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## Lessons from the Pandemic: Congress Must Act to Mandate Digital Accessibility for the Disabled Community

Shawn Grant

*Borough of Manhattan Community College, City University of New York*

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**LESSONS FROM THE PANDEMIC: CONGRESS MUST ACT TO  
MANDATE DIGITAL ACCESSIBILITY FOR THE DISABLED  
COMMUNITY**

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Shawn Grant\*

ABSTRACT

*The upheaval and disruption created by the COVID-19 pandemic has left some of our most vulnerable, the disabled community, facing increased discrimination and hardship due in part to lack of access to websites and other digital technologies. The pandemic has laid bare the extent of our dependence on technology and the perils faced by those who are unable to access that technology. This Article identifies the regulatory, judicial, and legislative failures to resolve the issue of whether digital technologies are “places of public accommodation” under Title III of the Americans with Disabilities Act. It then calls on Congress to enact a new title to the ADA which clearly mandates the removal of barriers to website accessibility, while taking into account the impact on businesses and other entities that may be subject to accessibility requirements.*

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\* J.D., Univ. of Virginia Law School; Assistant Professor, Borough of Manhattan Community College, City University of New York.

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## INTRODUCTION

If you are reading this Article, it likely means that you were able to access a website where this Article is available. There are, however, millions of people who will not have access to the information in this Article, or equal access to education, healthcare, and numerous other services, because many of the websites and digital platforms that provide these resources are not accessible by people who are disabled. Website accessibility means that websites and other digital technologies are created and designed so that people with disabilities can perceive, understand, navigate, and interact with the web.<sup>1</sup> As developers, engineers, and programmers have continued to craft the internet into a necessity of modern life, they have also erected barriers, obstacles, and minefields to web access. Images, graphics, and documents that are incompatible with screen readers and other assistive devices and a lack of audio and captioning create barriers to accessibility. COVID-19 has exacerbated the impact of these barriers.

The COVID-19 pandemic upended life in the United States and the rest of the world. The ways in which much of the population has managed life under restrictions imposed during this crisis have made clear that, more and more, consumer purchases are made through a wide range of digital platforms, online technologies, and mobile applications—and interactions for goods and services are increasingly web-based, including through entities without a brick-and-mortar presence. Life under these restrictions has highlighted how increasingly dependent we are as a society upon computers, tablets, smartphones, and other devices to meet even basic needs for goods and services and to communicate. During the pandemic, we have faced what are likely

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1. *Introduction to Web Accessibility*, W3C, <https://www.w3.org/WAI/fundamentals/accessibility-intro/> [https://perma.cc/K3DH-837S] (last updated July 11, 2019).

temporary challenges regarding accessibility—barriers to effective education, banking, employment, transportation, and other needed goods and services. For many disabled Americans,<sup>2</sup> however, these are hardships they have faced every day, long before the pandemic. Title III of the Americans with Disabilities Act (ADA) was enacted to ensure that “places of public accommodation” are accessible to the disabled community.<sup>3</sup> It is unclear, though, whether particular websites or other digital platforms fall within the scope of the ADA. The pandemic has both exacerbated and underscored the hardships created by lack of access to services and products available online.

Amidst the growing pandemic, many states and localities implemented restrictions beginning in February and March 2020 in an effort to slow the spread of COVID-19. These restrictions limited how frequently and the circumstances under which people could leave their homes. Schools closed,<sup>4</sup> and many state and local governments suggested or required that non-essential workers stay home, except to perform essential errands.<sup>5</sup> Under the more stringent restrictions, non-essential businesses could not open; those who could, worked from home; and restaurants could offer only takeout or delivery services.<sup>6</sup> For

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2. It is estimated that, as of 2019, there were at least seven million adults with a vision disability; eleven million with a hearing disability; twenty million with an ambulatory disability; fifteen million with a cognitive disability; seven million with a self-care disability; and fifteen million with an independent living disability. UNIV. OF N.H. INST. ON DISABILITY, 2020 ANNUAL DISABILITY STATISTICS COMPENDIUM 16–17 tbls.1.4–1.9 (2020). Because difficulties with vision, especially blindness, are the main impediments to use of websites and apps, this Article focuses primarily on that segment of the disabled population. *Id.*

3. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (Titles I, II, III and V codified as amended at 42 U.S.C. §§ 12101–12213, Title IV codified at 47 U.S.C. § 225).

4. Closings of public schools in many states began as early as March 2020. *29 States Announce School Closures amid Coronavirus*, CNN (Mar. 15, 2020, 10:22 PM), [https://www.cnn.com/world/live-news/coronavirus-outbreak-2-03-15-20-intl-hnk/h\\_cb43d175eb1bc46d6f53eef202868c22](https://www.cnn.com/world/live-news/coronavirus-outbreak-2-03-15-20-intl-hnk/h_cb43d175eb1bc46d6f53eef202868c22) [<https://perma.cc/Z5KN-SHM2>]. Whether to reopen schools in the fall of 2020 became a controversial question, and state and local responses varied, with some districts opening, others remaining closed, and some opening only to shut down later in the fall. Neil MacFarquhar & Apoorva Mandavilli, *Trump Officials Object, but School Doors Are Closing Around the Country*, N.Y. TIMES (Nov. 20, 2020), <https://www.nytimes.com/2020/11/20/world/trump-officials-object-but-school-doors-are-closing-across-the-country.html?searchResultPosition=52> [<https://perma.cc/NQ36-QTEX>]. Colleges and universities faced similar shutdowns, causing financial instability that may lead to permanent closures. Michael T. Nietzel, *Higher Education's Big Shake-Up Is Underway*, FORBES (Oct. 16, 2020, 1:50 PM), <https://www.forbes.com/sites/michaelt Nietzel/2020/10/16/higher-educations-big-shake-up-is-underway/?sh=6c699ab8cd53> [<https://perma.cc/9AY3-DGGE>].

5. In the United States, the level of restriction varied from state to state, on a spectrum of none to the most stringent, exemplified by those in the Northeast. Thomas Hale, Tilbe Atav, Laura Hallas, Beatriz Kira, Toby Phillips, Anna Petherick & Annalena Pott, *Variations in US States' Responses to COVID-19* (Univ. of Oxford, Blavatnik Sch. of Gov't, Working Paper No. BSG-WP-2020/034, Version 1.0, 2020), <https://www.bsg.ox.ac.uk/sites/default/files/2020-08/BSG-WP-2020-034.pdf> [<https://perma.cc/7KJF-LKS7>].

6. The “New York State on PAUSE” executive order is an example of the most stringent restrictions. Press Release, Governor Cuomo Signs the ‘New York State on PAUSE’ Executive Order, (Mar. 20, 2020), <https://www.governor.ny.gov/news/governor-cuomo-signs-new-york-state-pause-executive-order> [<https://perma.cc/7PUB-NAG8>]. As of March 22, 2020, all “non-essential businesses” were ordered closed, restrictions were placed on non-essential gatherings and use of public transportation, and “social

individuals particularly vulnerable to COVID-19,<sup>7</sup> the risks of going out were greater, and the CDC recommended heightened caution.<sup>8</sup> Use of the internet and mobile applications (apps) skyrocketed because for many, these platforms became their primary means to access needed goods and services and their only way to access schools or colleges. Online retail giant Amazon saw demand and revenues increase dramatically during the pandemic<sup>9</sup> as did other online retail services.<sup>10</sup> Grocery delivery services were swamped with requests.<sup>11</sup> Many people used online apps or restaurant websites to have restaurant meals

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distancing” of six feet from others in public was mandated. Phased reopening did not begin until the middle of May 2020 for some regions of the state. Jesse McKinley, *New York to Begin Limited Reopening in Upstate Region*, N.Y. TIMES (May 11, 2020), <https://www.nytimes.com/2020/05/11/nyregion/reopen-new-york-coronavirus.html?searchResultPosition=12>. It was not until June 2021, when target vaccination rates had been achieved, that New York lifted virtually all restrictions. Luis Ferre-Sadurni & Shawn Hubler, *A Momentous Day: New York and California Lift Most Virus Restrictions*, N.Y. TIMES (updated June 23, 2021), <https://www.nytimes.com/2021/06/15/nyregion/coronavirus-restrictions.html>.

7. The Centers for Disease Control identified the following groups as being particularly at risk for severe illness from the virus: older adults (65 and older) and those with certain underlying medical conditions, including cancer, chronic kidney disease, COPD, heart conditions, immunocompromised condition, Down syndrome, obesity and severe obesity, pregnancy, sickle cell disease, smoking and Type 2 diabetes. *Different Groups of People*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/index.html> [<https://perma.cc/UEM5-MWJY>] (last updated Apr. 21, 2021).

8. *Deciding to Go out*, CDC, <https://web.archive.org/web/20200617050115/https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/deciding-to-go-out.html> (web archive, June 17, 2020).

9. Amazon reported a revenue increase for Q2 2020 of “40% to \$88.90 billion” (compared to revenue of \$63.4 billion in Q2 2019). Press Release, Amazon, Amazon.com Announces Second Quarter Results (July 30, 2020, 4:08 PM), <https://ir.aboutamazon.com/news-release/news-release-details/2020/Amazon.com-Announces-Second-Quarter-Results/default.aspx> [<https://perma.cc/WV6C-LD3P>]. The company increased its grocery delivery capacity by over 160% “to support customers during COVID-19.” *Id.* Online grocery sales tripled during Q2 2020. *Id.* Overall for 2020, Amazon’s net sales increased by 42% compared to 2019. Press Release, Amazon, Amazon.com Announces Financial Results and CEO Transition (Feb. 23, 2021), <https://ir.aboutamazon.com/news-release/news-release-details/2021/Amazon.com-Announces-Fourth-Quarter-Results/default.aspx> [<https://perma.cc/EH5V-3SBE>].

10. *E.g.*, Gillian Friedman, *Big Box Retailers’ Profits Surge as Pandemic Marches on*, N.Y. TIMES (Aug. 19, 2020), <https://www.nytimes.com/2020/08/19/business/coronavirus-walmart-target-home-depot.html> [<https://perma.cc/5QZ3-REXH>]; Adriana Nunez, *Target Rounds out 2020 with Impressive Growth but Will It Carry into 2021?*, BUS. INSIDER (Mar. 3, 2021), <https://www.businessinsider.com/target-closes-out-q4-2020-with-ecommerce-sales-boom-2021-3> [<https://perma.cc/FN74-DPXF>]; Fareeha Ali, *Omnichannel Fuels Target’s 145% Growth in Ecommerce*, DIGIT. COM. 360 (Mar. 2, 2021), <https://www.digitalcommerce360.com/2021/03/02/omnichannel-fuels-targets-145-growth-in-ecommerce/> [<https://perma.cc/4U4E-K92V>]; Sarah Perez, *Pandemic Helps Drive Walmart E-Commerce Sales up 97% in Second Quarter*, TECHCRUNCH (Aug. 18, 2020), <https://techcrunch.com/2020/08/18/pandemic-helped-drive-walmart-e-commerce-sales-up-97-in-second-quarter/> [<https://perma.cc/38FN-DJBQ>].

11. For instance, Ahold Delhaize, the Dutch parent of several U.S. grocery operations including Food Lion, Giant Foods, Hannaford’s, Stop & Shop, and, as of January 5, 2021, the New York-based Fresh Direct, reported that for 2020, “[o]nline [U.S.] sales were €1,968 million, up by 105.1% compared to last year at constant exchange rates. The increase was mainly driven by the pandemic, as customers changed their shopping habits and leaned towards the e-commerce market.” AHOLD DELHAIZE, LEADING TOGETHER THROUGH CHANGE: ANNUAL REPORT 2020, 75 (2020), [https://media.aholddelhaize.com/media/emmkjowe/annual\\_report\\_2020\\_full\\_links-1.pdf?t=637526943268000000](https://media.aholddelhaize.com/media/emmkjowe/annual_report_2020_full_links-1.pdf?t=637526943268000000) [<https://perma.cc/V9SP-XWMQ>]. Amazon’s online grocery sales through Amazon Fresh and Whole Foods tripled during its Q2 2020, during the height of the pandemic, compared to the previous year at the same time. Amazon.com Announces Second Quarter Results, *supra* note 9.

delivered.<sup>12</sup> Registrations for online courses soared.<sup>13</sup> Zoom, an app which allows video and audio communication as well as screen sharing among groups, became a familiar noun and verb.<sup>14</sup> While some could rely on technology or the assistance of others, those unable to access the internet or mobile apps did not have it as easy. Trying to secure food, toiletries, household supplies, needed medications, and even non-emergency medical consultations proved very difficult. This increased reliance on digital platforms during COVID-19 has made the digital divide even clearer. Disabled people often lack full access to the array of resources required to carry out the basic necessities of daily life during the “new normal.”<sup>15</sup>

The ADA was enacted more than thirty years ago. At that time, lawmakers could not have imagined technology that would make working from home and online learning possible. The reach of Title III of the Act, which prohibits discrimination against the disabled with respect to places of public accommodation,<sup>16</sup> has not kept pace with the rapid progress in digital technological innovations; courts struggle to apply a twentieth-century statute to twenty-first century technology. As one commentator put it, the “ADA is analog in a digital world.”<sup>17</sup>

12. Liyin Yeo, *Which Company Is Winning the Restaurant Food Delivery War?*, SECOND MEASURE (Aug. 18, 2020), <https://secondmeasure.com/datapoints/food-delivery-services-grubhub-ubereats-doordash-postmates/> [<https://perma.cc/8W4J-UPQU>].

13. Steve Lohr, *Remember the MOOCs? After Near-Death, They're Booming*, N.Y. TIMES (May 26, 2020), <https://www.nytimes.com/2020/05/26/technology/moocs-online-learning.html?referrer=masthead> [<https://perma.cc/9H9J-DXZ4>].

14. Dan Gallagher, *Zoom Is a Verb—and a Target*, WALL ST. J. (Sept. 21, 2021, 6:35 PM), <https://www.wsj.com/articles/zoom-is-a-verb-and-a-target-11632263728> [<https://perma.cc/ZU4X-SDX2>]. The company describes its application as allowing people to connect “through frictionless and secure video, phone, chat, and content sharing and enabl[ing] face-to-face video experiences for thousands of people in a single meeting across disparate devices and locations.” Zoom Video Commc'ns, Inc., Annual Report (Form 10-K) 6 (Mar. 5, 2021), <https://www.sec.gov/Archives/edgar/data/1585521/000158552121000048/zm-20210131.htm> [<https://perma.cc/QJN4-785W>]. The company saw its revenues increase by 169% over the previous year for the quarter which ended on April 30, 2020. *Zoom Reports First Quarter Results for Fiscal Year 2021*, ZOOM (June 2, 2020), <https://investors.zoom.us/node/7661/pdf> [<https://perma.cc/Z5YK-7TBZ>]. Its revenues increased 355% for the quarter which ended on July 31, 2020. *Zoom Reports Second Quarter Results for Fiscal Year 2021*, ZOOM, <https://investors.zoom.us/node/7996/pdf> [<https://perma.cc/65AD-D9TF>]. Zoom's stock price rose from under \$100 to over \$300 over the course of 2020. *Zoom Video Communications, Inc. (ZM)*, YAHOO! FIN., <https://finance.yahoo.com/quote/ZM/history/> [<https://perma.cc/MJ7A-HPS5>] (click on the linked dates next to “Time Period” to input relevant timeframe; then select “Apply”).

15. Many who are not disabled also lack access to the internet. The economic and racial digital divides are beyond the scope of this Article, except to the extent that they intersect with the divide based on disability. See *infra* notes 138–40 and accompanying text. Also beyond the scope of this Article are the many other disparities that the pandemic has exposed.

16. 42 U.S.C. §§ 12181–12189.

17. Jason P. Brown & Robert T. Quackenboss, *Supreme Court Passes on a Case That Likely Would Have Clarified the Scope of the ADA Regarding Access to Private Businesses' Virtual Platforms*, HUNTON ANDREWS KURTH (Oct. 9, 2019), <https://www.huntonlaborblog.com/2019/10/articles/public-accommodations/supreme-court-passes-on-a-case-that-likely-would-have-clarified-the-scope-of-the-ada-regarding-access-to-private-businesses-virtual-platforms/> [<https://perma.cc/UX7T-46E9>].

As discussed in Part I, there is currently a lack of cogent guidance from the Department of Justice (DOJ), Congress, and the judiciary as to how to interpret the phrase “place of public accommodation.” The lack of agreement as to whether websites and mobile applications are covered under Title III of the ADA disadvantages both consumers with disabilities and businesses. These businesses operate in an environment of uncertainty regarding the applicable legal standards for today’s ever-advancing technologies. Since 2013, the number of cases filed under Title III has increased sharply, plateauing only during the first wave of the pandemic.<sup>18</sup>

Digital accessibility is more important than ever. Accessibility issues can no longer be subject to the haphazard development of case law through the circuit courts. Rather, prompt federal legislative action must establish a statutory mandate that consistently secures access for the disabled to websites and other emerging technologies.

This Article argues that Congress must, without further delay, end the discrimination against people with disabilities. Lawmakers should enact cogent legislation that provides guidance to private entities about making their websites and other technologies accessible.<sup>19</sup> Part I provides a brief review of the ADA’s history and the judicial and regulatory landscape around interpreting and enforcing Title III. This Part emphasizes that Title III, as it is currently written and interpreted, fails to adequately address the digital accessibility problems faced by the disabled community. Part II discusses the impact that our increased dependency on the internet due to the COVID-19 pandemic has on disabled communities already suffering from the inequalities of a digital divide. It also addresses the economic impact of COVID-19 and burgeoning ADA website accessibility litigation on businesses that, due to lack of guidance, do not know whether, or even how, to make their websites compliant. Part III explores the competing concerns that new legislation must address, discusses the strengths and weaknesses of various legislative proposals, and offers requirements for effective legislation. The Article concludes that Congress should create an additional title to the ADA to address the accessibility of websites, mobile apps, and future technologies. This title should set clear guidelines regarding coverage and include a statutory mandate for promulgation of regulations.

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18. See *infra* notes 185–91 and accompanying text.

19. This Article will primarily refer to access to “websites” but is meant to include mobile applications and other similar technologies.

I. TITLE III AS CURRENTLY WRITTEN AND INTERPRETED FAILS TO SECURE  
DIGITAL ACCESS FOR THE DISABLED

A. *The Statutory Landscape*

Enabling those with disabilities to “exercise their rights and participate in mainstream American life” was one of the noble goals of the Americans with Disabilities Act of 1990.<sup>20</sup> To achieve that goal, Title I prohibits discrimination by private employers, state and local governments, employment agencies, and labor unions “against qualified individuals with disabilities in applying for jobs, hiring, firing and job training.”<sup>21</sup> Title II prohibits discrimination by state and local government entities in services, programs, and activities, and “extends the prohibition on discrimination established by section 504 of the Rehabilitation Act of 1971, as amended, 29 U.S.C. 794, to all activities of state and local governments regardless of whether these entities receive Federal financial assistance.”<sup>22</sup> Title III, at issue here, provides that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”<sup>23</sup> “Public accommodation” is referenced in the definitions section in the statute, which provides that “[t]he following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect interstate commerce,” and then lists twelve categories of businesses or facilities, including hotels, restaurants, theaters, sales or rental establishments, schools, day care facilities, recreation facilities, and service facilities, including professional offices.<sup>24</sup> While the text reveals the legislature’s intent to make the

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20. 136 CONG. REC. 17,376 (1990) (remarks of Sen. Robert Dole).

21. 42 U.S.C. § 12111.

22. 42 U.S.C. § 12131.

23. 42 U.S.C. § 12182(a).

24. 42 U.S.C. § 12181(7) lists the following entities:

- (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;

scope of the statute clear, Congress did not specifically define “place of public accommodation.” This oversight has been the primary obstacle to applying Title III to websites.

Discrimination under Title III includes “a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities.”<sup>25</sup> Such a failure is not discrimination if “the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages or accommodations.”<sup>26</sup> Discrimination may also be “a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services.”<sup>27</sup> As with the previous subsection, an entity can avoid liability if it can demonstrate that taking such steps would fundamentally alter the nature of such goods or services, or “would result in an undue burden.”<sup>28</sup>

Although the ADA aims to ensure that everyone can participate in mainstream American life, how we live has undergone a sea change from the time the ADA was enacted. The internet and the World Wide Web as we know it today did not exist in 1990.<sup>29</sup> Although the legislative

- 
- (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.

25. 42 U.S.C. § 12182(b)(2)(A)(ii).

26. *Id.*

27. 42 U.S.C. § 12182(b)(2)(A)(iii).

28. *Id.*

29. The internet was invented in the late 1960s, giving rise to the modern internet in 1983. Evan Andrews, *Who Invented the Internet?*, HISTORY (Oct. 28, 2019), <https://>

history of the statute states that “the types of accommodations and services . . . should keep pace with the rapidly changing technology of the times,”<sup>30</sup> only the most visionary legislator could have imagined business and communication conducted through smartphones, video conferencing, or social media. Thus, while the ADA provides relatively clear guidance regarding physical barriers, it fails to do the same for the digital world.

Not surprisingly, much early Title III litigation involved physical barriers to access.<sup>31</sup> However, as early as 1994, courts began to consider whether Title III of the ADA applied only to physical spaces,<sup>32</sup> a significant issue in determining the statute’s application to websites. By 1999, the World Wide Web Consortium issued its first set of guidelines for website accessibility,<sup>33</sup> and the National Federation of the Blind filed its first case regarding the accessibility of an internet-based service.<sup>34</sup> Scholars and commentators debated whether websites were places of public accommodation under Title III.<sup>35</sup> In light of these developing issues, Congress held hearings in 2000 “to consider the impact of the ADA on the internet.”<sup>36</sup> The subcommittee Chair noted that the federal government planned to issue regulations in 2000 regarding the accessibility of federal department and agency websites.<sup>37</sup> The

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[www.history.com/news/who-invented-the-internet](http://www.history.com/news/who-invented-the-internet) [https://perma.cc/5AF6-UZGM]. The World Wide Web was created in 1989 but didn’t become publicly available until 1991. *Id.*

30. H.R. REP. NO. 101-485, pt. 2, at 108 (1990).

31. See, e.g., *Pinnock v. Int’l House of Pancakes Franchisee*, 844 F. Supp. 574 (S.D. Cal. 1993) (wheelchair access to restroom in restaurant); *United States v. Days Inns of Am., Inc.*, 997 F. Supp. 1080 (C.D. Ill. 1998) (accessibility of construction of new hotel); *Indep. Living Res. v. Or. Arena Corp.*, 982 F. Supp. 698 (D. Or. 1997) (sight lines in arena for wheelchair seating), *supplemented*, 1 F. Supp. 2d 1159 (D. Or. 1998).

32. *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994).

33. *Web Content Accessibility Guidelines 1.0: W3C Recommendation 5-May-1999*, W3C (1999), <https://www.w3.org/TR/WAI-WEBCONTENT/> [https://perma.cc/HEC7-EMUB].

34. In 1999, the National Federation of the Blind sued America Online (“AOL”), alleging that AOL’s internet services were inaccessible to blind persons. *Complaint and Request for Injunctive Relief, Nat’l Fed’n of the Blind, Inc. v. Am. Online, Inc.*, No. 99-CV-12303 (D. Mass. Nov. 4, 1999); see Barbara Pierce, *NFB Sues AOL, NAT’L FED’N OF THE BLIND*, <https://nfb.org/sites/default/files/images/nfb/publications/bm/bm99/bm991201.htm> [https://perma.cc/F5EZ-WX3D]. The case was settled in July 2000. *AOL Agrees to Make Service Accessible to the Blind*, N.Y. TIMES (July 27, 2000), <https://www.nytimes.com/2000/07/27/technology/aol-agrees-to-make-service-accessible-to-the-blind.html> [https://perma.cc/44QN-35EM].

35. See, e.g., Jonathan Bick, *Americans with Disabilities Act and the Internet*, 10 ALB. L.J. SCI. & TECH. 205 (2000); Patrick Maroney, *The Wrong Tool for the Right Job*, 2 VAND. J. ENT. L. & PRAC. 191 (2000); Tom Harkin, *The Americans with Disabilities Act: A Framework for the Future*, 85 IOWA L. REV. 1575 (2000); Dana Whitehead Mckee & Deborah T. Fleischaker, *ADA and the Internet: Must Websites Be Accessible?*, 33 MD. B.J. 34 (2000).

36. *Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 106th Cong. 2 (2000) (opening statement of Charles T. Canady, Chairman).

37. *Id.* at 1. The regulations were drafted by the Electronic and Information Technology Access Advisory Committee for Federal department and agency online publishing. *Id.*

subcommittee heard from two panels. The first panel addressed technical issues, as well as whether the ADA was “an appropriate vehicle for increasing access to the internet by the disabled.”<sup>38</sup> The second addressed “the legal and policy implications of the ADA’s application to private internet sites.”<sup>39</sup> But despite the attention, no amendments were made to Title III at that time.

Congress passed the ADA Amendments Act in 2008.<sup>40</sup> The primary purpose of the amendments was to broaden the definition of “disabled,” which the Supreme Court narrowed under a series of rulings.<sup>41</sup> Despite the emerging question of Title III’s applicability to websites, Congress did not include clarifying amendments to Title III at that time. None have been made to date.<sup>42</sup>

Although Congress has not amended Title III with respect to websites, it has enacted other legislation governing digital technology. For instance, in 1998, Congress amended § 508 of the Rehabilitation Act of 1973 to add accessibility requirements for websites operated by the federal government.<sup>43</sup> More broadly, § 508 mandates that “electronic and information technology” of federal agencies and departments be accessible to persons with disabilities, including federal employees and members of the public seeking information and services.<sup>44</sup> Congress updated § 508 in 2017 to require, inter alia, that websites (and other digital technologies) comply with the Web Content Accessibility Guidelines (WCAG) 2.0 standard.<sup>45</sup> Although § 508 goes beyond the

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38. *Id.* at 11–12.

39. *Id.*

40. See ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

41. In the Findings and Purposes section, Congress specifically declared that two cases, *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999), *overturned due to legislative action* (2009), and *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002) *overturned due to legislative action* (2009), “have narrowed the broad scope of protection intended to be afforded by the ADA” and rejected the reasoning and standards of those cases. See ADA Amendments Act of 2008 § 2(a)(4)–(6).

42. Somewhat ironically, in 2018, 103 members of Congress acknowledged the need for “Congress to act to provide greater clarity through the legislative process” in a letter chastising the Department of Justice for failing to issue regulations regarding website accessibility. Letter from Members of Cong. to Jeff Sessions, Att’y Gen. (June 20, 2018), <https://www.adatitleiii.com/wp-content/uploads/sites/121/2018/06/ADA-Final-003.pdf> [<https://perma.cc/39RG-CEBN>] [hereinafter Letter to Att’y Gen. Sessions].

43. Workforce Investment Act of 1998, Pub. L. No. 105-220, § 408, 112 Stat. 936, 1203 (amending 29 U.S.C. § 794d).

44. 29 U.S.C. § 794d(a)(1)(A).

45. *Do Section 508 Accessibility Standards Apply to My Website?*, SECTION 508 (Dec. 12, 2017), <https://www.section508.gov/blog/do-section-508-accessibility-standards-apply-to-mywebsite> [<https://perma.cc/SG3R-KN4G>]. WCAG 2.0 standards were introduced by the Website Accessibility Initiative of the World Wide Web Consortium (W3C) to define requirements and provide recommendations for making websites (and other digital technologies) accessible to people with disabilities. *Web Content Accessibility Guidelines (WCAG) 2.0*, W3C (Dec. 11, 2008), <https://www.w3.org/TR/WCAG20/#intro-layers-guidance> [<https://perma.cc/55Z5-L9K9>]. It has three levels—A, AA, and AAA—with A being the lowest threshold requirement and AAA requiring the highest level of compliance. *Id.* It consists of twelve guidelines organized under four principles.

requirements of the ADA, its implementation was widely criticized for not going far enough. Many of its proponents saw its implementation as a missed opportunity to use the federal government's procurement power to extend greater internet accessibility to the disabled community.<sup>46</sup> Instead, § 508 has been largely limited to ensuring that “federal employees” have access to technology within the workplace.<sup>47</sup> Another criticism of § 508 is the lack of consistent guidance and enforcement.<sup>48</sup>

The Twenty First Century Communications and Video Accessibility Act of 2010 (CVAA) requires that federal laws regulating communications, media services, content, and equipment be updated to increase accessibility for users with disabilities.<sup>49</sup> The CVAA provides guidelines for video programming and telecommunications—including electronic messaging, video chat, and internet-based voice chat and captioning of video content delivered through the internet.<sup>50</sup>

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Principle 1: . . . Information and user interface components must be presentable to users in ways they can perceive. . . . Principle 2: . . . User interface components and navigation must be operable. . . . Principle 3: . . . Information and the operation of user interface must be understandable. . . . Principle 4: . . . Content must be robust enough that it can be interpreted by a wide variety of user agents, including assistive technologies.

*Id.*

46. Ali Abrar & Kerry Dingle, *From Madness to Method: The Americans with Disabilities Act Meets the Internet*, 44 HARV. C.R.-C.L. L. REV. 133, 151 (2009) (“[S]ome commentators and members of the government expressed their hope that the Section 508 Amendment would motivate a broader accessibility movement encompassing the entire Internet . . . .” (footnotes omitted)).

47. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 508, 87 Stat. 355 (codified as amended at 29 U.S.C. § 794(d)(1)(A)) (“[E]ach Federal department or agency shall ensure, unless an undue burden would be imposed on the department or agency, that the electronic and information technology allows, regardless of the type of medium of the technology . . . (i) individuals with disabilities who are Federal employees to have access to and use of information and data that is comparable to the access to and use of the information and data by Federal employees who are not individuals with disabilities.”).

48. One of the key issues regarding the efficacy of § 508 is that no agency is responsible for enforcing compliance. Although the Access Board is responsible for providing oversight, training, and technical assistance with respect to § 508, it does not “explicitly have an enforcement role.” NAT’L COUNCIL ON DISABILITY, NATIONAL DISABILITY POLICY: A PROGRESS REPORT, HAS THE PROMISE BEEN KEPT? FEDERAL ENFORCEMENT OF DISABILITY RIGHTS LAWS 82 (2018), [https://ncd.gov/sites/default/files/Documents/NCD\\_Federal-Enforcement\\_508.pdf](https://ncd.gov/sites/default/files/Documents/NCD_Federal-Enforcement_508.pdf) [<https://perma.cc/K4CG-TCF3>]. The DOJ, which is required to conduct surveys and provide a biennial report to the President and Congress regarding the status of federal agency compliance with the statute, has failed to consistently fulfill its responsibility to do so—filing reports only in 2000, 2004, and 2012. *Id.* The reports that the agencies themselves are required to provide to the Chief Information Officer Council’s Accessibility Community of Practice, which could potentially provide information regarding the status of compliance and make recommendations, are not publicly available, further hampering the ability to determine compliance. *Id.*

49. The Twenty First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111–260, 124 Stat. 2751.

50. *Id.*

Several countries outside the U.S. have enacted legislation mandating that private entities make their websites accessible to people with disabilities.<sup>51</sup> A number of international conventions also support the idea that access to information and technology such as the internet is a human right. In 2016, a report from the Human Rights Council of the United Nations General Assembly declared that access to the internet is a human right.<sup>52</sup> However, as discussed below, Congress has failed to directly address the issue of access to websites and other platforms. The pandemic underscored that this failure must be remedied.<sup>53</sup>

### B. *The Case Law*

A major impediment to applying Title III to websites is the phrase “place of public accommodation,”<sup>54</sup> as courts struggle to determine if a website is such a “place.” Early Courts of Appeals cases, most involving insurance or benefit plans, influenced this area of law. Some courts held that a physical location was required to constitute a place of public accommodation,<sup>55</sup> while others disagreed and held that a physical

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51. See *Web Accessibility Laws & Policies*, W3C, <https://www.w3.org/WAI/policies/> [<https://perma.cc/K6HR-LKQ4>] (last updated Mar. 21, 2018).

52. Human Rights Council Res. 32/13, U.N. Doc. A/HRC/32/L.20 (June 27, 2016). Moreover, Article 9 of the Convention on the Rights of Persons with Disabilities (CRPD), requires states that are parties to the convention to “take appropriate measures to ensure to persons with disabilities access, on an equal basis with others . . . to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas” including “the identification and elimination of obstacles and barriers to accessibility.” G.A. Res. 61/106, art. 9, Convention on the Rights of Persons with Disabilities (Jan. 24, 2007). Article 9 also obligates parties to promote “other appropriate forms of assistance and support to persons with disabilities to ensure their access to information” and “access for persons with disabilities to new information and communications technologies and systems, including the Internet.” *Id.* Although signed by President Obama in 2009, the United States Senate has twice failed to ratify the CRPD, legislation which would likely assist in fulfilling the goals of the ADA. Arlene S. Kanter, *Let's Try Again: Why the United States Should Ratify the United Nations Convention on the Rights of People with Disabilities*, 35 *TOURO L. REV.* 301, 330–33 (2019).

53. One proposed bill, H.R. 620, attempts to address a symptom, rather than the problem. See ADA Education and Reform Act, H.R. 620, 115th Cong. (2017). Since 2013, the number of lawsuits under Title III has risen sharply. See *infra* notes 185–91 and accompanying text. The bill sought to curb that rise by implementing procedural hurdles, such as notice and a waiting period, before suits could be brought. *Id.* § 3. More recently, another bill along similar lines has been offered; that new bill at least takes a stab at mandating accessibility. Online Accessibility Act, H.R. 6478, 116th Cong. (2020), reintroduced as H.R. 1100, 117th Cong. § 601 (2021). See *supra* Section III.C.

54. Title III of the ADA provides that “[n]o individual shall be discriminated against on the basis of a disability . . . by any person who owns, leases (or leases to), or operates a place of public accommodation.” 42 U.S.C. § 12182(a).

55. *E.g.*, *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 . . . .”); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114–15 (9th Cir. 2000) (“[S]ome connection between the good or service

location was not necessary to establish a place of public accommodation.<sup>56</sup> The first two cases to specifically mention websites or the internet did so in dicta, since neither case actually involved the internet or a website.<sup>57</sup> The first case involving internet services was filed in 1999,<sup>58</sup> and the first reported decision came in 2002.<sup>59</sup> With no direct circuit precedent, courts addressing the question of website accessibility generally interpreted Title III's applicability with reference to earlier rulings as to whether "place of public accommodation" or "public accommodation" requires a physical location.

Most decisions now acknowledge at least some circumstances in which a website may constitute a "public accommodation" or "place of public accommodation," but those circumstances vary among the circuits. The cases may be roughly divided into three categories, and there may now be a fourth with the Eleventh Circuit's recent decision in *Gil v. Winn-Dixie Stores, Inc.*<sup>60</sup>

In the strictest view, the requirement of a physical place has meant that a business that has no brick-and-mortar presence and operates only through a website is not subject to Title III. Under this

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complained of and an actual physical place is required ... [therefore] an insurance company administering an employer-provided disability policy is not a 'place of public accommodation.'")

56. *E.g.*, *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n. of New England, Inc.*, 37 F.3d 12, 20 (1st Cir. 1994) ("[To] limit the application of Title III to physical structures which persons must enter to obtain goods and services would run afoul of the purposes of the ADA and would severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public.") (concluding that the claims against the trade association and its administering trust for health benefits should not have been dismissed); *Palozzi v. Allstate Life Ins. Co.*, 198 F.3d 28 (2d Cir. 1999), *opinion amended on denial of reh'g*, 204 F.3d 392 (2d Cir. 2000); *see also* *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279, 1283 (11th Cir. 2002) (holding that, although defendants' automated telephone line was not at a physical location, Title III covers both tangible and intangible barriers that restrict a disabled person's ability to enjoy a defendant entity's goods, services and privileges). *Rendon* was distinguished by *Gil v. Winn-Dixie Stores, Inc.*, 993 F.3d 1266 (11th Cir. 2021).

57. *See* *Morgan v. Joint Admin. Bd.*, 268 F.3d 456, 459 (7th Cir. 2001) ("The defendant asks us to interpret 'public accommodation' literally, as denoting a physical site, such as a store or a hotel, but we have already rejected that interpretation. An insurance company can no more refuse to sell a policy to a disabled person over the Internet than a furniture store can refuse to sell furniture to a disabled person who enters the store . . . . 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 good or service be offered to the public."); *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999) ("The core meaning of this provision [42 U.S.C. § 12182(a)], plainly enough, is that the owner or operator of a store, hotel, restaurant, dentist's office, travel agency, theater, Web site or other facility[,] whether in physical space or in electronic space . . . that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do.")

58. *Nat'l Fed'n of the Blind, Inc. v. Am. Online, Inc.*, No. 99-CV-12303 (D. Mass. Nov. 4, 1999); *see* *Barbara Pierce, NFB Sues AOL, NAT'L FED'N OF THE BLIND*, <https://www.nfb.org/sites/www.nfb.org/files/images/nfb/publications/bm/bm99/bm991201.htm> [<https://perma.cc/F5EZ-WX3D>].

59. *See* *Access Now, Inc. v. Sw. Airlines, Co.*, 227 F. Supp. 2d 1312, 1321 (S.D. Fla. 2002) (holding airline's internet website was not a place of public accommodation under Title III of the ADA).

60. *Gil v. Winn-Dixie Stores, Inc.*, 993 F.3d 1266 (11th Cir. 2021).

interpretation, courts have held that popular sites such as Netflix,<sup>61</sup> eBay,<sup>62</sup> and Facebook<sup>63</sup> are not places of public accommodation because they “operate only in cyberspace.”<sup>64</sup>

In the more prevalent intermediate interpretation, a website is subject to Title III if it has a nexus to a physical location. The most noted recent example of the nexus test is the Ninth Circuit’s decision in *Robles v. Domino’s Pizza, LLC*.<sup>65</sup> In *Robles*, the blind plaintiff alleged that Domino’s violated Title III of the ADA by failing to make its websites and mobile apps fully accessible to users who are blind or visually impaired.<sup>66</sup> The district court held that although the ADA applied to Domino’s website and app, under the primary jurisdiction doctrine, applying the ADA in the absence of clear guidance from the DOJ regarding web accessibility would violate Domino’s due process rights.<sup>67</sup> The Ninth Circuit agreed with the district court that the ADA applied to Domino’s website and app.<sup>68</sup> The court reasoned that Title III and DOJ regulations required that places of public accommodation “provide auxiliary aids and services to make visual materials available to individuals who are blind.”<sup>69</sup> The court noted that although customers primarily accessed the website and app outside of the physical restaurant, the ADA “applies to the services of a place of public accommodation, not services in a place of public accommodation.”<sup>70</sup> Customers used the website and app to locate restaurants and to order pizza for pick up or delivery.<sup>71</sup> Thus, any alleged “inaccessibility of Domino’s website and app impedes access to the goods and services of its physical pizza franchises – which are places of accommodation.”<sup>72</sup> The court found this “nexus” between the website and the services available at Domino’s physical locations to be “critical to [its] analysis.”<sup>73</sup> Indeed, the court specifically declined to consider whether the inaccessibility of a website or app of a physical place of public accommodation that does not impede access to the goods and services

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61. *Cullen v. Netflix, Inc.*, 600 F. App’x 508, 509 (9th Cir. 2015) (holding that Netflix’s services are not connected to any physical place, and therefore not subject to Title III).

62. *Earll v. eBay, Inc.*, 599 F. App’x 695 (9th Cir. 2015).

63. *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1115 (N.D. Cal. 2011).

64. *Id.*

65. *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 122 (2019).

66. *Id.* at 902–03.

67. *Robles v. Domino’s Pizza, LLC*, No. 16-CV-06599, 2017 WL 1330216, at \*8 (C.D. Cal. Mar. 20, 2017), *rev’d and remanded sub nom.*, *Robles*, 913 F.3d 898.

68. *Robles*, 913 F.3d at 904.

69. *Id.* at 905.

70. *Id.* (quoting *Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 953 (N.D. Cal. 2006)).

71. *Id.*

72. *Id.*

73. *Id.*

of its physical location runs afoul of Title III.<sup>74</sup> The Ninth Circuit reversed the district court with respect to Domino's due process and primary jurisdiction claims and remanded the case to the district court to determine "whether Domino's website and app provide the blind with effective communication and full and equal enjoyment of its products and services as the ADA mandates."<sup>75</sup>

The nexus test as expressed in *Robles* can lead to the absurd result that some portions of a website might be subject to the ADA and other portions might not.<sup>76</sup> For instance, a website selling goods might offer home delivery or in-store pickup. Because shopping online for home delivery might arguably not have a "nexus" with a brick-and-mortar store, that portion of the website might not be subject to the accessibility requirements of Title III.<sup>77</sup> Thus, the nexus test could mean that "[d]isabled individuals have a right to 'pre-shop' in their home, but no right to actually make a purchase in their home."<sup>78</sup>

In the most expansive interpretation of the ADA, courts have rejected the argument that website accessibility under Title III requires a nexus to a physical space. Rather, by broadly interpreting the plain meaning of the statutory language and considering its legislative history, these courts concluded that websites—even freestanding websites—fall within the ambit of places of public accommodation.<sup>79</sup> Thus, a blind plaintiff can state a claim under Title III when the inaccessibility of defendant's website did not allow the plaintiff to make purchases online for delivery, even though this inaccessibility might not impede the plaintiff's ability to make purchases at the defendant's brick-and-mortar stores.<sup>80</sup> In this view of the statute, courts have found even web-only entities such as Scribd and Netflix to be subject to Title III.<sup>81</sup>

The Eleventh Circuit's recent decision in *Gil v. Winn-Dixie Stores, Inc.*,<sup>82</sup> may represent yet another approach. At the time of suit, the website of defendant Winn-Dixie, an operator of a chain of

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74. *Id.* at 905 n.6.

75. *Id.* at 910–11.

76. *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 396–97 (E.D.N.Y. 2017).

77. *Id.* at 396 (discussing *Nat'l Fed'n of the Blind v. Target Corp.*, No. C 06-01802, 2007 WL 1223755, at \*4 (N.D. Cal. Apr. 25, 2007)).

78. *Id.* at 397.

79. *E.g., id.* at 397–98; *Gniewkowski v. Lettuce Entertain You Enters., Inc.*, 251 F. Supp. 3d 908, 914–18 (W.D. Pa. 2017) (holding defendant bank's website was place of public accommodation since alleged discrimination took place on property that the bank owned, operated, and controlled—its website); *West v. DocuSign, Inc.*, No. 19-cv-0501, 2019 WL 3843054, at \*4 (W.D. Pa. Aug. 15, 2019) (holding defendant's website is a place of public accommodation)

80. *Andrews v. Blick Art Materials*, 268 F. Supp. 3d at 397–98.

81. *Nat'l Fed'n of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565 (D. Vt. 2015); *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196 (D. Mass. 2012).

82. *Gil v. Winn-Dixie Stores, Inc.*, 993 F.3d 1266 (11th Cir. 2021).

supermarkets, did not allow consumers to make purchases through the website.<sup>83</sup> The site did, however, offer two services that were inaccessible to Gil, the legally blind plaintiff. Consumers could use the website (1) to order prescription refills that would be picked up at a store and (2) to link manufacturers' digital coupons to their loyalty cards so that the coupons would be automatically applied upon checking out at a store.<sup>84</sup>

The district court entered judgment for the plaintiff after a bench trial.<sup>85</sup> The court declined to decide whether the website itself was a public accommodation.<sup>86</sup> However, it did conclude that there was a sufficient nexus between Winn-Dixie's website and its physical location, as the facts demonstrated that "the website [was] heavily integrated with Winn-Dixie's physical store locations and operates as a gateway to the physical store locations."<sup>87</sup> Thus, the court held that "Winn-Dixie has violated the ADA because the inaccessibility of its website denied Gil the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations that Winn-Dixie offers to its sighted customers."<sup>88</sup>

After two and a half years of deliberation, during which the Ninth Circuit decided and the Supreme Court denied certiorari in *Robles*, the Eleventh Circuit finally issued its decision. The reviewing court vacated the judgment of the district court, but the decision was accompanied by a vigorous dissent.<sup>89</sup> The court answered the first question posed—whether the website itself a place of public accommodation—with a decided no.<sup>90</sup> The court stated that the "statutory language in Title III of the ADA defining 'public accommodation' is unambiguous and clear" because all of "the listed types of locations are tangible, physical spaces."<sup>91</sup> The court then addressed the general discrimination provision of Title III<sup>92</sup> to determine whether the website otherwise violated Title III. The court held that the inaccessibility of the website did not present an "intangible barrier" to accessing the defendant's goods, services, privileges, or advantages, because the website was not a

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83. *Id.* at 1270.

84. *Id.*

85. *Gil v. Winn-Dixie Stores, Inc.* 257 F. Supp. 3d 1340 (S.D. Fla. 2017), *vacated and remanded*, 993 F.3d 1266 (11th Cir. 2021).

86. *Id.* at 1349.

87. *Id.*

88. *Id.*

89. *Gil*, 993 F.3d 1266.

90. *Id.* at 1277.

91. *Id.* at 1276–77.

92. Under 42 U.S.C. § 12182(b)(2)(A)(iii), discrimination occurs when a place of public accommodation "fail[s] to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services."

point of sale, and, although some interactions could be initiated on the website, all had to be completed at the physical location of a store.<sup>93</sup> The court distinguished its decision in *Rendon v. Valleycrest Productions, Ltd.*<sup>94</sup> In *Rendon*, the Eleventh Circuit rejected the argument that a game show's telephone screening system, the only method by which an individual could become a contestant, did not violate Title III because it did not present a physical barrier to the auditorium or studio where the show was recorded.<sup>95</sup> The court stated:

Title III covers both tangible barriers, that is, physical and architectural barriers that would prevent a disabled person from entering an accommodation's facilities and accessing its goods, services and privileges . . . and intangible barriers, such as eligibility requirements and screening rules or discriminatory policies and procedures that restrict a disabled person's ability to enjoy the defendant entity's goods, services and privileges. . . . There is nothing in the text of the statute to suggest that discrimination must occur on site to offend the ADA.<sup>96</sup>

Distinguishing *Rendon*, the *Winn-Dixie* court noted that the phone system, which was inaccessible to those with hearing and mobility disabilities, was the "sole access point" to gain the privilege of appearing on defendant's game show, a physical location, and therefore presented an intangible barrier to a physical location.<sup>97</sup> By contrast, in *Winn-Dixie*, the court held that the defendant's "limited use website, although inaccessible by individuals who are visually disabled, does not function as an intangible barrier to an individual with a visual disability accessing the goods, services, privileges, or advantages of Winn-Dixie's physical stores (the operative place of public accommodation)."<sup>98</sup> Thus, in the Eleventh Circuit, a plaintiff must now show that "the inaccessibility of [a] website . . . serve[s] as an 'intangible barrier' to [the plaintiff's] ability to communicate with [the defendant's] physical [locations], which results in [the plaintiff] being excluded, denied services, segregated, or otherwise treated differently from other individuals in the physical [locations]."<sup>99</sup>

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93. *Gil*, 993 F.3d at 1279–80.

94. *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279 (11th Cir. 2002).

95. *Id.* at 1283.

96. *Id.* at 1283–84.

97. *Gil*, 993 F.3d at 1279.

98. *Id.*

99. *Id.* at 1283–84.

Making the circuit split clear, the *Winn-Dixie* court distinguished the case from the Ninth Circuit's decision in *Robles*.<sup>100</sup> Factually, the cases differed because in *Robles*, purchases could actually be made on Domino's website.<sup>101</sup> More significantly, the Eleventh Circuit explicitly rejected the "nexus" test relied on by the Ninth Circuit, finding "no basis for it in the statute or in our precedent."<sup>102</sup> While acknowledging the "significant inconveniences" faced by people with disabilities due to lack of website accessibility, the Eleventh Circuit nonetheless declined to extend the definition of places of public accommodation indicating that the resolution was a "project best left to Congress."<sup>103</sup>

Given these varying approaches, businesses and individuals with disabilities remain subject to inconsistent rules from jurisdiction to jurisdiction. For instance, a district court in the First Circuit ruled that a place of public accommodation need not be a physical location, and that the website of Netflix, the streaming service, was a place of public accommodation subject to Title III.<sup>104</sup> Less than a month later, a district court in the Ninth Circuit ruled that under Ninth Circuit precedent, the Netflix website was not a place of public accommodation because it was not a physical place.<sup>105</sup>

Even parties within the same circuit have faced different outcomes depending on the district court in which the suit was brought. A court in the Western District of Pennsylvania held that a bank's website was a place of public accommodation because "the alleged discrimination has taken place on property that [defendant] owns, operates and controls – the [defendant's] website."<sup>106</sup> By contrast, in the Eastern District of Pennsylvania, a court held that the website of a snack food company was not a place of public accommodation because it was not an actual

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

101. *See Gil*, 993 F.3d at 1283.

102. *Id.* at 1281.

103. *Id.* at 1284.

104. *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 201–02 (D. Mass. 2012).

105. *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017, 1023–24 (N.D. Cal. 2012). Although the plaintiff's claim was not brought under the ADA, a violation of Title III would have been a violation of the California antidiscrimination statutes at issue. *Id.* The court's analysis of "place of public accommodation" relied on case law under Title III. *Id.* Netflix entered into a consent decree in October 2012 in which Netflix agreed to provide closed captioning on all of its streaming products by September 2014. Consent Decree, *National Ass'n of the Deaf v. Netflix, Inc.*, No. 11-CV-30168 (D. Mass. Oct. 11, 2012), ECF No. 88. In 2016, Netflix entered into a settlement agreement in which it agreed to provide "Audio Description," i.e., "narration added to the soundtrack to describe important visual details that cannot be understood from the main soundtrack alone." *Settlement Agreement and Release*, SEYFARTH: ADA TITLE III NEWS & INSIGHTS, [http://www.adatitleiii.com/wp-content/uploads/sites/121/2016/04/Settlement\\_Agreement\\_FOR\\_WEBSITEvz.pdf](http://www.adatitleiii.com/wp-content/uploads/sites/121/2016/04/Settlement_Agreement_FOR_WEBSITEvz.pdf) [<https://perma.cc/A5FG-6NYE>].

106. *Gniewkowski v. Lettuce Entertain You Enters., Inc.*, 251 F. Supp. 3d 908, 914–18 (W.D. Pa. 2017) (holding defendant bank's website was place of public accommodation since alleged discrimination took place on property that the bank owned, operated, and controlled—its website); *see also West v. DocuSign, Inc.*, No. 19-cv-0501, 2019 WL 3843054, at \*4 (W.D. Pa. Aug. 15, 2019) (holding defendant's website is a place of public accommodation).

physical location and had no nexus to a physical location.<sup>107</sup> These results cause needless and expensive uncertainty for businesses and other entities. Moreover, lacking certainty, plaintiffs must resort to piecemeal litigation with respect to particular websites and applications, resulting in sharp increases in the number of cases filed for the last several years.<sup>108</sup>

The Supreme Court's 2019 denial of certiorari in *Robles*<sup>109</sup> was a blow to those who had hoped for a resolution of the circuit split. It remains to be seen whether a petition for certiorari will be filed<sup>110</sup> and whether the sharpness of the circuit split will encourage the Supreme Court to grant such a petition. However, even if the Court does so, it is unlikely that the decision would sufficiently resolve all the issues necessary to ensure access for the disabled community and provide clear guidance for businesses. The Court is unlikely to declare that all websites that offer, or are affiliated with entities that offer, the types of goods and services set forth in the statute are places of public accommodation and thus must be accessible. Anything short of that, such as a nexus test, leaves potential gaps and uncertainty. Moreover, no ruling could provide the necessary guidance as to the scope of coverage and the standards for compliance.<sup>111</sup>

### C. The Regulatory Landscape

Although the ADA authorizes the Department of Justice (DOJ) to issue regulations implementing Title III, the DOJ has yet to provide

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107. *Mahoney v. Herr Foods Inc.*, No. 19-CV-5759, 2020 WL 1979153, at \*3 (E.D. Pa. Apr. 24, 2020); *see also Mahoney v. Bittrex, Inc.*, No. 19-cv-3836, 2020 WL 212010, at \*2 (E.D. Pa. Jan. 14, 2020) (“A website, by itself, is not a physical location and therefore does not constitute a place of public accommodation under Section 12182(a) of the ADA.”); *Walker v. Sam’s Oyster House, LLC*, No. 18-cv-193, 2018 WL 4466076, at \*2 (E.D. Pa. Sept. 18, 2018) (“A website is not a physical location and therefore does not constitute a place of public accommodation under Section 12182(a) of the ADA . . . [H]owever, that the ADA applies to services and privileges of a place of public accommodation as long as there is ‘some nexus between the services or privileges denied and the physical place . . . as a public accommodation.’”) (citing *Menkowitz v. Pottstown Mem’l Med. Ctr.*, 154 F.3d 113, 122 (3d Cir. 1998)). *Compare Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 385 (E.D.N.Y. 2017) (“[Plaintiff] has a substantive right to obtain effective access to Blick’s website to make purchases, learn about products, and enjoy the other goods, services, accommodations, and privileges the defendant’s website provides to the general public.”), with *Winogard v. Newsday LLC*, No. 19-CV-04420, 2021 WL 3617522, at \*1 (“[T]he ADA excludes, by its plain language, the websites of businesses with no public-facing, physical retail operations from the definition of ‘public accommodations.’”).

108. *See infra* notes 185–91 and accompanying text.

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

110. Gil filed a petition for rehearing *en banc* on April 15, 2021. Plaintiff-Appellee Juan Carlos Gil Petition for Rehearing *En Banc*, *Winn-Dixie Stores, Inc. v. Gil*, No. 17-13467 (11th Cir. Apr. 15, 2020).

111. *See infra* Section III.B (discussing what a new or amended statute should address).

affirmative regulations and specific guidance to private entities regarding both which websites must be accessible and what constitutes an accessible website. As discussed below, in the absence of coherent rules, the DOJ has issued a bevy of potentially contradictory statements as to the breadth of Title III's accessibility requirements, resulting in confusion and frustration.

In a 1996 advisory letter, the DOJ appeared to assert that the ADA includes protections for website accessibility, writing that “[c]overed entities that use the Internet for communications regarding their programs, goods, or services, must be prepared to offer those communications through accessible means as well.”<sup>112</sup> The regulations issued by the DOJ in 2010 did not deal expressly with website accessibility or provide that websites of public accommodations were subject to Title III.<sup>113</sup> Rather, “accessible electronic and information technology,” which would include websites, was added to the examples of “auxiliary aids and services” that a public accommodation might be required to provide in order to ensure “effective communication” with those with disabilities.<sup>114</sup> The choice of how to provide the auxiliary aids was left to the public accommodation.<sup>115</sup> However, in a 2010 Advance Notice of Proposed Rulemaking (Advance Notice),<sup>116</sup> the DOJ stated that it “has . . . repeatedly affirmed the application of title [sic] III to websites of public accommodations,”<sup>117</sup> and “believes that title III reaches the Web sites of entities that provide goods and services that fall within the 12 categories as ‘public accommodations,’ as defined by the statute and regulations.”<sup>118</sup> The Advance Notice did not go so far as to suggest that Title III mandated that websites of public accommodations be made accessible, but rather allowed the possibility of providing the information or services through alternative means.<sup>119</sup> The DOJ

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112. Letter from Deval Patrick, Assistant Att’y Gen., C.R. Div., to Sen. Tom Harkin (Sept. 9, 1996), <https://www.justice.gov/crt/foia/file/666366/download>.

113. See 28 C.F.R. § 36.303 (2020).

114. 28 C.F.R. § 36.303(b).

115. See 28 C.F.R. § 36.303(c)(1)(ii).

116. 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) (to be codified at 28 C.F.R. pts. 35 & 36).

117. *Id.* at 43,464.

118. *Id.* at 43,465. In Congressional testimony earlier that year, the Principal Deputy Assistant Attorney General for Civil Rights asserted that, “the position of the Department of Justice has been clear.” *Achieving the Promises of the Americans with Disabilities Act in the Digital Age—Current Issues, Challenges, and Opportunities: Hearing Before the Subcomm. on the Const., C.R., and C.L. of the H. Comm. on the Judiciary*, 111th Cong. 6 (2010) (testimony of Samuel R. Bagenstos, Principal Deputy Assistant Attorney General). “Title III applies to the Internet sites and services of private entities that meet the definition of public accommodations set forth in the statute, whether or not they operate exclusively online, and the implementing regulation.” *Id.*

119. 75 Fed. Reg. at 43,466 (“The Department has taken the position that covered entities with inaccessible websites may comply with the ADA’s requirement for access by providing an

acknowledged that, in starting the rulemaking process, it was heeding repeated calls that it provide a coherent regulatory framework.<sup>120</sup>

The promised regulations were never proposed, much less issued. Before it became clear that regulations were not forthcoming, the DOJ's enforcement arm became quite active during the Obama administration. As a plaintiff, intervenor, or amicus, the DOJ became involved in several litigations or threatened litigations and secured significant settlement agreements or consent decrees with a number of entities regarding accessibility of their websites and mobile apps.<sup>121</sup>

In 2016, the DOJ announced that it was soliciting additional public comments on application of technical requirements to websites of Title II entities, i.e., state and local governments and entities.<sup>122</sup> The DOJ indicated that comments on the 2010 Advance Notice had led to the decision to pursue separate rulemaking regarding web accessibility for Titles II and III and that it would pursue Title II rulemaking first.<sup>123</sup> Then, in December 2017, the DOJ announced that it was withdrawing the 2010 and 2016 Advance Notices and that the Department was "evaluating whether promulgating regulations about the accessibility of Web information and services is necessary and appropriate."<sup>124</sup> The 2017 Notice admonished that the withdrawn Advance Notices "had no force or effect of law, and no party should rely upon them as presenting the DOJ's position on these issues."<sup>125</sup> The withdrawals were likely responsive to executive orders issued early in the Trump administration, which were intended to reduce or discourage regulatory action.<sup>126</sup>

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accessible alternative such as a staffed telephone line for individuals to access the information, goods, and services of their Web site.").

120. *Id.* at 43,464 ("For years businesses and individuals with disabilities alike have urged the Department to provide guidance on the accessibility of Web sites of entities covered by the ADA.").

121. Minh N. Vu & Julia N. Sarnoff, *Websites, Kiosks, and Other Self-Service Equipment in Franchising: Legal Pitfalls Posed by Title III of the Americans with Disabilities Act*, 36 *FRANCHISE L.J.* 443, 448–50 (2017); see also Laura Wolk, Note, *Equal Access in Cyberspace: On Bridging the Digital Divide in Public Accommodations Coverage Through Amendment to the Americans with Disabilities Act*, 91 *NOTRE DAME L. REV.* 447, 457–58 (2015).

122. Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Governments, 81 *Fed. Reg.* 28,658 (proposed May 9, 2016) (to be codified at 28 C.F.R. pt. 35).

123. *Id.* at 28,659.

124. 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 & 36).

125. *Id.* at 60,933.

126. See Exec. Order No. 13771, Reducing Regulation and Controlling Regulatory Costs, 82 *Fed. Reg.* 9339 (Jan. 30, 2017); Exec. Order No. 13777, Enforcing the Regulatory Reform Agenda, 82 *Fed. Reg.* 12,285 (Feb. 24, 2017). Additionally, in 2017 the Attorney General issued a memorandum prohibiting the issuance of any "guidance documents" by the DOJ "that purport to create rights or obligations binding on persons or entities outside the Executive Branch." Memorandum from the

The failure to issue regulations has been a source of frustration on many fronts. The DOJ's failure to act decisively leaves businesses unprepared in the face of increased litigation. Even if businesses choose a de facto technical standard, such as WCAG 2.0 or 2.1,<sup>127</sup> these standards do not carry the force of law,<sup>128</sup> and cannot guarantee that businesses will not be sued nor the extent of remedies. Cognizant of these issues, 103 members of Congress wrote to the Attorney General in 2018,<sup>129</sup> asserting that "unresolved questions about the applicability of the ADA to websites[,] as well as the DOJ's abandonment of the effort to write a rule defining website accessibility standards, has created a liability hazard" affecting their constituent businesses and customers of those businesses.<sup>130</sup> The letter then called on the DOJ "to state publicly that private legal action under the ADA with respect to websites is unfair and violates basic due process principles in the absence of clear statutory authority and issuance by the Department of a final rule establishing website accessibility standards."<sup>131</sup> In response, the DOJ disagreed with the assertion that the absence of a specific regulation excused non-compliance with the requirements of Title III.<sup>132</sup> While the letter noted that the DOJ "first articulated its interpretation that the ADA applies to public accommodations' websites over 20 years ago," the DOJ did not take the unequivocal position that websites of public accommodations must be accessible.<sup>133</sup> Some members of the business bar took comfort from the letter's statement that, "[a]bsent the adoption of specific technical requirements for websites through rulemaking, public accommodations have flexibility in how to comply

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Att'y Gen., Prohibition on Improper Guidance Documents (Nov. 16, 2017), <https://www.justice.gov/opa/press-release/file/1012271/download> [<https://perma.cc/B9D6-JDH4>].

127. WCAG 2.1 was published in 2018 and is the most recent standard. It extends the requirements of WCAG 2.0 by providing an increased focus on "users with cognitive or learning disabilities, users with low vision and users with disabilities on mobile devices." *Web Content Accessibility Guidelines (WCAG) 2.1*, W3C (June 5, 2018), <https://www.w3.org/TR/WCAG21/#comparison-with-wcag-2-0> [<https://perma.cc/6ACN-7HW7>].

128. In *Gil v. Winn-Dixie Stores, Inc.*, Winn-Dixie appealed the decision of the District Court ordering it to make its website compliant in accordance with WCAG 2.0. The Eleventh Circuit reversed the District Court but did not reach the issue of whether WCAG is the appropriate legal standard for that Circuit for website accessibility compliance. *Gil v. Winn-Dixie Stores, Inc.*, 993 F.3d 1266, 1273 (11th Cir. 2021).

129. Letter to Att'y Gen. Sessions *supra* note 42; *see also* Letter from Charles E. Grassley, Sen., et al. to Jeff Sessions, Att'y Gen. (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/3XWC-E3CF>] [hereinafter Sen. Grassley Letter].

130. Letter to Att'y Gen. Sessions, *supra* note 42, at 1.

131. *Id.* at 2.

132. Letter from Stephen E. Boyd, Assistant Att'y Gen., Off. of Legis. Affs., to Ted Budd, Rep. 2 (Sept. 15, 2018), <https://www.adatitleiii.com/wp-content/uploads/sites/121/2018/10/DOJ-letter-to-congress.pdf> [<https://perma.cc/Y9DA-B4LQ>].

133. *Id.* at 1.

with the ADA's general requirements of nondiscrimination and effective communication," as harking back to the DOJ's earlier statements regarding alternative methods of establishing effective communication.<sup>134</sup> Finally, noting "Congress' [sic] ability to provide greater clarity through the legislative process," the DOJ looked forward to working with Congress "to continue those efforts," thus placing the ball back in Congress's court.<sup>135</sup>

Whether the DOJ will be more active under the Biden administration remains to be seen.<sup>136</sup> However, as discussed in Subsection III.C.1, regulatory action is unlikely to provide sufficient resolution of the issues.

## II. WHY CONGRESS MUST ACT NOW

Congressional inaction continues to harm the disabled community as well as entities potentially subject to regulation under Title III. Overcoming barriers to social and economic equity remains difficult for people with disabilities, a disadvantage that the ADA was intended to remedy. Failure to uniformly resolve issues of which websites are subject to Title III and what compliance with accessibility requirements entails has burdened businesses and other entities with an explosive growth in litigation, and uncertainty about whether attempts to make websites compliant will shield an entity from further liability.

### A. COVID-19 Exacerbated Challenges Faced by the Disabled Community

Our increased digital dependence during the COVID-19 pandemic underscored existing challenges and created additional barriers for people with disabilities in many aspects of life, including healthcare, employment, education, and access to information, support systems, goods, and services. COVID-19 has disproportionately impacted Black,

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134. See Minh N. Vu, *DOJ Says Failure to Comply with Web Accessibility Guidelines Is Not Necessarily a Violation of the ADA*, SEYFARTH SHAW: ADA TITLE III NEWS & INSIGHTS (Oct. 2, 2018), <https://www.adatitleiii.com/2018/10/doj-says-failure-to-comply-with-web-accessibility-guidelines-is-not-necessarily-a-violation-of-the-ada/> [<https://perma.cc/EWK4-WMGE>] (quoting Letter from Stephen E. Boyd, *supra* note 132, at 2).

135. Letter from Stephen E. Boyd, *supra* note 132, at 2. In 2019, Senator Chuck Grassley and others sent a letter to Attorney General William Barr seeking answers to specific questions about the DOJ's position and actions with respect to the matters raised in the 2018 letter. Letter from Chuck Grassley, Sen., et al. to William P. Barr, Att'y Gen. (July 30, 2019), <https://www.grassley.senate.gov/imo/media/doc/2019-07-30%20Grassley%20et%20al%20to%20DOJ%20-%20ADA%20Website%20Accessibility.pdf> [<https://perma.cc/YLH4-VB9G>].

136. Former Vice President Joseph Biden was elected president in November 2020 and inaugurated on January 20, 2021.

Hispanic, and low-income communities with respect to rates of infection, mortality, hospitalization, and disease severity.<sup>137</sup> People with disabilities are disproportionately represented in communities of color.<sup>138</sup> But even before COVID-19, the disabled community confronted the inequities of the digital, economic, and racial divide. A disabled person in the U.S. is more likely to be poor, more likely to be a minority,<sup>139</sup> and more likely to lack access to the internet, as compared to someone who is not disabled.<sup>140</sup> Furthermore, most people with disabilities still face web design barriers, such as the failure to provide keyboard connectivity, images and text transcripts, or captions of video and audio that are compatible with assistive technologies such as screen readers and other specialized software.<sup>141</sup> In addition, issues such as insufficient color contrast between written information and background, lack of volume contrast between spoken information and other background noises, difficult-to-read font types and sizes, and flashing and blinking content, create additional challenges with website navigation.<sup>142</sup> Although there have been numerous improvements in technology since the ADA was first enacted, these advances have, in recent years, just begun to trickle down to assistive devices for the disabled.<sup>143</sup> For instance, screen readers, which function by reading the

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137. Stephen A. Mein, *COVID-19 and Health Disparities: The Reality of the Great Equalizer*, 35 J. GEN. INTERNAL MED. 2439 (2020).

138. Stephanie Pappas, *Fighting Inequity in the Face of COVID-19*, MONITOR PSYCH., June 2020, at 45.

139. NANETTE GOODMAN, MICHAEL MORRIS & KELVIN BOSTON, NAT'L DISABILITY INST., FINANCIAL INEQUALITY: DISABILITY, RACE AND POVERTY IN AMERICA (2019), <https://www.nationaldisabilityinstitute.org/reports/financial-inequality-disability-race-and-poverty-in-america/> [<https://perma.cc/B4AJ-2AKX>].

140. In a 2016 survey, twenty-three percent of disabled Americans indicated that they never utilize the internet as compared to eight percent of people who are non-disabled. Monica Anderson & Andrew Perrin, *Disabled Americans Are Less Likely to Use Technology*, PEW RSCH. CTR. (Apr. 7, 2017), <https://www.pewresearch.org/fact-tank/2017/04/07/disabled-americans-are-less-likely-to-use-technology/> [<https://perma.cc/L3NS-GG6F>]; Andrew Perrin & Sara Atske, *Americans with Disabilities Less Likely Than Those Without to Own Some Devices*, PEW RSCH. CTR. (Sep. 10, 2021), <https://www.pewresearch.org/fact-tank/2021/09/10/americans-with-disabilities-less-likely-than-those-without-to-own-some-digital-devices/> [<https://perma.cc/V8QA-MFMD>]. Poverty also likely has an impact on these figures. Although telling only part of the story, the Bureau of Labor Statistics (BLS) reported that “[d]uring 2019, 20.8% of people with a disability either were employed or were looking for work.” *Labor Force Participation Rate 20.8 Percent for People with a Disability in 2019*, U.S. BUREAU OF LABOR STAT.: TED: ECON. DAILY (Aug. 10, 2020), <https://www.bls.gov/opub/ted/2020/labor-force-participation-rate-20-point-8-percent-for-people-with-a-disability-during-2019.htm> [<https://perma.cc/FAW4-GY98>]. “In contrast, the labor force participation rate for people without a disability was 68.7%. Across all age groups, labor force participation rates were much lower for people with a disability than for people without a disability.” *Id.*

141. *Diverse Abilities and Barriers*, W3C (May 15, 2017), <https://www.w3.org/WAI/people-use-web/abilities-barriers/> [<https://perma.cc/EC6D-2EN6>].

142. *Id.*

143. Innovation is slow to trickle down to accessibility devices due to a view of disability technology as a “niche” market and the treatment of disabilities as a medical condition that requires a higher level of government regulation before approval. Ken Chua, *Here's How to Build Inclusive Technology, Today*, WORLD ECON. F., (Dec. 3, 2018), <https://www.weforum.org/agenda/2018/12/disabilities-inclusive-technology-singapore-microsoft/> [<https://perma.cc/J4GV-L5TP>].

text on webpages, do not work on graphical web pages because they cannot effectively access webpages that contain animation, video, and audio.<sup>144</sup>

The effectiveness of the public health response to COVID-19 has been dependent upon the dissemination and receipt of accurate and up-to-date information. Information regarding quarantining, limitations on travel and gatherings, social distancing, and other general information has been of critical importance during the pandemic, especially because most restrictions were imposed on a state or local level and varied widely according to locality.<sup>145</sup> The evolving nature of agency and governmental guidance, sometimes changing on a daily or even hourly basis, made society even more acutely dependent on the internet for communication.<sup>146</sup> However, people who are hearing impaired, deaf, low vision, blind, and cognitively impaired frequently encounter a lack of accessible information online.<sup>147</sup> People who are visually impaired, for example, express concern regarding websites' lack of audio and Alt Text for images, which would make them accessible to screen readers.<sup>148</sup> In this and other instances, the inability to access information due to web design impedes the disabled community's ability to access vital, life-saving information.

Access to healthcare has been an ongoing challenge for the disabled, largely due to higher levels of risk factors such as obesity, diabetes, heart disease, smoking, and being physically inactive.<sup>149</sup> Sadly, these and other comorbidity risk factors also place them at greater risk of

144. Alliance for Access to Computing Careers, *Are Text Only Webpages an Accessible Alternative?*, ACCESS COMPUTING, <https://www.washington.edu/accesscomputing/are-text-only-web-pages-accessible-alternative> [https://perma.cc/BC3G-M8A6].

145. Hale, et al., *supra* note 5.

146. See, e.g., Tara Parker-Pope, *Should I Start Wearing a Mask?*, N.Y. TIMES (May 7, 2020), <https://www.nytimes.com/article/coronavirus-N95-mask-DIY-face-mask-health.html?searchResultPosition=12> [https://perma.cc/2V8D-8L65]; Will Feuer, *CDC Revises Coronavirus Guidance to Acknowledge That It Spreads Through Airborne Transmission*, CNBC (Oct. 5, 2020), <https://www.cnbc.com/2020/10/05/cdc-revises-coronavirus-guidance-to-acknowledge-that-it-spreads-through-airborne-transmission.html> [https://perma.cc/XQ5K-Q3K6]; Valerie Strauss, *Confused by CDC's Changing Guidance on School Reopening? Here are Recommendations from Experts Not Pressured by the White House*, WASH. POST (July 25, 2020), <https://www.washingtonpost.com/education/2020/07/25/confused-by-cdcs-changing-guidance-school-reopening-here-are-recommendations-experts-not-pressured-by-white-house/> [https://perma.cc/MFE6-H9BP]; Tara Parker-Pope, *Vaccinated and Confused? Answers About Masks, the Delta Variant and Breakthrough Infections*, N.Y. TIMES (July 26, 2021), <https://www.nytimes.com/2021/06/30/well/live/delta-variant-vaccines-masks.html?searchResultPosition=7> [https://perma.cc/G9RM-HJK6].

147. Gus Alexiou, *Inaccessible Coronavirus Information Excludes Impaired Communities*, FORBES (May 6, 2020) <https://www.forbes.com/sites/gusalexiou/2020/05/06/inaccessible-coronavirus-information-excludes-impairment-communities/?sh=47cf18dc3621> [https://perma.cc/Z6L5-B83A].

148. *Id.*

149. Thiru M. Annaswamy, Monica Verduzco-Gutierrez & Lex Frieden, *Telemedicine Barriers and Challenges for Persons with Disabilities: COVID-19 and Beyond*, 13 DISABILITY & HEALTH J. 100973 (2020).

COVID-19 infections.<sup>150</sup> As doctors' offices were forced to either shut down or restrict their patient volume in response to the pandemic, more people have shifted to telemedicine as the primary means of obtaining healthcare.<sup>151</sup> Features of telemedicine platforms, such as digital check-in, remote patient monitoring, self-scheduling, and other telehealth services, require screen readers or other assistive technologies. People who are disabled rely on these technologies to successfully interface with webpages and mobile apps on computers and smartphones.<sup>152</sup> The lack of enforcement of web accessibility guidelines in virtual spaces also leaves the disabled community vulnerable to other communication interface issues such as "sign language, captions, magnification, color and contrast."<sup>153</sup> The inability to access COVID-19 vaccination registration and information on websites has created additional barriers for people who are visually impaired.<sup>154</sup> Hence, while telemedicine and other online services improve access and reduce barriers to healthcare access for many, several barriers and challenges remain for persons with disabilities.<sup>155</sup>

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150. *COVID-19 Information and Resources: People with Disabilities*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 21, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-disabilities.html> [<https://perma.cc/J5BE-FBX9>].

151. Jedrek Wosik, Marat Fudim, Blake Cameron, Ziad F. Gellad, Alex Cho, Donna Phinney, Simon Curtis, Matthew Roman, Eric G. Poon, Jeffrey Ferranti, Jason N. Katz & James Tcheng, *Telehealth Transformation: COVID-19 and the Rise of Virtual Care*, 27 J. AM MED. INFO. ASSOC. 957, 958 (2020).

152. *Rising to Meet the Telehealth Accessibility Challenge in the Time of COVID-19*, BUREAU OF INTERNET ACCESSIBILITY (Aug. 11, 2020), <https://www.boia.org/blog/rising-to-meet-the-telehealth-accessibility-challenge-in-the-time-of-covid-19> [<https://perma.cc/L8R4-ZV6Y>].

153. Annaswamy et al., *supra* note 149, at 2.

154. In April 2021, Johns Hopkins University introduced a COVID-19 Website Accessibility Dashboard to provide accessibility rankings for state vaccine websites to people with disabilities. *Vaccine Website Accessibility*, JOHNS HOPKINS UNIV., DISABILITY HEALTH RSCH. CTR., <https://disabilityhealth.jhu.edu/vaccinedashboard/webaccess/> [<https://perma.cc/FM5P-MWEX>] (last updated May 19, 2021). A study by Johns Hopkins University revealed gaps in accessibility in several states. For example, many sites require users to complete the Completely Automated Public Turing test to tell Computers and Humans Apart ("CAPTCHA") in order to access certain websites. Grace Jo, Daniel Habib, Varshini Varadaraj, Jared Smith, Sabrina Epstein, Jiafeng Zhu, Gayane Yenokyan, Kara Ayers & Bonnielin K. Swenor, *COVID-19 Vaccine Website Accessibility Dashboard*, LANCET (forthcoming 2021) (manuscript at 8), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3866605](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3866605). A November 2021 press release announced that Rite Corporation, which operates a chain of drugstores offering the COVID-19 vaccine and provides an online COVID-19 registration portal, reached a settlement with the Department of Justice after a compliance review revealed that people with vision and mobility impairments could not schedule appointments through the portal. Pursuant to the settlement, the company must make its COVID-19 vaccine portal content compliant with WCAG, Version 2.1, Level AA. U.S. Att'y's Off., Middle Dist. of Pa., *Justice Department Secures Settlement with Rite Aid Corporation to Make Its Online COVID-19 Vaccine Portal Accessible to Individuals with Disabilities* (Nov. 1, 2021), <https://www.justice.gov/usao-mdpa/pr/justice-department-secures-settlement-rite-aid-corporation-make-its-online-covid-19> [<https://perma.cc/Z82V-W6WQ>].

155. Annaswamy et al., *supra* note 149, at 1.

In addition to healthcare, people with disabilities also faced challenges getting food and essential supplies. In an effort to avoid public spaces during the pandemic, more people shopped online rather than in person. Many people with mobility impediments depended on delivery of goods, including vital groceries and pharmaceutical items, even before COVID-19 made it unsafe to leave home. Those who have low vision or are blind are now even more likely to seek delivery of such goods. People who are visually impaired and travel unassisted cannot depend on their vision to determine when they are encountering people who are not wearing masks. It is also difficult for them to follow other pandemic protocols, such as “social distancing,”<sup>156</sup> which often requires reading signs on the floor or other visual cues. In the midst of these challenges, accessibility issues regarding websites and mobile apps further impair their ability to purchase needed goods.

COVID-19 closings and restrictions resulted in more people working from home than ever before. Guidance from the Centers for Disease Control and Prevention (CDC) recommended that workers be allowed to work remotely where possible.<sup>157</sup> While the ADA does not require an employer to offer a telework program to all employees, if they offer one to their abled employees, they must extend the same opportunity to their disabled employees.<sup>158</sup> However, for many in the disabled community, this is not an option because they lack the ability to interface with intranet and internet environments at home that would enable them to work remotely.

Access to learning was a critical issue during the pandemic, which further highlighted the inequities in access to education. For many educators, digital accessibility took a backseat to the pressures of converting coursework to digital format in a short amount of time.<sup>159</sup> The shift to remote learning in many states also exposed the large

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156. During the pandemic, the CDC advised the nation that the spread of COVID-19 could be reduced by staying at least six feet from other people. *What Is Social Distancing?*, CTFRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> [https://perma.cc/ZQ89-PG6C] (last updated Aug. 13, 2021).

157. Kiva Fisher, Samantha M. Olson, Mark W. Tenforde, Leora R. Feldstein, Christopher J. Lindsell, Nathan I. Shapiro, D. Clark Files, Kevin W. Gibbs, Heidi L. Erickson, Matthew E. Prekker, Jay S. Steingrub, Matthew C. Exline, Daniel J. Henning, Jennifer G. Wilson, Samuel M. Brown, Ithan D. Peltan, Todd W. Rice, David N. Hager, Adit A. Ginde, H. Keipp Talbot, Jonathan D. Casey, Carlos G. Grijalva, Brendan Flannery, Manish M. Patel & Wesley H. Self, *Telework Before Illness Onset Among Symptomatic Adults Aged ≥ 18 Years with and Without COVID-19 in 11 Outpatient Health Care Facilities*, CTFRS. FOR DISEASE CONTROL: MORBIDITY AND MORTALITY WEEKLY REPORT (Nov. 6, 2020), [https://www.cdc.gov/mmwr/volumes/69/wr/mm6944a4.htm?s\\_cid=mm6944a4\\_w](https://www.cdc.gov/mmwr/volumes/69/wr/mm6944a4.htm?s_cid=mm6944a4_w) [https://perma.cc/PAS9-ZNSN].

158. *Work at Home/Telework as Reasonable Accommodations*, EEOC (Feb. 3, 2003), <https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation> [https://perma.cc/S2A2-2PCX].

159. Greta Anderson, *Accessibility Suffers During Pandemic*, INSIDE HIGHER ED. (Apr. 6, 2020), <https://www.insidehighered.com/news/2020/04/06/remote-learning-shift-leaves-students-disabilities-behind> [https://perma.cc/EA7L-2QXW].

number of students who lacked access to the internet and related technologies.<sup>160</sup> The challenges facing distance learners were multiplied for disabled and differently abled learners.<sup>161</sup> Course materials and online texts are often incompatible with screen readers. Although homework assignments and other resources can be made available on webpages, this is of limited use if the webpage itself is inaccessible. Many schools utilized Zoom, learning management systems (LMS) such as Google Classroom, Blackboard, and other platforms to assist with distance learning.<sup>162</sup> While many LMS platforms provide accessibility and support, students with disabilities may still face barriers if instructors create inaccessible pages by failing to include alternate text, using inaccessible PDFs and other digital documents, and showing uncaptioned videos.<sup>163</sup> Live instruction on platforms such as Zoom, Webex, and Google Hangout generally do not provide American Sign Language interpreters and real time captioning.<sup>164</sup> Dictation assistive technology<sup>165</sup> can assist students, including those who are low vision, blind, or have physical or cognitive disabilities. However, the usefulness of this technology is limited in that it may not always provide an accurate transcription of the voice input.<sup>166</sup>

In addition to its impact on the right to equality of educational opportunity, COVID-19 also created widespread voting issues which deprived many of the opportunity to exercise their Constitutional right to vote. During the 2020 election cycle, many disabled voters were denied access because websites and other technologies were not fully accessible. For instance, the election websites of several states were

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160. Kipp Bentley, *9 Million Students Lack Home Internet for Remote Learning*, GOV'T TECH. (June 8, 2020), <https://www.govtech.com/network/9-Million-Students-Lack-Home-Internet-for-Remote-Learning.html> [<https://perma.cc/B6YY-P3E2>].

161. See, e.g., Dana C. Gierdowski & Joseph Galanex, *ECAR Study of the Needs of Students with Disabilities*, 2000, EDUCAUSE (June 1, 2020), <https://www.educause.edu/ecar/research-publications/ecar-study-of-the-technology-needs-of-students-with-disabilities/2020/introduction-and-key-findings> [<https://perma.cc/R9KW-GKN7>]; Constancia C. Parnal, *The Internet as a Public Accommodation and Its Impact on Higher Education*, 22 ASIAN-PACIFIC L. & POL'Y J. 143, 168–69, 174, 183–90 (2021).

162. Daniel Camacho & Jill Legare, *Pivoting to Online Learning—The Future of Learning and Work*, J. COMPETENCY-BASED ED., Mar. 2021, <https://onlinelibrary.wiley.com/doi/10.1002/cbe2.1239> [<https://perma.cc/445S-2H5N>].

163. Mallory Smith, Laura Pineault, Marcus Dickson & Krystal Tosch, *Beyond Compliance*, INSIDE HIGHER ED. (Sept. 2, 2020), <https://www.insidehighered.com/advice/2020/09/02/making-accessibility-priority-online-teaching-even-during-pandemic-opinion> [<https://perma.cc/9TBZ-CZMV>].

164. Anderson, *supra* note 159.

165. This technology is also referred to as “speech-to-text,” ‘voice-to-text’, ‘voice recognition’ or ‘speech recognition’ technology.” Jaimie Martin, *Dictation (Speech-to-Text) Technology: What It Is and How It Works*, UNDERSTOOD, <https://www.understood.org/en/school-learning/assistive-technology/assistive-technologies-basics/dictation-speech-to-text-technology-what-it-is-and-how-it-works> [<https://perma.cc/M9GG-2QFP>]. It allows students to speak, and the computer transcribes then their voices as text. *Id.*

166. *Id.*

reported to be inaccessible to those with vision problems.<sup>167</sup> While absentee ballots that could be mailed in or otherwise submitted without going to a polling place were available in many states, most did not provide a way for voters with visual disabilities to complete the ballots privately and unassisted.<sup>168</sup> Although the technology for such electronic ballots existed and was in use for military and overseas voters, a number of states failed to offer that option for disabled voters.<sup>169</sup> Indeed, many voters may have been unable to secure any type of mail-in ballots because the application websites were not fully accessible.<sup>170</sup> This lack of access forced many to choose between exercising their civil rights and potentially exposing themselves to COVID-19.<sup>171</sup>

COVID-19 did not create the disparities in access for people with disabilities. However, the pandemic clarified those disparities and how the disabled community's exclusion from the benefits of the internet may be a matter of life and death.

### B. *The Business Community Is in Crisis*

Business entities<sup>172</sup> potentially subject to Title III, and the business community as a whole, have been hurt by the uncertainty around

167. Yelena Dzhanova, *Millions of Disabled Voters Could be Sidelined in 12 Battleground States, New Report Shows*, BUS. INSIDER (Sept. 24, 2020), <https://www.businessinsider.com/election-sites-battleground-states-not-accessible-report-2020-9> [<https://perma.cc/BJ5M-WE5R>]; *Disabilities Rights Group Targets East Texas Election Websites*, LONGVIEW NEWS-J. (Sept. 28, 2020), [https://www.news-journal.com/news/elections/disability-rights-group-targets-east-texas-elections-websites/article\\_08a141c4-76a8-52cf-b5d7-e961cf55ed32.html](https://www.news-journal.com/news/elections/disability-rights-group-targets-east-texas-elections-websites/article_08a141c4-76a8-52cf-b5d7-e961cf55ed32.html) [<https://perma.cc/T83Y-NKTX>].

168. See, e.g., Abigail Abrams, *Blind Voters Are Suing North Carolina and Texas, Arguing that Mail Ballots Are Discriminatory*, TIME (Sept. 24, 2020) <https://time.com/5892750/election-2020-litigation-blind-disability-rights/> [<https://perma.cc/DN4C-JF7M>]; Justin Mattingly, *Lawsuit Claims Virginia's Absentee Voting System Violates Americans with Disabilities Act*, RICHMOND TIMES-DISPATCH (July 29, 2020), [https://richmond.com/news/virginia/lawsuit-claims-virginias-absentee-voting-system-violates-americans-with-disabilities-act/article\\_6131a205-2eb6-5394-b0bd-5f09f209ec4c.html](https://richmond.com/news/virginia/lawsuit-claims-virginias-absentee-voting-system-violates-americans-with-disabilities-act/article_6131a205-2eb6-5394-b0bd-5f09f209ec4c.html) [<https://perma.cc/3SHF-2DF9>]; Laurin-Whitney Gottbrath, *Blind US Voters Sue over Lack of Accessible Mail-In Ballots*, ALJAZEERA (Sept. 15, 2020), <https://www.aljazeera.com/news/2020/9/15/blind-us-voters-sue-over-lack-of-accessible-mail-in-ballots> [<https://perma.cc/6U8L-BYFP>].

169. See, e.g., *Lawsuit Alleges Paper Vote-by-Mail Ballots Keep Blind Texans from Voting*, NAT'L FED'N OF THE BLIND (July 24, 2020), <https://nfb.org/about-us/press-room/lawsuit-alleges-paper-vote-mail-ballots-keep-blind-texans-voting> [<https://perma.cc/6GQM-XGX9>].

170. Yelena Dzhanova, *Vote-by-Mail Applications in 43 States Are Not Accessible to People with Disabilities, Possibly Disenfranchising Millions of Voters*, BUS. INSIDER (Sept. 30, 2020), <https://www.businessinsider.com/ballot-applications-voters-with-disabilities-43-states-inaccessible-2020-9> [<https://perma.cc/4R8V-NYRD>].

171. See, e.g., Abrams, *supra* note 169; Gottbrath, *supra* note 169.

172. Places of public accommodation comprise more than business entities and include, for instance, educational institutions. 42 U.S.C. § 12181(7)(J). Prior to the pandemic, colleges and universities had been sued for lack of accessibility of their websites and instruction materials under Title III, as well as under Section 504 of the Rehabilitation Act of 1973 as recipients of federal funds. 29 U.S.C. § 794 (1988) ("No otherwise qualified individual with handicaps in the United States . . . shall, solely by reason of her or his handicap be excluded from the participation in, be

whether websites, apps, and other digital technologies are places of public accommodation subject to Title III, and if so, what standard should determine accessibility compliance. Without clear guidelines, a company may still face litigation risk, even if it proactively hires a consultant or expert to create a compliant website. Updating an existing website could, in some cases, cost upwards of hundreds of thousands of dollars<sup>173</sup> and yet might not guarantee that the company will not be sued for non-compliance.<sup>174</sup> The absence of guidance puts businesses in a catch-22 where they are left unprepared to address litigation regarding website accessibility.<sup>175</sup> “Mom and pop” stores and

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denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance . . .”). See, e.g., *Nat’l Ass’n of the Deaf v. Harvard Univ.*, 377 F. Supp. 3d 49 (D. Mass. 2019) (denying motion for judgment on the pleadings on claims regarding lack of captioning of video and audio instructional materials made available to the public); *National Association of the Deaf Announces Landmark Settlement with Harvard to Improve Online Accessibility*, DISABILITY RTS. EDUC. & DEF. FUND (Nov. 27, 2019), <https://dredf.org/2019/11/27/landmark-settlement-with-harvard-to-improve-online-accessibility/#:~:text=November%2027%2C%202019&text=BOSTON%E2%80%9494On%20November%2027%2C%20the,deaf%20or%20hard%20of%20hearing> [<https://perma.cc/9MSC-7GDT>] (settling in 2019); *Complaint, Fernandez v. Duke Univ.*, No. 20-cv-00492 (M.D. N.C. June 4, 2020) (alleging lack of accessibility of course materials and course registration and recruiting software programs). The pandemic forced many institutions to go to online instruction, which may not be fully accessible. See *supra* notes 160–66 and accompanying text. Many institutions may have been spared from costly lawsuits by students regarding accessibility of online instruction by Department of Education guidance, which appears to allow schools to provide alternative, non-web-based means of accommodating students with disabilities and strengthens the possibility of an undue hardship defense to any such challenges. *Updated Guidance for Interruptions of Study Related to the Coronavirus (COVID-19)*, U.S. DEP’T OF EDUC. (Apr. 3, 2020), <https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2020-04-03/updated-guidance-interruptions-study-related-coronavirus-covid-19>, [<https://perma.cc/K9NJ-QNBQJ>]. Nonetheless, many of these institutions are facing financial crises from pandemic costs, including decreased enrollment, loss of revenues from student housing, costs for safety measures, and decreased funding due to budget cuts at the state or local level. Victoria Yuen, *Mounting Peril for Public Higher Education During the Corona Virus Pandemic*, CTR. FOR AM. PROGRESS (July 11, 2020), <https://www.americanprogress.org/issues/education-postsecondary/reports/2020/06/11/485963/mounting-peril-public-higher-education-coronavirus-pandemic/> [<https://perma.cc/474D-HNJM>].

173. These costs could potentially include the cost of compliance as well as the cost for ongoing maintenance of the coding of the site due to content updates. See *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340, 1346–47 (2017); Lauren Stuy, Comment, *No Regulations and Inconsistent Standards: How Website Accessibility Lawsuits Under Title III Unduly Burden Private Businesses*, 69 CASE W. RES. L. REV. 1079, 1099–1100 (2019).

174. See, e.g., *Alcazar v. Bubba Gump Shrimp Co. Restaurants*, Case No. 20-cv-02771, 2020 WL 4601364 (N.D. Cal. Aug. 11, 2020).

175. Some defendants have raised due process defenses to no avail. See *Robles v. Domino’s Pizza, L.L.C.*, No. 16-CV-06599, 2017 WL 1330216, at \*5 (C.D. Cal. Mar. 20, 2017) (granting the defendant’s motion to dismiss based on the grounds that the absence of formal guidance from the DOJ was violation of the defendant’s due process rights). That case was reversed by *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898, 906–07 (9th Cir. 2019). “Domino’s has received fair notice that its website and app must comply with the ADA.” *Id.* at 906. Further, the DOJ “has repeatedly affirmed the application Title III to Web sites of public accommodations.” *Id.* (citation omitted). Hence, “at least since 1996, Domino’s has been on notice that its online offerings must effectively communicate with its disabled customers and facilitate ‘full and equal enjoyment’ of Domino’s goods and services.” (quoting 42 U.S.C. § 12182(a), other citation omitted).

other small businesses may face the greatest litigation risk.<sup>176</sup> These smaller businesses may choose to settle a lawsuit rather than face the added expense of litigation in addition to compliance costs. There is no shortage of firms offering consulting and other services to companies seeking to make their sites and other digital technologies accessible.<sup>177</sup> However, many entities are finding out that even using these services does not ensure that they will successfully avoid litigation. Companies actively remediating their website violations may still be vulnerable to additional lawsuits.<sup>178</sup> The lack of dispositive information regarding exactly what compliance entails has also led to what is essentially a battle of the experts. For instance, in *Alcazar v. Bubba Gump Shrimp*, although the defendant believed that the deficiencies of its website had been corrected and had the opinion of an expert to that effect, it lost its motion to dismiss a Title III lawsuit, because the plaintiff's expert challenged its compliance.<sup>179</sup> In addition, there is a growing number of lawsuits filed against digital consulting firms offering “quick-fix” solutions to businesses seeking to make their websites compliant.<sup>180</sup>

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176. See Izai Elizur, *How to Make Your Website ADA Compliant and Avoid Accessibility Lawsuits*, SMALL BUS. TRENDS (Aug. 20, 2019), <https://smallbiztrends.com/2019/08/make-your-website-ada-compliant.html> [<https://perma.cc/D7SF-XTNQJ>].

177. One blogger has compiled a list of forty-two such companies as of September 16, 2021. Raghavendra Satish Peri, *Digital Accessibility Companies Roundup*, DIGITAL11Y, <https://www.digital11y.com/digital-accessibility-agencies-roundup/> [<https://perma.cc/XQF8-XX44>].

178. For instance, in 2016, a blind plaintiff brought a lawsuit against Hooters because its website was not accessible using the screen reader. Complaint, *Gomez v. Hooters of Am., LLC*, No. 16-cv-23608 (S.D. Fla. Aug. 22, 2016), ECF No. 1. Hooters quickly settled and agreed to make its website compliant in accordance with WCAG 2.0 standards by 2018. *Haynes v. Hooters of Am., LLC*, 893 F.3d 781, 783 (11th Cir. 2018). In 2017, a similar claim brought by Haynes, another blind plaintiff, was dismissed by the District Court for mootness. *Haynes v. Hooters of Am., LLC*, 17-CV-60663, 2017 WL 2579044 (S.D. Fla. June 14, 2017), *vacated and remanded*, 893 F.3d 781 (11th Cir. 2018). The Eleventh Circuit reversed the lower court's decision, finding that the claims were not moot because: (1) although Hooters already had a remediation plan, it had not demonstrated that the website was accessible; (2) the second case represented a live controversy because Haynes was requesting injunctive relief requiring Hooters to continually update its website; and (3) Haynes was not a party to the settlement agreement that Hooters had entered into with the first plaintiff. *Haynes*, 893 F.3d at 784.

179. *Alcazar v. Bubba Gump Shrimp Co. Restaurants*, Case No. 20-cv-02771, 2020 WL 4601364, at \*4 (N.D. Cal. Aug. 11, 2020). Interestingly, one of the key issues in this case was not whether WCAG 2.1 was the appropriate standard, but whether it had been correctly applied to bring the website into compliance. *Id.* at \*3.

180. For instance, there have been a number of lawsuits involving accessibility overlays which claim to automatically bring websites into compliance. *The Many Pitfalls of Accessibility Overlays*, ESSENTIAL ACCESSIBILITY (Nov. 27, 2020), <https://www.essentialaccessibility.com/blog/the-many-pitfalls-of-accessibility-overlays> [<https://perma.cc/68EQ-8CPU>]; see Complaint for Declaratory and Injunctive Relief, *Murphy v. Eyebobs, LLC*, No. 21-cv-00017 (W.D. Pa. Jan. 7, 2021), ECF No. 1 (Defendant used the accessibility overlay called accessiBe but was sued by a blind plaintiff claiming that the website was still inaccessible); see also, Kristina M. Launey & Minh N. Vu, *Criticisms of “Quick Fix” Website Accessibility Products Highlighted in New Lawsuit*, SEYFARTH SHAW: ADA TITLE III (Jan. 29, 2021), <https://www.adatitleiii.com/2021/01/criticisms-of-quick-fix-website-accessibility-products-highlighted-in-new-lawsuit/> [<https://perma.cc/9ZSN-K4AM>].

At the same time that businesses face accessibility litigation, they also struggle with the crippling impact of COVID-19, which wreaked havoc on the business world and created widespread economic uncertainty. Large numbers of businesses were forced to close and many are unlikely to reopen.<sup>181</sup> As many as 25,000 retail stores were predicted to close in 2020, following a record number of closings in 2019.<sup>182</sup> The retail, restaurant, travel, and tourism industries are struggling as a result of pandemic-related closures and travel restrictions.<sup>183</sup> Small businesses bore the brunt of the pandemic<sup>184</sup> with minority-owned small businesses disproportionately impacted.<sup>185</sup> As online sales during COVID-19 skyrocketed due to consumers' forced dependency on digital resources and online services, businesses had to revise their business models to try to create new revenue streams. To survive, many businesses were forced to quickly focus on their e-commerce presence by creating or expanding their digital footprints to include additional services such as ordering online and through mobile apps.<sup>186</sup> But without being able to ensure ADA compliance, many teetering businesses may have inadvertently increased their risk of digital accessibility lawsuits. The threat of litigation is significant, as the past several years have seen a dramatic upsurge in Title III

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181. The Federal Reserve Board calculated that the first year of the COVID-19 pandemic resulted in approximately 800,000 permanent closures of U.S. business establishments, 200,000 more than the yearly historical frequency. Leland C. Crane, Ryan A. Decker, Aaron Flaaen, Adrian Hamins-Puertolas & Christopher Kurz, *Business Exit During the Covid-19 Pandemic: Non-Traditional Measures in Historical Context* 28–29 (Fed. Rsrv. Bd., Finance & Economics Discussion Series 2020-0891, 2021), <https://www.federalreserve.gov/econres/feds/files/20200891pap.pdf> [<https://perma.cc/B2K9-D8BZ>].

182. As Many as 25,000 U.S. Stores May Close in 2020, Mostly in Malls, CORESIGHT RSCH. (June 9, 2020), <https://coresight.com/press/as-many-as-25000-u-s-stores-may-close-in-2020-mostly-in-malls/> [<https://perma.cc/8WCJ-CMZB>].

183. Retail sales account for approximately \$2.6 trillion of the annual U.S. GDP. Barbara Thau, *Experts Unpack the Massive Cross-Industry Impact of the Coronavirus, From Retail to Hospitality*, U.S. CHAMBER OF COM.: CO (Mar. 20, 2020), <https://www.uschamber.com/co/good-company/launch-pad/coronavirus-effects-on-major-industries> [<https://perma.cc/FP4N-FTYR>]. Retail employs fifty-two million people. *Id.* Major department stores such as Macy's, Nordstrom, and JC Penney are closing many of their stores, and the country's largest mall operator has closed over 200 shopping centers nationwide during the pandemic. *Id.* "The health crisis is costing the U.S. hotel industry a reported \$1.4 billion a week" due to decreased occupancy rates. *Id.*

184. Alexander Bartik, Marianne Bertrand, Zoe Cullen, Edward L. Glaeser, Michael Luca & Christopher Stanton, *The Impact of COVID-19 on Small Business Outcomes and Expectations*, 117 P.N.A.S. 17656 (July 28, 2020). The study found that, unlike larger companies and chains, small businesses are "financially fragile." *Id.* The median business with more than \$10,000 in monthly expenses had only about two weeks cash on hand. *Id.* at 17662. This makes it extremely challenging for such businesses to weather drastic economic changes, let alone a pandemic.

185. METLIFE & U.S. CHAMBER OF COM., SPECIAL REPORT ON RACE AND INEQUALITY ON MAIN STREET (2020), <https://www.uschamber.com/report/august-2020-special-report-race-and-inequality-main-street> [<https://perma.cc/YHB6-XZJS>].

186. Jia Wertz, *Common Challenges for Companies Expanding Their E-Commerce Business During the Pandemic*, FORBES (Sept. 30, 2020), <https://www.forbes.com/sites/jiawertz/2020/09/30/common-challenges-for-companies-expanding-their-e-commerce-business-during-the-pandemic/?sh=5b05cd1c14a9> [<https://perma.cc/8U8N-XEPA>].

accessibility litigation. In 2013, approximately 2,722 cases were filed under Title III.<sup>187</sup> That number jumped to 4,436 in 2014 and was 11,053 in 2019.<sup>188</sup> The total number of website accessibility lawsuits rose 177%, from 814 in 2017 to 2,258 in 2018, with only a slight decline in 2019 to 2,256.<sup>189</sup> Most of these cases are filed by a handful of law firms.<sup>190</sup> The pandemic did not halt the filing of website accessibility lawsuits. Indeed, although the rate of filings decreased in April and May of 2020, the total number of filings for 2020 was 12% higher than the number of filings in 2019.<sup>191</sup> One defense attorney expressed the anger and disbelief of his clients at receiving such complaints during this time when their businesses had not been making any money.<sup>192</sup>

Businesses are aware of the economic and social cost of ADA non-compliance. Approximately one quarter of people living in the United States are disabled.<sup>193</sup> As one commentator put it, “disability is pervasive in society and it is one of the only identity groups everyone will become part of as they age.”<sup>194</sup> Disabled customers in the U.S. represent more

187. Minh N. Vu & Kristina Launey, *Federal ADA Title III Lawsuit Numbers Drop 15% for the First Half of 2020 but a Strong Rebound Is Likely*, SEYFARTH SHAW: ADA TITLE III (Sept. 2, 2020), <https://www.adatitleiii.com/2020/09/federal-ada-title-iii-lawsuit-numbers-drop-15-for-the-first-half-of-2020-but-a-strong-rebound-is-likely/> [https://perma.cc/DRR6-ZPX7].

188. *Id.*

189. Minh N. Vu & Kristina Launey, *The Curve Has Flattened for Federal Website Accessibility Lawsuits*, SEYFARTH SHAW: ADA TITLE III (Apr. 29, 2020), <https://www.adatitleiii.com/2020/04/the-curve-has-flattened-for-federal-website-accessibility-lawsuits/> [https://perma.cc/2KTH-TRLD].

190. Unfortunately, ADA lawsuits are largely characterized by serial plaintiffs and law firms. *Controversial 60 Minutes Segment on “Drive-by” ADA Lawsuits Highlights Negative Aspect of the Law*, SEYFARTH SHAW: ADA TITLE III (Dec. 9, 2016), <https://www.adatitleiii.com/2016/12/controversial-60-minutes-segment-on-drive-by-ada-lawsuits-highlights-negative-aspect-of-the-law/> [https://perma.cc/F8DN-B2CX] (mentioning thousands of lawsuits filed by one Arizona attorney and hundreds of demand letters filed by a select few plaintiff’s attorneys citing violations of website accessibility). A few lawyers are responsible for filing most of the Title III lawsuits, with the more prolific filers submitting thousands of lawsuits. AM. TORT REFORM FOUND., *JUDICIAL HELLHOLES REPORT 2020-2021 10* (2020), [https://www.judicialhellholes.org/wp-content/uploads/2020/12/ATRA\\_JH20\\_layout\\_09d-1.pdf](https://www.judicialhellholes.org/wp-content/uploads/2020/12/ATRA_JH20_layout_09d-1.pdf) [https://perma.cc/PQP8-59GA]. “A handful of plaintiffs’ firms file a majority of the ADA lawsuits in New York.” *Id.* The report recounts that one attorney and client have sued at least 80 businesses, and a Florida resident has sued more than 40 hotels in New York and over 300 nationwide. *Id.* One notorious attorney “was arrested after the State discovered he engaged in a massive scheme to shake down small mom-and-pop stores across the state. He filed multiple lawsuits on behalf of unknowing plaintiffs, threatening stores with additional litigation if they refused to immediately settle. He earned over \$930,000 in attorney’s fees.” *Id.*

191. Kristina M. Launey & Minh N. Vu, *Federal Website Accessibility Lawsuits Increased in 2020 Despite Mid-Year Pandemic Lull*, SEYFARTH SHAW: ADA TITLE III (Apr. 28, 2021), <https://www.adatitleiii.com/2021/04/federal-website-accessibility-lawsuits-increased-in-2020-despite-mid-year-pandemic-lull/> [https://perma.cc/8XLH-M6CM].

192. AM. TORT REFORM FOUND., *supra* note 190, at 10.

193. CTRS. FOR DISEASE CONTROL & PREVENTION, *DISABILITY IMPACTS ALL OF US* (2020), <https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html> [https://perma.cc/ZD39-BQPX].

194. Jasmine E. Harris, *The Frailty of Disability Right*, 169 U. PA. L. REV. ONLINE 29, 45 (2020), [http://www.pennlawreview.com/wp-content/uploads/2020/07/Harris\\_Final-1.pdf](http://www.pennlawreview.com/wp-content/uploads/2020/07/Harris_Final-1.pdf) [https://perma.cc/N26U-ARG6].

than 1.28 trillion in discretionary spending power and are potentially significant contributors to e-commerce revenue.<sup>195</sup> Presumably, businesses would rather invest in changes that would serve those customers rather than in fighting litigation.<sup>196</sup> In the absence of clear guidelines, it is difficult, if not impossible, for companies to achieve compliance. Yet, despite the devastating impacts on business, Congress has failed to act.

### C. Proposed Non-Legislative Solutions Are Inadequate

Although various solutions have been proposed by scholars and commentators, these solutions are inadequate and fall short in terms of providing actions that will mandate equal access for the disabled community to websites and other technologies.

#### 1. Without Legislation, Agency Action Is Unlikely to Solve the Problem

##### a. The Department of Justice

Although the DOJ has had ample opportunity, it has repeatedly declined to provide regulations regarding website accessibility and a technical standard for compliance. The DOJ's only serious attempt at formal rulemaking on the subject ended abruptly in 2017, when it placed its rulemaking notices on the inactive list after eight years of inaction.<sup>197</sup> It is possible that under the Biden administration, the DOJ will become more active in rulemaking as well as enforcement. Some practitioners anticipate that the DOJ may also take an active role in shaping future Title III legislation by returning to its prior roles of providing regulatory guidance and intervening in lawsuits.<sup>198</sup>

One commentator suggested that the DOJ issue a rule expanding the definition of "facility" in its current regulations to include websites.<sup>199</sup> Such a regulatory change, however, would present a challenge, as "facility" has been narrowly interpreted to mean a physical

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195. RICH DONOVAN, 2020 ANNUAL REPORT: THE GLOBAL ECONOMICS OF DISABILITY 12 (2020), <https://www.rod-group.com/sites/default/files/2020%20Annual%20Report%20-%20The%20Global%20Economics%20of%20Disability.pdf> [<https://perma.cc/B86P-YMCQ>].

196. See Sen. Grassley Letter, *supra* note 129.

197. See *supra* notes 124–26 and accompanying text.

198. Minh N. Vu & Kristina M. Launey, *How Will the DOJ Enforce Title III of the ADA in a Biden Administration?*, LEXOLOGY (Nov. 17, 2020), <https://www.lexology.com/library/detail.aspx?g=2756ee38-ec43-4e86-928e-ee9f12aed8df> [<https://perma.cc/MHM9-SKZF>].

199. Ryan Brunner, *Websites as Facilities Under the ADA Title III*, 15 DUKE L. & TECH. REV. 171, 186–90 (2017).

place.<sup>200</sup> Alternatively, the DOJ could expand its interpretation of places of “public accommodation”<sup>201</sup> to include websites, in addition to physical places. The DOJ has made statements supporting the position that websites are places of public accommodation,<sup>202</sup> however, it has not taken any regulatory action, and it is not clear that the DOJ has the authority to alter statutory definitions. Moreover, in the absence of formal rulemaking, it is unlikely that any such reinterpretations of places of public accommodation to include websites would be accorded *Chevron* deference by courts.<sup>203</sup>

### b. Other Agencies

Given the DOJ’s inaction, some commentators suggest utilizing federal and state consumer protection statutes to address the accessibility issue.<sup>204</sup> But because the regulatory and enforcement power of any agency is limited to the authority delegated by Congress,<sup>205</sup> any actions taken by the agency will be decidedly narrow in

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200. Some cases and commentators have determined that the term “facility” is limited to a physical place. *See, e.g.,* Samuel H. Ruddy, *Websites, Apps, Accessibility and Extraterritoriality Under Title III of the Americans with Disabilities Act*, 108 GEO. L.J. ONLINE 80, 87–89 (2019), <https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2019/10/Ruddy-Websites-Apps-Accessibility-and-Extraterritoriality-Under-Title-III-of-the-Americans-with-Disabilities-Act.pdf> [<https://perma.cc/X55H-MS7D>] (“Construing the term ‘place,’ the Sixth Circuit emphasized that Title III’s implementing regulations defined the term ‘place’ to mean ‘facility’ and noted that the definition of ‘facility’ discussed only physical locations and structures.”).

201. 28 C.F.R. § 36.104 (2020).

202. *See supra* Section I.C. Notably, in a recent press release announcing a settlement with the pharmaceutical chain RiteAid over the accessibility of its COVID vaccination website, the DOJ did not indicate that the websites must be accessible as places of public accommodation. Rather, the DOJ stated that “Title III of the ADA requires public accommodations like drugstores and grocery stores to provide individuals with disabilities with full and equal enjoyment of goods and services. The ADA also requires public accommodations to provide effective communications with people with disabilities, including through auxiliary aids and services like accessible technology.” U.S. Att’y’s Off., *supra* note 154.

203. *Chevron* deference, articulated by the Supreme Court in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), requires that federal courts interpreting agency action defer to the interpretations of such agencies provided that the statute in question is ambiguous and the agency interpretation is reasonable. In this case, given that the DOJ’s statements are less formal pronouncements rather than regulations or interpretative rules, courts are even less likely to give *Chevron* deference to these pronouncements. *See* *United States v. Mead Corp.*, 533 U.S. 218 (2001). *Mead* held that ruling letters should not be treated like Customs regulations and receive *Chevron* deference because they are not preceded by the notice and comment period and do not carry the force of law but may be eligible for a lower level of deference as persuasive under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Mead*, 533 U.S. at 221.

204. Jonathan Lazar, *The Potential Role of US Consumer Protection Laws in Improving Digital Accessibility for People with Disabilities*, 22 U. PA. J.L. & SOC. CHANGE 185, 203 (2019).

205. *See, e.g.,* *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“It is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.”).

scope. Furthermore, private citizens have limited power to enforce these regulatory schemes. In the case of the Federal Trade Commission (FTC), for instance, although the statute gives the FTC a variety of enforcement tools, there is no private right of action. Thus, there is no provision for a consumer to directly redress a problem.<sup>206</sup>

### (1) The Federal Trade Commission

The FTC has the authority to protect consumers and enforce regulations prohibiting deceptive and unfair trade practices including those targeting certain individuals for discrimination on the basis of prohibited characteristics.<sup>207</sup> In the absence of a modification to the FTC Act to specifically address disabilities and website accessibility claims, however, the potential cases within the purview of the FTC would likely be limited to those in which a disabled consumer is forced to pay a higher price because they could not access the discount available on a company website<sup>208</sup> or is deprived of information regarding the accessibility of a particular product prior to purchase, such as a mobile or web application or other digital service.<sup>209</sup> The general issue of accessibility of websites and other digital technologies would be unlikely to fall within the FTC's purview without additional facts indicating fraud or some other type of consumer injury that would trigger the FTC Act. The FTC Act also lacks a private right of action, which leaves the disabled consumer no choice other than to file an informal complaint with the FTC pursuant to Section 5 of the Act and continue to endure discrimination in hopes that the FTC decides to issue an injunction against the company to end its deceptive

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206. The FTC Act provides a number of statutory remedies including temporary restraining orders, preliminary and permanent injunctions, restitution, disgorgement, rescission of contracts, freezing of assets, imposition of civil penalties, and the appointment of receivers. *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FTC, <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> [https://perma.cc/P55S-JHM2] (last updated May 2021) [hereinafter *A Brief Overview*].

207. *Id.* Section 5(a) of the FTC Act provides that "[u]nfair or deceptive acts or practices in or affecting commerce . . . are . . . declared unlawful." 15 U.S.C. § 45(a)(1). In addition to its general grant of authority under the FTC Act, the FTC also enforces the Equal Credit Opportunity Act which prohibits credit discrimination on the basis of race, religion, national origin, sex, marital status, and whether the applicant is the recipient of public assistance. 15 U.S.C. §§ 1691-1691f.

208. See Lazar, *supra* note 204, at 193.

209. See *id.* at 194.

practices.<sup>210</sup> As of 2019, no FTC cases have focused on discrimination against disabled consumers.<sup>211</sup>

## (2) The Federal Communications Commission

The Federal Communications Commission (FCC) is responsible for enforcing the Twenty-First Century Communications and Video Accessibility Act (CVAA).<sup>212</sup> This federal communications law, meant “to increase the access of persons with disabilities to modern communications,” has largely failed its statutory mandate to make “sure that accessibility laws enacted in the 1980s and 1990s are brought up to date with 21st century technologies . . . .”<sup>213</sup> Although well-meaning, the CVAA is littered with loopholes and exceptions that allow private companies to obfuscate the CVAA’s mandate to make online video and communication accessible.<sup>214</sup> Although “more than 86% of companies provide user-generated content as part of their marketing strategy,” the CVAA excludes user-generated content from its closed captioning

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210. A *Brief Overview*, *supra* note 206 (“Following an investigation [of the complaint], the Commission may initiate an enforcement action, using either an administrative or judicial process if it has ‘reason to believe’ that the law is being or has been violated.”).

211. Lazar, *supra* note 204, at 196. The consumer protection laws of some states may more directly address discrimination against disabled consumers. However, rather than providing clarifying rules, these differing lawsuits could potentially create a patchwork of enforcement dependent on jurisdiction, which may become untenable with respect to the internet. *See infra* notes 244–47 and accompanying text. Most, if any cases, would give rise to an interstate commerce issue, more appropriately handled on the federal level. Similar to the potential consequences of individual state adoption of website accessibility laws, the EU member states have adopted various versions of the EU Web Accessibility Directive, resulting in the fragmentation of the legal landscape. Alexis Fierens, Elizabeth Daem & Emma Stockman, *Website Accessibility for Persons with Disabilities: Minimum Harmonization Creates Fragmentation*, LEXOLOGY (Sep. 6, 2021), <https://www.lexology.com/library/detail.aspx?g=729d658a-7b8d-45be-a573-b98e4311efc5>.

212. *See 21st Century Communications and Video Accessibility Act (CVAA)*, FED. COMM’N COMM’N, <https://www.fcc.gov/consumers/guides/21st-century-communications-and-video-accessibility-act-cvaa> [<https://perma.cc/5UPU-QYEK>].

213. *Id.*

214. For example, the Coalition of E-Reader Manufacturers obtained an indefinite waiver from the accessibility requirements of the CVAA from the Consumer and Government Affairs Bureau of the FCC for their screen readers, with the proviso that they provide reports regarding whether advanced communications services is the primary or secondary purpose. Stephanie Fogel, *Video Game Communications Now Subject to U.S. Accessibility Law*, VARIETY (Jan. 4, 2019, 12:18 PM), <https://variety.com/2019/gaming/news/video-games-cvaa-accessibility-law-1203099440/> [<https://perma.cc/GS64-CAD8>]. In addition, video game manufacturers have also received waivers from full compliance with the CVAA. *Id.* However, as of December 31, 2018, many of these waivers expired, allowing people with disabilities to gain additional access to text chat and voice chat features in video games and other communications features. *Id.* The FCC does not require that manufacturers provide accessibility to the disabled with respect to game play. *Id.*

requirements,<sup>215</sup> creating additional challenges for disabled consumers to have equitable access to the marketplace. Unlike the ADA and the Rehabilitation Act of 1973, which are modeled after the Civil Rights Act of 1964, the CVAA is structured as a telecommunications law and unlike the ADA, does not have an anti-discrimination focus.<sup>216</sup>

## 2. The Judicial System Cannot Solve the Problem

As discussed in Section II.B, courts have differed in their approaches to the issues of whether and to what extent Title III mandates website accessibility. While Congress intended that the ADA “keep pace with the rapidly changing technology of the times,”<sup>217</sup> it is not clear that Congress sought to make the courts solely responsible for clarifying the scope of Title III and many would argue that it is not the appropriate role of the judiciary to create legislation.<sup>218</sup> Without resolution by the Supreme Court, courts will continue to apply different tests in an effort to determine whether a website is a “place of public accommodation,” thereby perpetuating the circuit split.

None of the tests currently employed by the various circuits is a perfect solution. The strictest view would not provide disabled people with equal access to the internet.<sup>219</sup> The intermediate view would exclude businesses that are fully-online from the ADA’s coverage.<sup>220</sup> The more expansive view runs the risk of being overly broad as to include all websites.<sup>221</sup> For example, this view would necessarily include businesses that host third party user content on their websites and hold them liable for ADA compliance. This would also potentially set up a clash between the ADA and § 230 of the Communications Decency Act of 1996, which provides immunity for operators of websites for the content of their users.<sup>222</sup>

In the absence of Congressional or DOJ action, some commentators have proposed various tests intended to serve as a singular standard.

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215. Under the CVAA, “Video programming” is defined as “[p]rogramming provided by, or generally considered comparable to programming provided by, a television broadcast station, but not including consumer-generated media.” 47 C.F.R. § 79.4(a)(1) (2020).

216. Statement of Interest of the United States of America in Opposition to Defendant’s Motion for Judgment on the Pleadings at 19, *Nat’l Ass’n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196 (D. Mass. 2012) (No. 11-cv-30168) (“Title III of the ADA and the CVAA can be read to coexist, especially given their differing legislative focus, requirements, forums, and remedies.”).

217. H.R. Rep. No. 101-485, pt. 2, at 108 (1990).

218. See *Gil v. Winn-Dixie Stores, Inc.*, 993 F.3d 1266, 1284 (11th Cir. 2021) (“[C]onstitutional separation of powers principles demand that the details concerning whether and how these difficulties should be resolved is a project best left to Congress.”).

219. See *supra* notes 61–64 and accompanying text.

220. See *supra* notes 65–78 and accompanying text.

221. See *supra* notes 79–81 and accompanying text.

222. 47 U.S.C. § 230(c).

While none of these would ever have the force of law, they are useful in thinking about what a new or revised statute might provide.

One such test is the website accommodations test (WAT).<sup>223</sup> It abandons the nexus test, as it does not require a connection with a physical place. Instead, it requires an inquiry into (1) whether the website provides goods or services that are “or could be provided by a physical place and (2) whether accessibility is readily achievable.”<sup>224</sup> A website that meets both of these requirements is categorized as a place of public accommodation.

The first part of the test is useful because it eliminates any “nexus” requirement and seems to come close to what Congress might have intended. As to the second part, its author suggests that by analogizing websites to physical structures and the alternatives that make those structures accessible, one can determine whether accessibility is readily achievable. Therefore, one of the advantages of WAT over other tests is that it provides a compliance standard for determining website accessibility.<sup>225</sup>

However, there are two related but distinct drawbacks to the WAT test. First, as its author acknowledges, WAT conflicts with the plain language of the ADA.<sup>226</sup> For example, it uses the term “readily achievable” as a standard for website compliance, when the text of the ADA clearly defines that term to apply to the removal of “architectural barriers.”<sup>227</sup> Second, “readily achievable” is not a sufficient compliance standard in and of itself. Similar to the application of the “undue burden” standard, “readily achievable” operates in concert with a compliance standard. For example, buildings and other physical structures are currently required to comply with the “2010 Standards

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223. See Ashley Cheff, *The Website Accommodations Test: Applying the Americans with Disabilities Act to Websites*, 26 WM. & MARY J. RACE, GENDER & SOC. JUST. 261 (2020).

224. *Id.* at 272 (punctuation omitted).

225. *Id.* at 275.

For example, ramps provide an alternative option for entering a building or structure. Similarly, a keyboard interface, which controls web content by keystrokes, allows for an alternative to navigating a website with a mouse. Similarly, installing a flashing alarm light is a readily achievable accommodation. Flashing alarm lights provide an alternative means for deaf persons to internalize an emergency situation. Similarly, subtitles for videos on websites provide an alternative for deaf persons to understand the content provided by a video.

*Id.* (footnotes omitted).

226. *Id.* at 278.

227. 28 C.F.R. § 36.304 (2020). Readily achievable is used in connection with architectural barriers. Such barriers must be removed to the extent removal is readily achievable. It is defined by the ADA as “easily accomplishable and able to be carried out without much difficulty or expense.” 28 C.F.R. § 36.304(a).

for Accessible Design”<sup>228</sup> unless compliance is not “readily achievable.”<sup>229</sup> Hence, a business need not fully meet all of the requirements of a particular compliance standard because it is not “readily achievable.” On its own, outside of the text of the ADA, “readily achievable” is so vague a standard as to be no standard at all. There are no such standards in effect for website accessibility.<sup>230</sup>

Three other suggested tests expand the nexus test by focusing on the relationship between what the website is offering and its connection to commerce or the twelve categories of public accommodations listed in the statute.<sup>231</sup> For instance, under the commerce and character-based test, a court would conclude that a website is covered under Title III of the ADA by (1) determining if the website is a private entity that affects commerce and (2) looking at the character of the commercial entity and whether it fits into one of the twelve enumerated categories of places of accommodation.<sup>232</sup> Based on this analysis, the court might end up excluding some websites from coverage under the ADA that should be included because they do not fit into one of the twelve categories.<sup>233</sup>

The storefront test calls on courts to evaluate whether the website in question is acting as a storefront for a business entity that actually has a physical facility.<sup>234</sup> Under the test, “[a]ny website that acts as a storefront for an entity that offers a substantial amount of its goods or services from a physical facility may be subject to Title III if the facility and the website together form an entity that would otherwise fall under one of the enumerated places of public accommodation.”<sup>235</sup> The storefront test differs from the nexus test in that it shifts the court’s analysis from looking for a connection between the goods and services offered by the website and those offered by the physical place,<sup>236</sup> to an

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228. DEPT OF JUST., 2010 ADA STANDARDS FOR ACCESSIBLE DESIGN (2010) <https://www.ada.gov/regs2010/2010ADASTandards/2010ADASTandards.htm> [<https://perma.cc/P6MQ-WRDZ>].

229. 28 C.F.R. § 36.304.

230. See *infra* Section III.B.2.

231. Christopher Mullen, Note, *Places of Public Accommodation: Americans with Disabilities and the Battle for Internet Accessibility*, 11 DREXEL L. REV. 745, 772 (2019); 42 U.S.C. 12181(7)(A)–(L).

232. 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, 1024–27 (2008).

233. For instance, it is not clear whether businesses which provide services, such as Airbnb and Uber, are covered by the ADA, as they do fit neatly into the one of the twelve categories. Minh N. Vu & Kimberly C. Gordy, *Mobile Apps Like Uber and Airbnb Raise Novel ADA Title III Issues*, SEYFARTH (Dec. 16, 2015), <https://www.adatitleiii.com/2015/12/mobile-apps-like-uber-and-airbnb-raise-novel-ada-title-iii-issues/#page=1> [<https://perma.cc/8R9T-4HU6>].

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

235. *Id.* at 683.

236. As in *Robles*, the “nexus” analysis used by the court required a determination of whether the plaintiff’s inability to access the goods and services on the website impeded his ability to access

inquiry of the “physical” nature of the goods or services being offered and the link between the website and the physical location. Under this analysis, the physical location need not be the provider of goods and services, and instead, the website can act as a storefront.<sup>237</sup>

One shortcoming of the storefront test, however, is that while it ostensibly includes a fully online marketplace—such as Amazon, which has a physical location from which its goods are offered by means of its website—it would not include the services of Facebook, because although Facebook’s offices are a physical location, its services are offered in cyberspace.<sup>238</sup> Moreover, where a business, such as Netflix, offered both wholly online goods or services and “physical” goods and services from the same website, coverage under Title III would depend on whether the latter comprise a “substantial amount” of the goods and services.<sup>239</sup> This test, therefore, is an invitation to litigation.

The content test differs from the other tests in that it requires the court to first classify the material offered by the website and then determine “if what the website provides falls within one of the categories provided by Congress in its definition of public accommodation.”<sup>240</sup> Both the commerce and character and content-based tests conclude with an analysis of whether the website fits within one of the twelve enumerated categories defining places of public accommodation. But whereas the commerce and character-based test begins with an examination of the “commercial nature and character of the website,” the content-based test focuses on the type of good sold by the website. For example, if the “content” sold by the website is clothing, it would potentially fit in the categories of clothing store or sales establishment, and therefore would be subject to the Title III of the ADA.<sup>241</sup> Of all the aforementioned tests, the content test may come the closest to allowing the definition of public accommodation to keep pace with changing technologies by shifting the focus away from “venue” towards the particular content that the website is selling.<sup>242</sup>

Even if all courts were required to adopt any one of these tests, none of them provides a single standard for ADA website compliance. Ultimately, litigation through the judicial system is a haphazard, inefficient, and expensive way of solving these significant questions about the statute’s application. It has been more than thirty years since

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the goods at the physical location. *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898, 905–06 (9th Cir. 2019).

237. Crowley, *supra* note 234, at 684–85.

238. *Id.* at 685–86.

239. *Id.* at 688.

240. Carly Schiff, *Cracking the Code: Implementing Internet Accessibility Through the Americans with Disabilities Act*, 37 CARDOZO L. REV. 2315, 2346 (2016).

241. *Id.* at 2346.

242. *Id.* at 2348.

the ADA was enacted and more than twenty since the first litigation over web accessibility began. In those decades, although the circuits may have gradually converged somewhat, there has been no definitive resolution and that movement has come at a glacial pace. As noted, when presented with an opportunity to resolve the circuit split, the Supreme Court declined to do so.<sup>243</sup>

### 3. State Website Accessibility Legislation May Only Compound the Problem

The enactment of digital accessibility laws by individual states is a step towards eliminating some barriers for the disabled community, but these state-level laws also create challenges. Currently, most states have adopted some form of legislation requiring that the websites of their state and local agencies be made accessible to individuals with disabilities.<sup>244</sup> Many states also have antidiscrimination statutes that afford some protection to the disabled community. As of this writing, however, California is the only state that has enacted legislation specifically requiring that private companies doing business in that state make their websites digitally accessible.<sup>245</sup> Application of the California Consumer Privacy Act (CCPA) raises jurisdictional issues because the CCPA applies not just to companies located in the state of California, but companies that meet particular thresholds.<sup>246</sup> Potentially, any business used by a California resident could be subject to the requirements of the Unruh Civil Rights Act and the CCPA.<sup>247</sup>

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243. See *supra* note 109 and accompanying text.

244. According to the General Services Administration website, approximately fourteen states have adopted legislation similar to § 508 in requiring accessibility to electronic information technology. State Policy, SECTION 508, <https://www.section508.gov/manage/laws-and-policies/state> [<https://perma.cc/AFD5-274D>]. This may not reflect the current number of states as the site relies on submissions from the general public for up-to-date information. *Id.* (“Your state not listed? Send us your policy or site information and we’ll display it here”).

245. The California Consumer Protection Privacy Act (“CCPA”), 2018 Cal. Stat. 1807 (codified as amended at 2019 Cal. Stat. 6255), is a consumer data privacy law and the first state law to specify accessibility guidelines (WCAG 2.1) for the websites of private businesses. Among other things, the CCPA requires that online privacy policies and other disclosure notices must be accessible to consumers with disability and at minimum provide information on how a consumer can access the notice in an alternative format. *Id.* § 1798.185(6).

246. *Id.* § 1798.100.

247. The Unruh Civil Rights Act mandates that

all persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

Jurisdictional issues will necessarily lead to inconsistencies in the application of state statutes. A California business that has a website that complies with WCAG 2.1 could still potentially be subject to litigation by plaintiffs accessing their website in states which have different compliance standards. State legislation might also result in an increase in the number of website accessibility lawsuits because although the ADA only awards attorneys' fees, state statutes could potentially provide monetary damages—further incentivizing litigation. Moreover, such litigation would likely involve preemption issues, given Congress's clear power to regulate interstate commerce.

### III. WHAT SHOULD CONGRESS DO?

More than twenty years ago, Congress recognized that the accessibility of the internet had become a significant issue and held hearings with advocates and industry experts to discuss the ADA's applicability to the websites of private businesses.<sup>248</sup> Yet neither then, nor when the ADA was amended in 2008,<sup>249</sup> did Congress propose or pass any amendments to the statute or any clarifying legislation. Nor did that happen in the ensuing years, except for two unenacted bills, neither of which came close to fully addressing the issues.<sup>250</sup>

No one commentator can provide a silver bullet to solve a decades old problem. Nor should Congress continue to propose poorly thought out, myopic legislation. Rather, Congress must undertake a deeper and more serious version of the hearings in 2000. Congress must solicit views and hear from representatives of several constituencies, including the disabled community, the business community, and technical experts. It is possible, however, to consider what legislative action should be taken and to identify the issues that must be addressed. It is also possible to evaluate solutions that have been proposed.

#### A. Congress Should Amend the ADA to Add a New Title

Some commentators have suggested that Congress should simply amend the definition of "public accommodation" in 42 U.S.C. § 12181(7) to include websites, thereby adding a thirteenth category.<sup>251</sup> While this

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248. *Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites*, *supra* note 36.

249. *See supra* notes 40–42 and accompanying text.

250. *See infra* Section III.C.

251. *See, e.g.*, Mullen, *supra* note 231, at 768 ("[E]ither the DOJ or Congress can solve the issue of unequal internet access. . . by simply amending the definition of 'places of accommodation' to include websites"); Isabel A. Dupree, *Websites as Places of Public Accommodation: Amending the*

proposal might provide some protections for the disabled community by providing a basis for more consistent judicial decision making, it is not a viable quick fix. Simply adding websites to the list of places of public accommodation runs the risk of narrowly focusing on websites while ignoring other existing technologies, such as smart speakers and mobile apps, and fails to provide a framework capable of capturing future emerging technologies.<sup>252</sup> In addition, simply adding websites as a thirteenth category leaves open the question of which websites should be considered places of public accommodation. For instance, what would that mean in terms of liability for social media and other platforms that host user-generated content?

Another commentator has suggested adding the following language to Title III: “No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation, whether in virtual or physical space, by any person who owns, leases (or leases to), or operates a place of public accommodation.”<sup>253</sup> While this approach has some initial appeal, the term “virtual space” is vague, and may not be broad enough to encompass technologies that might emerge in the future. In addition, the change would not address whether, as discussed below, there should be differences in coverage or defenses, for “virtual” rather than physical accessibility.

A better option is for Congress to add a sixth title to the ADA. The ADA is divided into five titles, covering the areas of employment rights, public service, public accommodations, telecommunications, and

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*Americans with Disabilities Act in the Wake of National Federation of the Blind v. Target Corporation*, 8 N.C.J.L. & TECH. 273, 297–300 (2007) (arguing that Congress should amend the language of 42 U.S.C. § 12181(7) to address the issue of websites as places of public accommodation). *But see* Katherine Rengel, Comment, *The Americans with Disabilities Act and Internet Accessibility for the Blind*, 25 J. MARSHALL J. COMPUTER & INFO. L. 543, 577 (2008) (“Adding the Internet to Title III’s list of public accommodations would threaten the clarity of the entire section. The public accommodations listed in Title III have certain attributes in common, including that they are all physical entities.”).

252. Another option would be for Congress to draft new stand-alone legislation providing for digital accessibility rather than amending the ADA. Creating stand-alone legislation may create several issues with respect to the successful implementation of the statute. First, any stand-alone legislation would risk going outside of the language of the ADA, potentially creating a separate regulatory regime. However, incorporating the language of the ADA into such legislation might be inefficient, because certain terms of the ADA would need to be referenced or repeated, including definitional sections regarding disability, in order to avoid conflict. Further, as has been observed with respect to the Employment Non-Discrimination Act (“ENDA”) in the context of Title VII, a separate statute would necessarily suffer from a “lack of doctrinal development” or be “vulnerable to legislative tinkering.” William C. Sung, *Taking the Fight back to Title VII: A Case for Redefining “Because of Sex” to Include Gender Stereotypes, Sexual Orientation and Gender Identity*, 84 S. CAL. L. REV. 487, 511–12 (2011).

253. Michael P. Anderson, Note, *Ensuring Equal Access to the Internet for the Elderly: The Need to Amend Title III of the ADA*, 19 ELDER L.J. 159, 181 (2011).

miscellaneous considerations.<sup>254</sup> Creating a sixth title allows Congress to unhook the twenty-first century (and the future) from the twentieth century's place-centric model and take a fresh look at how access to technology should be approached.

### B. What Issues Must the New Title Address?

The twenty years of history of this accessibility question make clear that there are at least three major issues that any effective legislation must address.

#### 1. Coverage

Coverage in terms of a new title has two aspects. The first is, what must be accessible? The legislation must be written in such a way that it not only covers current technology but is also flexible enough to include future advances and technologies. The objective should be to alleviate the need for continual amendments in order to keep pace with current technologies.<sup>255</sup> In this area, Congress needs to call on the expertise of those in the technology fields and consult with the disabled community and its advocates.

The second aspect of coverage is more complex and perhaps involves a rethinking of what the statute's reach should be in light of the changes that technology has wrought. In the brick-and-mortar world of 1990, access to "goods," "services," and even "facilities,"<sup>256</sup> clearly contemplated removing physical barriers. Although many bemoan the impact on businesses, Title III clearly reaches more than just commercial entities and includes entities, such as schools, which are usually not-for-profit.<sup>257</sup> Thus one question to address is whether, given potential costs of compliance, the new statute should carve out not-for-profit entities and leave schools, who receive federal financial

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254. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (Titles I, II, III and V codified as amended at 42 U.S.C. §§ 12101–12213, Title IV codified at 47 U.S.C. § 225).

255. See Wolk, *supra* note 121, at 476–77.

256. The definition of facility as set forth by the DOJ clearly refers to a tangible, physical place. "Facility means 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." 28 CFR § 36.104 (2020).

257. Title III of the ADA enumerates twelve specific categories of places of accommodation which include, among other places, "a nursery, elementary, secondary, undergraduate, or postgraduate private school or other place of education." 42 U.S.C. § 12181(7)(I).

assistance, subject to comply with the requirements of § 504 of the Rehabilitation Act.<sup>258</sup>

The language of the statute might read as follows:

No person, solely due to a disability, shall be denied the equal use or benefits of a private website, mobile application, or other digital technology provided for the purpose of accessing goods, services, or otherwise engaging in commerce with respect to places of public accommodation as defined under Title III of the ADA, as now or hereafter amended.

“Other digital technologies” could be broadly defined to include electronic tools, systems, devices, and resources that generate, store, or process data. Referencing other digital technology would potentially allow the statute to include future technology beyond websites and mobile applications.

Even for entities that provide goods and services, which one might think of as the core of what Title III was intended to reach, Congress must evaluate whether that is the coverage standard when considering websites and other technology. In 1990, when the ADA was enacted, starting a business almost certainly meant an investment in a physical space. Complying with the ADA primarily meant making sure that there were no physical barriers to access to that space. The costs of compliance could be ascertained relatively easily and the obligation to remove those barriers was qualified by a “readily achievable” standard,<sup>259</sup> and once accomplished, the compliance was relatively permanent.

With the advent of the internet, however, many goods and services could be provided online without having to make an investment in a physical space. Small businesses could be operated out of homes or shared spaces that no customer or client would need to enter.<sup>260</sup> Indeed,

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258. Codified at 29 U.S.C. §§ 701–796l. Cf. Abrar & Dingle, *supra* note 46, at 170 (“Congress should mandate that the web content of for-profit enterprises (as opposed to non-profits and individuals) be accessible according to the standards laid down by the W3C (with the exception of subtitling). A for-profit enterprise, for the purposes of this proposal, is one that directly profits from the good or service sold over the Internet.”). The authors’ primary concern in this regard is “the First Amendment impact of mandating accessibility of free Internet content.” *Id.*

259. “The term ‘readily achievable’ means easily accomplishable and able to be carried out without much difficulty or expense.” 42 U.S.C. § 12181(9). The readily achievable standard is a lower standard requiring less effort than undue burden (auxiliary aids) and undue hardship (reasonable accommodations in employment) limitations. U.S. DEP’T OF JUST., ADA TITLE III TECHNICAL ASSISTANCE MANUAL: COVERING PUBLIC ACCOMMODATIONS AND COMMERCIAL FACILITIES, §III-4.4000, <https://www.ada.gov> [<https://perma.cc/8ZWU-QLSN>].

260. Approximately fifteen million small businesses are home-based, about half of all small businesses in the United States. *Frequently Asked Questions*, U.S. SMALL BUS. ADMIN., OFFICE OF ADVOCACY (Oct. 2020), <https://cdn.advocacy.sba.gov/wp-content/uploads/2020/11/05122043/Small-Business-FAQ-2020.pdf> [<https://perma.cc/7EHC-WFUQ>].

the number of such businesses may have increased during the pandemic. In contrast to architectural barriers, technological barriers may be relatively more expensive to remove. In addition, given the dynamic nature of websites, there may be ongoing costs to ensure compliance.

While there is probably no disagreement that online-only internet giants such as Amazon should be subject to accessibility requirements, is the same true for small internet-only businesses or for small local businesses with a limited online presence? This issue might be addressed in different ways. One way may be to specifically define the entities that are subject to the new title. Covered entities could be limited by some measure of “size,” for instance, by revenue.<sup>261</sup> Another approach is to allow entities to be excused from compliance if they can prove that requirements pose an undue burden.<sup>262</sup> While the concept of undue burden is already applicable to Title III, it is not clear whether undue burden is a defense to inaccessibility of a “place of public accommodation” or only to the provision of “auxiliary aids and services.”<sup>263</sup> The new title could clarify that undue burden is a defense to the accessibility requirement.<sup>264</sup> It might also incorporate the kind of

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261. For example, the CCPA limits its coverage to entities that meet a certain applicability threshold. As enacted, it applied to businesses that exceed one of the following: “annual gross revenues of [\$25 million]”; “annually buys, receives . . . , sells, or shares . . . the personal information of 50,000 or more consumers”; or “[d]erives 50 percent or more of its annual revenues from selling consumers’ personal information.” CAL. CIV. CODE § 1798.140(c)(1)(A)–(C) (West 2018). The statute was later amended to increase the number of consumers to 100,000. A.B. 694, 2021–22 Leg., Reg. Sess. (Cal. 2021).

262. Factors to be considered in determining whether an action results in an undue burden 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.

28 C.F.R. § 36.104 (2016).

263. See, e.g., *DeSalvo v. Islands Rests., L.P.*, 20-cv-2620, 2020 WL 4035071 at \*5 (C.D. Cal. July 16, 2020).

264. See Rengel, *supra* note 251, at 578–80 (arguing for a “reasonable modification” standard for websites).

factors that are considered in determining undue hardship under Title I.<sup>265</sup>

## 2. Compliance

How does an entity comply with accessibility requirements? Much of the literature has focused on coverage, with less written about the guidelines that entities use to establish ADA compliance. The W3C is the leading organization setting forth international Web Content Accessibility Guidelines (WCAG) addressing the provision of accessible online content for people with disabilities. WCAG are universally accepted de facto standards. Hence, in the absence of federal legislation or regulatory action, there is no clear legal requirement for private companies to comply with these standards.<sup>266</sup> It is unlikely that Congress would adopt a particular standard, nor should it. Congress should, however, give an agency the power to set those standards by passing legislation mandating access to websites and other technologies for people with disabilities. The legislation should include a mandate for the promulgation of regulations regarding digital

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265. Factors used in determining whether an action results in undue hardship include:

- (i) The nature and net cost of the accommodation needed under this part;
- (ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;
- (iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;
- (iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity.

29 C.F.R. § 1630.2 (p) (2)(i)–(iv) (2020).

266. WCAG comprises generally accepted guidelines and is not a U.S. law. Section 508 of the Rehabilitation Act, and section 504 by incorporation, require federal agencies and organizations receiving federal assistance to comply with WCAG 2.0 guidelines. *See* sources cited *supra* note 45; *Information and Communication Technology, Revised 508 Standards and 255 Guidelines*, U.S. ACCESS BD., <https://www.access-board.gov/ict/> [<https://perma.cc/FY6R-YVM4>]. The Eleventh Circuit in deciding *Gil v. Winn-Dixie*, which could have set a precedent by affirming the lower court's decision to impose WCAG 2.0, declined to do so. *See supra* notes 82–103. Notably, H.R. 8478, The Online Accessibility Act, which would set WCAG 2.0 Level A as the standard for website accessibility compliance, was reintroduced in the 117th Congress after failing to pass during the prior Congressional session. *See* Online Accessibility Act, H.R. 1100, 117th Cong. (2021). Given the apparent flaws in the bill regarding coverage and implementation and the response from the disabled community and its advocates, it is unlikely that the bill will pass. *See infra* notes 285–302 and accompanying text. As of the date of this article, there is no DOJ regulation or federal legislation mandating compliance by private companies with a particular standard.

accessibility standards. The regulation can incorporate by reference the guidelines set forth by a private group such as W3C or introduce guidelines created by some other governmental or quasi-governmental body with the requisite expertise to create standards in this area.<sup>267</sup> In either case, to be effective, any Congressional legislation and implementation will require adequate oversight and vigorous enforcement of website compliance standards and re-evaluation when appropriate. Again, it may be time to consider whether the DOJ is the best entity to be given regulatory and enforcement power in this area or if there should be some other agency, existing or to be created, that should have those powers.

Keeping this in mind, and prioritizing compliance, language in a new statute could be drafted similarly to the EU Directive on the Accessibility of Public Sector Websites, by requiring that the company provide “(1) an accessibility statement for each website, mobile application or other digital technology, (2) a feedback mechanism so users can flag accessibility problems or request information published in non-accessible content and (3) require regular monitoring of websites, apps and other technologies by a designated private, state or federal agency and a public reporting of the results.”<sup>268</sup>

### 3. Impact on Covered Entities

Any legislation may disproportionately impact small businesses and entrepreneurs due to the potentially high cost of implementing and maintaining compliance. As discussed, part of the solution may be to define which entities are covered or to provide a defense of undue burden or hardship. In addition, clear regulatory standards for compliance should provide guidance as well as defenses.

The proliferation of litigation suggests that the statute should also address enforcement and procedures. It may be that a clearer statute and regulatory scheme will decrease the amount of litigation. It may also be that there should be some procedural steps, whether administrative or otherwise, that a litigant must complete before

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267. One suggestion is to enlist the U.S. Accessibility Board (“Access Board”), the independent federal agency which currently provides oversight of § 508 the Rehabilitation Act of 1973, the federal government’s web accessibility law, to take on the added responsibility of ensuring compliance with new congressional legislation. However, it is unlikely that the Access Board will be able to effectively develop and update an access standard for private businesses and other entities, in addition to its current responsibilities, given its limited budget and staff. See *About the U.S. Access Board: Performance and Accountability Report Fiscal Year 2020*, U.S. ACCESS BD., <https://www.access-board.gov/about/par.html> [<https://perma.cc/5A29-9L5V>].

268. Council Directive 2016/2102, art. 7–8, 2016 O.J. (L 327) 11–13 (EU), <https://eur-lex.europa.eu/eli/dir/2016/2102/oj> [<https://perma.cc/3YA3-UZ2V>].

initiating litigation. But those measures should not create onerous or insurmountable barriers to bringing a private lawsuit.<sup>269</sup> As discussed below, some of the Congressional proposals provide hurdles that go too far.

#### 4. Impact on the Disabled Community

Legislation addressing the issue of digital accessibility runs the risk of being too narrow to provide sufficient access to private websites, further perpetuating negative consequences for people with disabilities by continuing to exclude them from full participation in activities of daily living that are increasingly technology-based. While some states are making strides towards creating legislation that expands digital access,<sup>270</sup> more favorable outcomes could likely be achieved through national legislation, rather than a patchwork of policies and strategies developed by various states.

##### C. Recently Proposed Bills Fail to Address the Issues

The recent legislation proposed by Congress has focused on reducing litigation by erecting barriers to the ability of disabled people with disabilities to assert their accessibility rights under Title III rather than eliminating barriers. Both H.R. 620,<sup>271</sup> and H.R. 8478,<sup>272</sup> if adopted, would further marginalize people with disabilities.<sup>273</sup>

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269. It is possible to require the exhaustion of administrative remedies without creating barriers to filing a private lawsuit. In contrast to H.R. 620, discussed *infra* Section III.C, which essentially provides 180 days for the business to acknowledge and engage in “substantial progress” towards curing the alleged violation, the EEOC, for example, generally provides 180 days after the filing of a charge for the agency to investigate whether there is reasonable cause to believe there was a violation, to engage in conciliation, and then provide the party with a notice and right to sue, if it is unable to resolve the issue through conciliation and decides not to litigate. *Filing a Lawsuit*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/filing-lawsuit> [<https://perma.cc/9TXY-7STG>].

270. The Colorado State Legislature passed House Bill 21-1110, which incorporates federal protections for people with disabilities into state and local law. The statute sets deadlines by which state and local agencies must submit and implement accessibility plans and provides injunctive relief and fines of up to \$3,500 to plaintiffs with disabilities. H.B. 21-1110, 73d Gen. Assemb., Reg. Sess. (Co. 2021).

271. See ADA Education and Reform Act of 2017, H.R. 620, 115th Cong. (2017).

272. See Online Accessibility Act, H.R. 8478, 116th Cong. (2020).

273. In particular, H.R. 620 nowhere mentions websites. The legislative history of H.R. 620 focuses on structural barriers and “drive-by” lawsuits and ignores the issues of website accessibility of the disabled. 164 Cong. Rec. H1136-37 (daily ed. Feb.14, 2018) (remarks of Rep. Collins).

H.R. 620, the “ADA Education and Reform Act of 2017,”<sup>274</sup> makes no effort to address issues of website accessibility. Rather, the bill was a response to increasing complaints from the business community regarding the proliferation of ADA lawsuits over architectural barriers.<sup>275</sup> The passage of H.R. 620 by the House of Representatives in 2018 was met with public outcry from the disabled community and numerous advocates, organizations, and agencies.<sup>276</sup> A harbinger of a future bill, the requirement of “a notice and cure” period<sup>277</sup> for alleged violations of the ADA before a disabled plaintiff is permitted to file a lawsuit to assert their civil rights is inapposite to the bill’s stated purpose of “ensuring greater protection for individuals with disabilities.”<sup>278</sup> Extending the time period for remediation of ADA violations would not only dissuade some plaintiffs and their attorneys from pursuing claims,<sup>279</sup> but would also diminish the incentives for businesses to comply voluntarily when they can choose instead to simply wait out the time period.<sup>280</sup> Moreover, the actual removal of barriers could potentially extend for years, as the business owner would need to meet only the undefined standard of “substantial progress” towards eliminating barriers to access, instead of actual access.<sup>281</sup> Ultimately, for all of the impediments that it creates for people with disabilities to access the legal system, H.R. 620 fails to provide a remedy for the proliferation of non-meritorious litigation, largely incentivized by state laws which, unlike the ADA, allow a plaintiff to collect compensatory damages.<sup>282</sup> It also does nothing to address attorney misconduct which may play a role in the marked increase in litigation.<sup>283</sup>

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274. Some opponents of the bill consider this title to be a misnomer because the bill creates additional obstacles to the equitable treatment of disabled people, and fails to educate and reform. H.R. REP. NO. 115-539, at 18 (2018) (quoting Letter from Faiz Shakir, et al. to Members of Cong. in Opposition to H.R. 620 (Sept. 6, 2017) (“This misnamed and misrepresented bill would have a devastating impact on people with disabilities.”)).

275. *Id.* at 4–7.

276. A coalition of more than 230 disability rights groups, civil rights groups, labor unions, and veterans’ organizations strongly opposed the bill. Press Release, House Comm. on the Judiciary, Nadler’s Statement Opposing the “ADA Education and Reform Act of 2017” (Feb 15, 2018), <https://judiciary.house.gov/new/documentsingle.aspx?DocumentID=632> [<https://perma.cc/2F9H-3WR3>] [hereinafter Nadler’s Statement].

277. H.R. 620, 115th Cong., §3 (2017).

278. H.R. REP. NO. 115-539, at 2 (2018).

279. *Id.* at 23.

280. *Id.* at 20.

281. Letter from 110 California Disability, Civil Rights, Senior, and Civic Organizations to the California Delegation of the U.S. House of Representatives (May 25, 2017), <https://dredf.org/2017/05/25/letter-california-delegation-regarding-hr-620/> [<https://perma.cc/Y96H-BTXK>].

282. Nadler’s Statement, *supra* note 276.

283. See Vu and Launey, *supra* note 187.

As a follow-up to the flawed H.R. 620, in October 2020, two members of the House of Representatives proposed H.R. 8478, the “Online Accessibility Act.”<sup>284</sup> H.R. 8478 would amend the ADA to include “consumer facing websites and mobile applications owned or operated by a private entity” and “establish web accessibility standards for such websites and mobile applications, and for other purposes.”<sup>285</sup> H.R. 8478 is disappointing in that it fails to directly address the issue of inaccessibility for the disabled community in a substantive way, is replete with ambiguous language, and, similar to its predecessor H.R. 620, is an effort to protect businesses from increasing litigation at the expense of the rights of people with disabilities by erecting additional obstacles for disabled litigants.<sup>286</sup> The disabled community, its advocates, and the legal community have been vocal in their opposition to the bill, which failed to go for a vote before the House during the 116th Congressional Session<sup>287</sup> and was then reintroduced in Congress.<sup>288</sup>

H.R. 8478 is ill-suited to address digital accessibility for a number of reasons. The bill makes no meaningful attempt to define “consumer facing,”<sup>289</sup> and thus leaves the task of defining the contours of coverage to any agency, in this case the Access Board.<sup>290</sup> That failure disadvantages all parties in that it is not clear whether the phrase is meant to encompass the type of activities in Title III or something more or something less. As such, even with regulatory action, the bill invites litigation as to Congressional intent. In addition, the bill greatly disserves potentially covered entities by failing to give studied consideration to whether some entities should be excluded from the statute’s coverage, or allowed to raise a hardship defense, given the differences in removing physical versus technological barriers.<sup>291</sup>

Inexplicably, H.R. 8478 is limited in scope, covering only “consumer facing websites and mobile applications” and ignoring other current technologies such as kiosks, websites, and employee software<sup>292</sup> that make it difficult for people with disabilities to participate in the

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284. The bill was proposed by Democrat Lou Correa (CA) and Republican Ted Budd (N.C.).

285. H.R. 8478, 116th Cong., preamble (2020).

286. *Id.* at § 601(b)(1).

287. Minh N. Vu & Julia Sarnoff, *House Bill Introduced to Require Accessible Consumer Facing Websites and Mobile Apps*, ADA TITLE III NEWS AND INSIGHTS (Oct. 14, 2020), <https://www.adatitleiii.com/2020/10/house-bill-introduced-to-require-accessible-consumer-facing-websites-and-mobile-apps/> [https://perma.cc/7JBG-Q5YV].

288. *See* H.R. 8478 § 601(b)(2).

289. *See id.* § 604(1) (defining consumer facing website as “any website that is purposefully made accessible to the public for commercial purposes.”).

290. *Id.* § 601(c)(i).

291. *See supra* Subsection II.B.1.

292. Vu & Sarnoff, *supra* note 287.

workforce. The narrow coverage of the bill may also make it more difficult to expand accessibility to include future technologies.

Under H.R. 8478, consumer facing websites and mobile applications must comply with the Web Content Availability Guidelines (WCAG) 2.0 Level A and Level AA standard<sup>293</sup> and are “considered compliant . . . if such website or mobile application is in substantial compliance.”<sup>294</sup> Instead of H.R. 620’s “substantial progress,” H.R. 8478 uses a similar term: “substantial compliance.”<sup>295</sup> “Substantial compliance” is not defined in the bill. Without a true standard dictating compliance, H.R. 8478 provides companies with no true notice of when they are in compliance with the law. This leaves open the possibility of litigation, as well as inconsistencies within the courts as they grapple with interpreting exactly what “substantial compliance” means.

There is also an “escape clause” in the bill that allows owners and operators who are not in “substantial compliance” to provide “an alternative means of access” that is “equivalent to access the content available.”<sup>296</sup> However, H.R. 8478 is unclear, and case law has not specified what constitutes “equivalent.” Notably, in *Robles*, the appellate court did not address whether “providing a telephone number that customers using screen-reading software could dial to receive assistance” was an effective alternative to having access to Domino’s website and app.<sup>297</sup>

H.R. 8478 also requires exhaustion of administrative remedies, directly imposing procedural barriers for disabled plaintiffs to file civil lawsuits to force businesses to comply.<sup>298</sup> Particularly in discrimination cases, “exhaustion of remedies represent[s] significant obstacles for some of our most vulnerable citizens seeking relief for violations of federal statutes and civil rights laws.”<sup>299</sup> Like its predecessor, H.R. 620, H.R. 8478 was decidedly pro-business and focused more on reducing

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293. H.R. 8478 § 601(b)(1).

294. *Id.*

295. *Id.*

296. *Id.*

297. *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898 n.4 (9th Cir. 2019).

298. Pursuant to § 602 Administrative Remedies, a complainant cannot file an action in civil court until after she has completed the following steps: (1) file notice with the owner or operator that its forward facing website or mobile application is not in compliance; (2) if the owner or operator does become compliant within 90-days, the complainant can then file a complaint with the Department of Justice (must be filed within 90 days of the termination of the initial 90-day owner/operator compliance period); (3) After receiving the complaint, the Attorney General has 180 days to investigate the complaint and determine whether the owner or operator is in compliance; (4) The complainant can only file a private action, at the end of the 180-day period, if the DOJ determines there is a violation, but decides not to file a civil enforcement action. Consequently, a year or more can go by during which the discriminatory conditions persist. H.R. 8478 § 602.

299. Jon Greenbaum, *Toward a More Just Justice System: How Open Are the Courts to Social Justice Litigation*, LAW. COMM. FOR C.R. UNDER L., 45 (2016), <https://lawyerscommittee.org/wp-content/uploads/2016/08/Toward-A-More-Just-Justice-System.pdf> [<https://perma.cc/2SLG-CGXA>].

the surge of litigation than on disability rights.<sup>300</sup> H.R. 620 and H.R. 8478 lacked support among the disabled community and its advocates. Neither piece of legislation was put up for a vote in the Senate and each died at the end of the legislative term during which it was proposed.<sup>301</sup> H.R. 8478, the Online Accessibility Act, was reintroduced as H.R. 1100 in February 2021.<sup>302</sup>

### CONCLUSION

By failing to provide legislation on the issue of digital accessibility for disabled people, Congress is complicit in perpetuating disability-based discrimination, depriving individuals of full participation in society and, during the pandemic, potentially placing lives at risk. Now, more than ever, it is important for Congress take legislative action to mandate that private businesses provide the disabled community with access to websites and other digital technologies. While there is no easy solution, any workable Congressional legislation would need to be drafted in such a way that it is flexible enough to include future technologies and provide clear compliance guidelines. The Biden administration's commitment to involving the disabled in the administration and filling the role of special advisor on disability may bode well for future legislation.<sup>303</sup> Experts predict that technology will make human beings "better off" in the future,<sup>304</sup> but that will be true only for those for whom those technologies are accessible. When technology is improved for the disabled community, it is improved for everyone.

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300. H.R. 620, "The ADA Education Reform Act," was introduced in 2018 to amend the ADA "to promote compliance through education, to clarify the requirements for demand letters, to provide for a notice and cure period before the commencement of a private civil action, and for other purposes." H.R. 620, 115th Cong., preamble (2017).

301. H.R. 620 (115th): *ADA Education and Reform Act of 2017*, GOVTRACK, <https://www.govtrack.us/congress/bills/115/hr620> [<https://perma.cc/63KV-PH8X>]; H.R. 8478 (116th): *Online Accessibility Act*, GOVTRACK, <https://www.govtrack.us/congress/bills/116/hr8478> [<https://perma.cc/6UXL-JZVG>].

302. H.R. 1100, 117th Cong. (2021).

303. Prior to his election, President Joe Biden enlisted the help of the disabled community to assist him in drafting his policy meant to ensure equality for people with disabilities. *The Biden Plan for Full Participation and Equality for People with Disabilities*, <https://joebiden.com/disabilities/> [<https://perma.cc/LX8M-7NXW>].

304. Janna Anderson & Lee Rainie, *Artificial Intelligence and the Future of Humans*, PEW RSCH. (Dec. 10, 2018) <https://www.pewresearch.org/internet/2018/12/10/artificial-intelligence-and-the-future-of-humans/> [<https://perma.cc/H5L8-H2XX>].