7) category.¹⁶⁹

While novel in theory, these proposals all fail to provide Americans with disabilities “full and equal enjoyment of the goods [and] services” offered by websites *not* included under the twelve categories in § 12181—a core concept behind the enactment of the ADA.¹⁷⁰ Further, these tests are insufficient to address the problems at hand, as they require the judiciary to interpret what constitutes a “substantial amount of its goods or services” or define the “character” of the website.¹⁷¹ Under such subjective tests, the judiciary will perpetuate the current issue of inconsistent application of Title III regulations to websites. The ADA was designed to put people with disabilities on equal footing with citizens without disabilities; thus, limiting the websites covered under the ADA does not satisfy the Act’s original goal.

165. *Id.* at 1025–27.

166. *See id.* at 1024–26.

167. Crowley, *supra* note 162, at 652 (“The storefront test does not purport to be a substitution for legislation, but it provides a workable judicial solution that builds upon previous circuit court decisions without stepping into the realm of judicial lawmaking.”).

168. *Id.* at 652, 680.

169. Schiff, *supra* note 157, at 2345.

170. *See supra* text accompanying note 149.

171. Crowley, *supra* note 163, at 652; Kessler, *supra* note 161, at 1025–27.

Others, however, have suggested additional solutions more in line with achieving the goal of internet accessibility for the disabled community. As noted previously, attorneys and scholars have indicated that they anticipate Congress will eventually adopt the opinion articulated by the DOJ that websites fall within Title III of the ADA.¹⁷² Similar to my proposal that Congress amend the ADA's definition of "places of public accommodation" to include websites, it has been suggested that the judiciary, rather than Congress, implement this change.¹⁷³ This solution also falls short for reasons similar to those articulated above. Relying upon the judiciary to implement this change will inevitably produce inconsistent results and application.

Accordingly, as technology continues to evolve, Congress is in the best position to implement the changes for the sake of uniformity. A consistent application of the Act is essential to providing Americans with disabilities equal rights and access—the foundational purpose of the ADA's Title III¹⁷⁴—as inconsistent application robs disabled individuals of such rights. Therefore, a legislative solution is best because it would allow for consistent application of ADA regulations by binding the circuit and district courts to rule uniformly. Further, this approach would afford businesses a clear understanding of the applicable regulations while providing equal access to goods and services to all American citizens with disabilities.

It has also been suggested that the DOJ should issue a rule incorporating websites in its definition of "facility."¹⁷⁵ While this proposal may satisfy the end goal of making websites acces-

172. See *supra* note 126 and accompanying text.

173. See Else, *supra* note 30, at 1155–57.

174. 42 U.S.C. § 12101(b)(1) (2017) (stating the Act's purpose as it exists today: "to provide for a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"); *Hearing 100-926*, *supra* note 1, at 91 (articulating that "the overall purposes of the Act center[ed] on the establishment of a clear and comprehensive [n]ational mandate for the elimination of discrimination against persons with disabilities").

175. Brunner, *supra* note 31, at 186–90.

sible to Americans with disabilities,¹⁷⁶ because “public accommodations . . . are broadly defined,” it is likely the DOJ would instead add websites within its definition of “places of public accommodation.”¹⁷⁷ My proposal takes this into account as Congress intended the ADA to be broad in order to cover future accessibility issues.¹⁷⁸ Because of this, the DOJ is more likely to add websites within its definition of “places of public accommodation” so that the statute remains broad and can include future technology such as website-related applications.

C. Implementation

Some have suggested that including websites as “places of public accommodations” under Title III of the ADA would place unreasonable burdens on website owners.¹⁷⁹ But while there is some cost associated with any sort of renovation or implementation following new regulations, the process has never been easier.¹⁸⁰ The modern consensus is that “the requirements involved would be unobtrusive, inexpensive and easily accomplished” due in part to an abundance of “technical assistance resources.”¹⁸¹ Compared with the costly process of litigation and the numerous recent settlements reaching into the millions,¹⁸² companies could avoid such expenses by simply ma-

176. See *id.* at 172 (“Treating websites as facilities opens up a set of ADA obligations that would otherwise be inapplicable, allowing different standards to govern websites for existing, altered, and new facilities.”).

177. *Id.* at 173.

178. See *supra* note 150.

179. See *DOJ Creates Web Accessibility Minefield*, ABA (June 29, 2017), https://www.americanbar.org/groups/business_law/publications/blt/2016/03/08_reindl/; Mark Pulliam, *Is Your Company's Website Accessible to the Disabled? You'd Better Hope So*, L.A. TIMES (June 11, 2017, 4:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-pulliam-ada-websites-20170611-story.html>.

180. See NAT'L COUNCIL ON DISABILITY, *supra* note 26, at 15 (“Given the speed of electronic communication, the frequency with which many Web sites are updated and changed, the costs and delays of providing alternative formats, and the inexpensiveness and straightforwardness of making Web sites accessible, it is hard to imagine that any entity faced with a choice among methods would opt for any approach other than accessibility . . .”).

181. *Id.* at 26, 27.

182. See Carnival Corporation Press Release, *supra* note 131; see also Settlement Agreement Between the United States of America and Carnival Corporation, D.J. No. 202-17M-206 (July 23, 2015), https://www.ada.gov/carnival/carnival_sa.html.

nipulating their website to become accessible.¹⁸³ While there are arguments suggesting that the costs outweigh the importance of internet accessibility,¹⁸⁴ these relatively small expenses to large companies pale in comparison to the right for an individual to access the internet. Further, companies have an economic incentive to enhance the accessibility of their websites. The U.S. Department of Labor has noted that people with disabilities “represent[] more than \$200 billion in discretionary spending.”¹⁸⁵ This large portion of American consumers is essentially an untapped market for companies that do not yet have accessible websites.

Additionally, technology has significantly improved since the passage of the ADA, providing the disabled community with more tools to access goods, services, and information than ever before. Commonly called “assistive technology,” these advances include “any item, piece of equipment, software program, or product system that is used to increase, maintain, or improve the functional capabilities of persons with disabilities.”¹⁸⁶ Assistive technology ranges in its complexity and includes everything from crutches and mobility scooters to voice recognition and screen reading software.¹⁸⁷ For the purposes of website accessibility, closed captioning, auxiliary aids, text readers, screen readers, speech typing software, and on-screen keyboards are common types of available assistive technology which allow people with disabilities to access the internet.¹⁸⁸

Despite the ongoing circuit split detailed above, most legal advocates have suggested that companies with an online presence begin working to make their websites accessible to people

183. See *DOJ Creates Web Accessibility Minefield*, *supra* note 179.

184. See Pulliam, *supra* note 179.

185. BRAULT, *supra* note 8, at 1.

186. *What Is AT?*, ATIA, <https://www.atia.org/at-resources/what-is-at/> (last visited May 7, 2019).

187. *What Are Some Types of Assistive Devices and How Are They Used?*, NICHD, <https://www.nichd.nih.gov/health/topics/rehabtech/conditioninfo/device> (last updated Oct. 24, 2018).

188. *Types of Assistive Technology*, BERKELEY WEB ACCESS, <https://webaccess.berkeley.edu/resources/assistive-technology> (last visited May 7, 2019); *5 Types of Assistive Technologies That Help with Disabilities*, AUDIOEYE (Jan. 22, 2019), <https://www.audioeye.com/blog/types-of-assistive-technologies/>.

with disabilities to avoid potential ADA litigation.¹⁸⁹ Sources have generally advised businesses and private website owners to begin implementing the suggested regulations outlined in the WCAG 2.0, as the DOJ has aligned itself with this standard of accommodation.¹⁹⁰ The DOJ originally adopted these accessibility standards for state and government websites and has incorporated these standards in settlement agreements regarding places of public accommodation.¹⁹¹ While these standards may seem extensive on the surface, these guidelines suggest, *inter alia*, providing text alternatives for non-text content, providing captions and other alternatives for multi-media, as well as making all website functionality available with keyboard shortcuts, making text content recognizable to web navigation tools such as screen readers, and maximizing compatibility with assistive technology.¹⁹²

Similarly, the technology and resources allowing companies to design accessible websites have never been more available. The WCAG 2.0 guidelines suggest that companies design their websites using some, if not all, of the following technology: text alternatives for non-text content, captions or alternatives for multimedia, keyboard navigation, text-to-speech, and robust content.¹⁹³ Text alternatives are used to convey the image or its

189. Travis Crabtree, *Does My Website Need to Be ADA Compliant?*, GRAY REED: EMEDIA LAW INSIDER, <https://www.emedialaw.com/does-my-website-need-to-be-ada-compliant/> (last visited May 7, 2019); LaPlante, *supra* note 126; Wiener & Fuchs, *supra* note 28.

190. See Crabtree, *supra* note 189; H&R Block Press Release, *supra* note 131; LaPlante, *supra* note 126; DOJ Creates Web Accessibility Minefield, *supra* note 179; Jennifer S. Rusie & David Raizman, *WCAG 2.0 AA Gains Prominence as Website Accessibility Standard*, LEXOLOGY (Jan. 13, 2017), <https://www.lexology.com/library/detail.aspx?g=e74313d8-8573-4e25-9239-893474d28bc5>.

191. 81 Fed. Reg. 28658, 28683 (proposed May 9, 2016) (to be codified at 28 C.F.R. pt. 35); Roy Maurer, *DOJ Halts Plan to Create Website Accessibility Regulations*, SHRM (Sept. 25, 2017), <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/website-accessibility-disabilities-regulations-doj.aspx>.

192. Gavin Appleby et al., *The Wave of Website and Other ADA Accessibility Claims—What You Should Know*, LITTLER (Feb. 22, 2016), <https://www.littler.com/publication-press/publication/wa-ve-website-and-other-ada-accessibility-claims---what-you-should-know>; LaPlante, *supra* note 126; WCAG 2.1 at a Glance, W3C, <https://www.w3.org/WAI/WCAG20/glance/> (last visited May 7, 2019).

193. *Accessibility*, W3C, <https://www.w3.org/standards/webdesign/accessibility> (last visited May 7, 2019).

purpose on the webpage and are designed to provide an equivalent user experience for the disabled.¹⁹⁴ An example of this would be the word search appearing instead of a magnifying glass image.¹⁹⁵ Keyboard navigation allows for a keyboard to function like a mouse.¹⁹⁶ Text-to-speech allows for assistive technology devices such as screen reading software to read text.¹⁹⁷ Robust content ensures that the content is compatible with multiple types of browsers and assistive technology.¹⁹⁸ To simplify this process, small niche companies specializing in designing accessible websites have developed, while the larger platforms have already begun implementing WCAG 2.0 guidelines.¹⁹⁹ Overall, the technology and resources exist to provide businesses a smooth transition into the WCAG 2.0 accessibility guidelines if they have not already shifted into compliance.

It should be noted, however, that the ADA regulations, specifically section 36.303 covering auxiliary aids and services, are limited in authoritative scope.²⁰⁰ Defendants therefore often rely on section 36.303(a) to rebut plaintiffs' Title III claims. Section 36.303(a) provides:

A public accommodation shall take those steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the public accom-

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *See, e.g.*, ESSENTIAL ACCESSIBILITY, <https://www.essentialaccessibility.com> (last visited May 7, 2019); Rian Rietveld, *WordPress Goes WCAG*, WORDPRESS (Mar. 21, 2016, 12:00 PM), <https://make.wordpress.org/accessibility/2016/03/21/wordpress-goes-wcag/>.

200. Examples of auxiliary aids and services are provided in § 36.303. 28 C.F.R. § 36.303(b) (2018). They include generally the same items for which the WCAG 2.0 guidelines advocate, including but not limited to: (1) computer-aided transcription services; (2) assisted listening devices; (3) closed caption decoders, voice, text, and video-based communication products; (4) videotext displays; (5) braille; (6) screen reader software; and (7) large print.

modation can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden, i.e., significant difficulty or expense.²⁰¹

The terms “fundamentally alter” and “undue burden” limit the ADA’s power by providing exceptions to the ADA requirement to supply auxiliary aids and services to people with disabilities in places of public accommodation.²⁰² A public accommodation is required to provide auxiliary aids and services wherever necessary to allow for effective communication to disabled individuals.²⁰³ While no statutory definition is provided for “fundamentally alter,” courts have interpreted this to be an “individualized inquiry,” as each individual’s disability may be unique, and “whether a specific modification for a particular person’s disability would be reasonable under the circumstances” is a factual question.²⁰⁴ Title III regulations define “undue burden” to mean a “significant difficulty or expense” and provides five factors to be considered in proving such a burden.²⁰⁵ These factors include: (1) the nature and cost of the action needed, (2) the overall financial resources of the site involved as well as the number of employees and safety requirements, (3) the location of the site compared to its parent entity as well as its administrative or financial relationship to the entity, (4) the parent entity’s financial resources, and (5) if applicable, the type of entity involved.²⁰⁶

While this could limit the use of auxiliary aids in some circumstances, the “undue burden standard” test should be ap-

201. 28 C.F.R. § 36.303(a).

202. Brunner, *supra* note 31, at 179.

203. 28 C.F.R. § 36.303(c)(1).

204. PGA Tour, Inc. v. Martin, 532 U.S. 661, 688 (2001); *see* Brunner, *supra* note 31, at 178.

205. 28 C.F.R. § 36.104; *see also* Gil v. Winn-Dixie Stores, Inc., 257 F. Supp. 3d 1340, 1347 (S.D. Fla. 2017) (finding for blind plaintiff in a Title III ADA violation claim and holding that a cost of \$250,000 to make defendant’s website accessible did not constitute an undue burden).

206. 28 C.F.R. § 36.104.

plied on a case-by-case basis.²⁰⁷ Similar to the “fundamentally alter” limitation, the undue burden test is also fact specific.²⁰⁸ The general focus of the undue burden test hinges on the cost of providing the service and the type of services or resources the place of public accommodation provides.²⁰⁹ It appears that this test is rarely applied, especially to websites, but most courts apply the test based on the sense of “fairness.”²¹⁰ Those who oppose expanding the scope of Title III to include websites often argue that the costs associated with making websites accessible, especially for small companies, constitute an “undue burden.” However, as addressed above, the costs associated with making websites accessible are relatively low, and the upgrades are increasingly easy to accomplish. Further, the civil rights violations stemming from a lack of equal access to internet resources are beyond monetary value.

Due to the availability of affordable technology capable of assisting disabled individuals in accessing the internet as well as the widely accepted WCAG accessibility guidelines, Congress should amend the ADA’s definition of “place of public accommodation” to include websites. Further, the WCAG provides clear and easy guidelines to implement accessibility standards,²¹¹ which, if adopted by either Congress or the DOJ, would be useful in providing web developers and companies established guidelines when creating a website.

CONCLUSION

Congress must amend the ADA’s definition of “place of public accommodation” to include websites. Amending this definition is in line with the original purpose of the ADA and

207. Brunner, *supra* note 31, at 179 (citing 56 Fed. Reg. 35544, 35567 (July 26, 1991) (to be codified at 28 C.F.R. pt. 36)).

208. See Brunner, *supra* note 31, at 178.

209. See *id.* at 180; *What Is Considered an “Undue Hardship” for a Reasonable Accommodation?*, ADA NAT’L NETWORK, <https://adata.org/faq/what-considered-undue-hardship-reasonable-accommodation> (last updated Apr. 2019).

210. Brunner, *supra* note 31, at 180.

211. *Accessibility*, *supra* note 193.

takes steps to further the civil rights movement in America. Not only will amending this definition result in a more consistent application of Title III of the ADA, but millions of Americans will be provided access to a tremendous resource—the internet. Additionally, as noted above, considering the United Nations recognized “access to information and communications technologies, including the Web, [i]s a basic human right,”²¹² the United States—a leader in human rights—needs Congress to act on this matter. Further, as Senator Kennedy stated in his address to Congress in 1988, “there probably has not been a family in the country that has not been touched by some form of physical or mental challenge.”²¹³ It is a travesty that even with over 56.7 million Americans with disabilities who have, undoubtedly, left an impact on almost every family in America, their battle for equality continues. Time is of the essence as the internet continues to be the dominant means of accessing information, and with each day that passes, more American citizens with disabilities—Americans like Jake—are left in the dark.

212. *Id.*

213. *Hearing 100-926, supra* note 1, at 17.