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Reviving Negotiated Rulemaking for an Accessible Internet

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NOTE

REVIVING NEGOTIATED RULEMAKING FOR AN ACCESSIBLE INTERNET

Julie Moroney*

Web accessibility requires designing and developing websites so that people with disabilities can use them without barriers. While the internet has become central to daily life, websites have overwhelmingly remained inaccessible to the millions of users who have disabilities. Congress enacted the Americans with Disabilities Act (ADA) to combat discrimination against people with disabilities. Passed in 1990, it lacks any specific mention of the internet. Courts are split as to whether the ADA applies to websites, and if so, what actions businesses must take to comply with the law. Further complicating matters, the Department of Justice (DOJ) initiated the rulemaking process for web accessibility in 2010, only to terminate it seven years later without issuing a rule—leaving the disability community without meaningful online access and businesses without clear standards. Meanwhile, complaints about the accessibility of websites have flooded federal agencies and the courts. Against that backdrop, this Note calls for the DOJ to use negotiated rulemaking, a regulatory innovation from the 1980s that has since faded in use, to achieve web accessibility. Given that the Supreme Court has declined to resolve whether the ADA’s protections apply to the internet, the business and disability communities should come together through negotiated rulemaking to build consensus on web accessibility.

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INTRODUCTION

The COVID-19 global pandemic moved daily life inside and online. School and nonessential work were conducted over video conferencing software.¹ Groceries and takeout, ordered online, were delivered without con-

1. See Sheera Frenkel, *The Week in Tech: Welcome to the Age of Mandatory Videoconferencing*, N.Y. TIMES (Mar. 6, 2020), <https://www.nytimes.com/2020/03/06/technology/coronavirus-tech-businesses.html> [<https://perma.cc/PNN5-ET6V>]; Chris Berdik, *How School Districts Are Outsmarting a Microbe*, N.Y. TIMES (Apr. 23, 2020), <https://www.nytimes.com/2020/04/23/education/learning/coronavirus-online-class-public-schools.html> [<https://perma.cc/4AGA-QBL7>].

tact.² Quarantines required time spent with friends to happen virtually. Even workouts and church services moved online.³

But in this virtual world, access is everything. Video conferencing programs without captioning services make it harder for deaf employees to perform their jobs.⁴ Grocery-store websites without text descriptions of their product photos make it harder for blind customers who use screen readers to buy food and other essential items. News outlets with poor color contrasting or missing link text make it harder for readers with disabilities to stay informed. And this is not a small problem, as an estimated forty million people in the United States have disabilities.⁵

The coronavirus pandemic may have heightened the internet's central role in daily life, but it exposed inequalities that already existed. When online goods, services, and programs are not accessible, people with disabilities face

2. Hilary Russ, *Coronavirus Brings No-Contact Food Delivery to United States*, REUTERS (Mar. 10, 2020, 2:21 PM), <https://www.reuters.com/article/us-health-coronavirus-usa-delivery/coronavirus-brings-no-contact-food-delivery-to-united-states-idUSKBN20X2Q2> [<https://perma.cc/8DQQ-8KM7>].

3. Kaya Yurieff & Sara Ashley O'Brien, *Finding God Online: People Turn to Live-Streaming Religious Services During Coronavirus Pandemic*, CNN BUS. (Mar. 13, 2020, 9:45 AM), <https://www.cnn.com/2020/03/13/tech/religious-services-livestream/index.html> [<https://perma.cc/UH7F-JVNP>]; Lucy Handley, *Lockdowns Have Changed the Fitness Industry Forever—Here's What to Expect of Post-pandemic Workouts*, CNBC (Apr. 30, 2020, 4:09 AM), <https://www.cnbc.com/2020/04/29/lockdowns-have-changed-the-fitness-industry-forever---how-workouts-will-change.html> [<https://perma.cc/MH7J-2MRW>].

4. At the start of the pandemic, the popular video conferencing software Zoom claimed it enabled closed captioning, but it required meeting participants to either provide manual captioning or use a third-party service. See *Using Closed Captioning*, ZOOM, <https://support.zoom.us/hc/en-us/articles/207279736-Closed-Captioning> [<https://perma.cc/J652-K5PM>]. In late 2020, Zoom began offering automatic live captioning, but only to paid users; free users won't have access to the feature until fall 2021. See Jen Hill, *Update on Live Transcription for Free Accounts*, ZOOM: ZOOM BLOG (Feb 24, 2021), <https://blog.zoom.us/update-on-live-transcription-for-free-accounts> [<https://perma.cc/P87S-XGUE>]. Putting the onus on people with disabilities to provide their own accommodations or requiring a paid subscription for an accessibility feature is not true accessibility. Software should be developed with accessibility in mind, rather than as an afterthought.

5. This is the latest calculation by the Census Bureau. See *American Community Survey: Disability Characteristics*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/table?q=disability&t=Disability&tid=ACSST1Y2019.S1810> [<https://perma.cc/82MS-DAHG>]. Of course, not every person with a disability has trouble accessing the internet, and people with different disabilities encounter different types of barriers. See *Diverse Abilities and Barriers*, W3C: WEB ACCESSIBILITY INITIATIVE, <https://www.w3.org/WAI/people-use-web/abilities-barriers/#physical> [<https://perma.cc/TE8F-PZ8E>] (describing the different internet barriers faced by people with visual, auditory, cognitive, learning, neurological, and physical disabilities). Calculating the portion of people with disabilities who encounter issues accessing the internet is difficult, especially because scholars disagree on how to calculate people with disabilities in the first place. See, e.g., Nicole Buonocore Porter, *A Defining Moment: A Book Review of Disability & Equity at Work, Why Achieving Positive Employment Outcomes for Individuals with Disabilities Requires a Universal Definition of Disability*, 18 EMP. RTS. & EMP. POL'Y J. 289, 322–23, 329 (2014) (collecting examples of scholars using different definitions and methodologies and ultimately calling for a universal definition).

discrimination and isolation in a society that—for better or worse—cannot exist without the internet.⁶ Some things will likely never move back offline after COVID-19, which only increases the urgency for an accessible internet.⁷

Unfortunately, as commerce and activity continue to move online, businesses have largely failed to make their online offerings as accessible as their physical counterparts.⁸ The federal government has failed to provide businesses much direction, let alone encouragement, to make their online presences accessible to those with disabilities, while courts are divided on whether and how the Americans with Disabilities Act (ADA), the major antidiscrimination law guaranteeing equal access for people with disabilities, applies to websites.⁹ Passed in 1990, the ADA prohibits discrimination in any “place of public accommodation” but does not mention the internet.¹⁰ Courts are split on whether this phrase covers websites, resulting in uncertainty for businesses that want to comply with the law and for people with disabilities who want to use the internet.

This Note argues that the Department of Justice (DOJ) should revive the use of negotiated rulemaking, an alternative to traditional rulemaking, to bring together the business and disability communities so that they can agree on clearer guidelines for web accessibility.¹¹ Part I provides background on the ADA and its relationship with the internet. Part II discusses the open legal questions raised by the increase in web accessibility litigation, including the resurrection of a longstanding disagreement among circuit courts over the meaning of “place of public accommodation” in the ADA.¹² Part III ex-

6. When websites are inaccessible, people with disabilities often end up paying a higher price for the same goods or services that are offered online, or they are provided with a substantially smaller selection of offerings. See, e.g., Jonathan Lazar, *The Potential Role of U.S. Consumer Protection Laws in Improving Digital Accessibility for People with Disabilities*, 22 U. PA. J.L. & SOC. CHANGE 185, 192–96 (2019).

7. See Jason Abbruzzese, David Ingram & Sawyer Click, *The Coronavirus Pandemic Drove Life Online. It May Never Return.*, NBC NEWS (Mar. 28, 2020, 6:18 AM), <https://www.nbcnews.com/tech/internet/coronavirus-pandemic-drove-life-online-it-may-never-return-n1169956> [<https://perma.cc/4EKU-P9MT>] (explaining that global emergencies tend to accelerate trends that already exist in society and predicting that the coronavirus pandemic will intensify the internet’s hold on daily life).

8. See REBECCA WETTERMANN & TREVOR WHITE, NUCLEUS RSCH., *THE INTERNET IS UNAVAILABLE 2* (2019), <https://accessibility.deque.com/nucleus-accessibility-research-2019> [<https://perma.cc/GG2X-YKEM>] (finding that seventy percent of internet sites analyzed for their study were inaccessible).

9. See *infra* Sections I.B, II.B.

10. 42 U.S.C. § 12182(a).

11. “Disability community” is used throughout this Note and is intended to encapsulate a loose coalition of advocacy organizations, impact litigation firms, community organizers, individuals, and member associations that represent people with disabilities.

12. Compare *Morgan v. Joint Admin. Bd.*, 268 F.3d 456, 459 (7th Cir. 2001) (interpreting place of public accommodation broadly to mean any good or service offered to the public), *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New England, Inc.*, 37 F.3d 12, 20 (1st Cir. 1994) (refusing to restrict public accommodations to physical boundaries or physical entry because it would “run afoul of the purposes of the ADA”), and *Pallozzi v. Allstate Life*

amines negotiated rulemaking, ultimately arguing that it is the proper procedural device for the DOJ to use in making the internet more accessible.

I. THE ADA AND THE INTERNET

This Part provides an overview of the current state of web accessibility, which largely leaves decisions to private actors given the lack of federal guidelines. Section I.A discusses the ADA and its applicability to the internet. Section I.B examines the DOJ's failure to promulgate web accessibility regulations. Section I.C explains the nongovernmental web accessibility standards that are frequently used in the absence of government standards.

A. *Discrimination on the Basis of Disability*

The ADA is the major civil rights law that prohibits discrimination on the basis of disability.¹³ Congress passed the ADA to provide “clear, strong, consistent, enforceable standards” that addressed discrimination faced by people with disabilities.¹⁴ The statute addresses discrimination by employers,¹⁵ state and local governments,¹⁶ and private entities.¹⁷ Congress created general guidelines for eliminating discrimination and guaranteeing access, and it vested the DOJ with the authority to promulgate more specific regulations to implement those general guidelines.¹⁸

In Title III—the part of the statute that addresses discrimination by private entities—the ADA prohibits discrimination on the basis of disability in the “full and equal enjoyment of the goods, services, [and] facilities . . . of any place of public accommodation.”¹⁹ The Act lists twelve broad categories of entities that are considered places of public accommodation, ranging from restaurants to hotels to day care centers.²⁰ Each category also contains a

Ins. Co., 198 F.3d 28, 33 (2d Cir. 1999) (concluding for public accommodations, what matters is whether the goods and services are sold to the public, not where the goods and services are sold or used), *with* *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1011 (6th Cir. 1997) (concluding places of public accommodation must be physical places), *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612–13 (3d Cir. 1998) (interpreting place of public accommodation to require a connection to a physical place), *and* *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1115 (9th Cir. 2000) (same).

13. See Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. § 12101.

14. *Id.* § 12101(b).

15. *Id.* §§ 12111–12117.

16. *Id.* §§ 12131–12165.

17. *Id.* §§ 12181–12189.

18. *Id.* § 12186(b).

19. *Id.* § 12182(a).

20. *Id.* § 12181(7).

catchall phrase, making the list of places of public accommodation open to some interpretation.²¹

Because Title III was enacted as a compromise between civil rights groups and business interests, the broad coverage of Title III's "place of public accommodation" came at the cost of including defenses, exemptions, and limited remedies alongside the affirmative obligations.²² Under Title III, covered entities must make "reasonable modifications" to their policies and practices to ensure their goods and services are available to people with disabilities, except where such modifications would "fundamentally alter" the nature of the good or service.²³ Covered entities must take "such steps as may be necessary" to ensure that people with disabilities are not excluded, denied services, or treated differently, except where such steps would amount to an "undue burden."²⁴

The internet is noticeably absent from the text of the ADA. This is unsurprising, given that the ADA was enacted in 1990, the year before the World Wide Web was invented.²⁵ Congress did not foresee this "information revolution."²⁶ By 2005, over 400 million people used the internet, and by 2019, over half of the world's population was on the web.²⁷ This technological explosion—and the internet's growing importance to daily life—has altered what people understand to be a "place of public accommodation."²⁸ Though it makes sense that the internet was not referenced in the original ADA, it is harder to understand why public actors have failed to incorporate such an important part of daily life into the ADA or the regulations the DOJ promulgated to implement it. Despite having approximately thirty years to do so, Congress has not amended the ADA to explicitly bring the internet within its scope. The DOJ, charged with implementing the ADA, has likewise failed to update its existing regulations or add new ones specifically for website accessibility.²⁹

21. *E.g.*, § 12181(7)(K) (defining public accommodations to include any "day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment" (emphasis added)).

22. See Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377, 377–78 (2000).

23. 42 U.S.C. § 12182(b)(2)(A)(ii).

24. *Id.* § 12182(b)(2)(A)(iii).

25. Ali Abrar & Kerry J. Dingle, Note, *From Madness to Method: The Americans with Disabilities Act Meets the Internet*, 44 HARV. C.R.-C.L. L. REV. 133, 140–41 (2009).

26. *Id.* at 140.

27. *Statistics*, INT'L TELECOMMS. UNION, <https://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx> [<https://perma.cc/3HLK-RTBG>].

28. 42 U.S.C. § 12182(a).

29. See *Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions*, 82 Fed. Reg. 60,932 (Dec. 26, 2017).

B. *The DOJ's Action (and Inaction)*

Despite its failure to promulgate web accessibility regulations, the DOJ has consistently maintained that Title III requires a “place of public accommodation” to make its online presence accessible.³⁰ It first took this position over twenty years ago in a letter to Senator Tom Harkin, concluding that entities covered by the ADA that use the internet for communications “must be prepared to offer those communications through accessible means.”³¹ In 2000, the DOJ filed an amicus brief in a suit against an online gaming site, arguing that the ADA applied to the online content offered by places of public accommodation.³² The DOJ has since filed briefs and statements in support of this position in several private actions.³³

In July 2010, the DOJ took its first step toward promulgating specific regulations on web accessibility by publishing an Advance Notice of Proposed Rulemaking (ANPRM).³⁴ The ANPRM solicited comments from the public on various issues, including the guidelines that the DOJ should adopt, the material to which the regulations should apply, the feasible time frame for compliance, and other costs, benefits, and alternatives that the DOJ should consider.³⁵ The 2010 ANPRM signaled that the DOJ—at least at that time—understood that regulations were needed to bring about an accessible internet.

After publishing the ANPRM in 2010, the DOJ received hundreds of comments but continued to postpone the next phase of rulemaking.³⁶ This inaction, especially under an administration friendly to civil rights, indicates the complexity and breadth of the task set out by the ANPRM. In December 2017 under the Trump administration, the DOJ withdrew the 2010 ANPRM.³⁷ In explaining the withdrawal, the DOJ stated that it was evaluat-

30. 42 U.S.C. § 12182(a).

31. Letter from Deval L. Patrick, Assistant Att’y Gen., U.S. Dep’t of Just., to Sen. Tom Harkin (Sept. 9, 1996) (on file with the *Michigan Law Review*).

32. See Brief of the U.S. as Amicus Curiae in Support of Appellant, *Hooks v. OKbridge, Inc.*, 232 F.3d 208 (5th Cir. 2000) (No. 99-50891).

33. See, e.g., Statement of Int. of the U.S. in Opposition to Defendant’s Motion for Judgment on the Pleadings, *Nat’l Ass’n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196 (D. Mass. 2012) (No. 11-cv-30168).

34. See *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations*, 75 Fed. Reg. 43,460 (proposed July 26, 2010) [hereinafter 2010 ANPRM].

35. See *id.* at 43,464–67.

36. *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities*, 81 Fed. Reg. 28,658, 28,659 (proposed May 9, 2016); Deeva V. Shah, *Web Accessibility for Impaired Users: Applying Physical Solutions to Digital Problems*, 38 HASTINGS COMM’NS & ENT. L.J. 215, 236–37 (2016) (explaining how the DOJ continuously delayed the date for the Notice of Proposed Rulemaking from 2012 to 2018, essentially leaving it for the next administration to resolve).

37. *Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions*, 82 Fed. Reg. 60,932 (Dec. 26, 2017).

ing whether promulgating regulations about web accessibility is “necessary and appropriate” and would “continue to assess whether specific technical standards” are needed.³⁸ After withdrawing the ANPRM, however, the DOJ again affirmed its position in September 2018 that the ADA applies to the websites of places of public accommodation and emphasized that the absence of specific regulations is not a basis for noncompliance.³⁹

C. Nongovernmental Standards

Even without specific regulations from the DOJ, businesses do have a set of standards they can follow. The World Wide Web Consortium (W3C) is an international standards-setting organization that aims to develop various sets of web standards that can be used around the world.⁴⁰ The W3C developed the Web Content Accessibility Guidelines (WCAG), a set of consensus-based, comprehensive accessibility standards.⁴¹ The WCAG are widely used.⁴²

The WCAG confer significant benefits, particularly in the absence of any governmental standards. W3C continues to update them, so governments that have adopted them do not have to worry about maintenance costs.⁴³ The WCAG are structured more like best practices than detailed, technical rules, allowing the guidelines to be flexible as technology develops and changes over time.⁴⁴ The WCAG are also backwards compatible, meaning that content that conforms to the newest version also conforms to older versions.⁴⁵ To make it easy for businesses to benchmark their websites’ accessi-

38. *Id.*

39. Letter from Stephen E. Boyd, Assistant Att’y Gen., U.S. Dep’t of Just., to Rep. Ted Budd (Sept. 25, 2018), <https://www.adatitleiii.com/wp-content/uploads/sites/121/2018/10/DOJ-letter-to-congress.pdf> [<https://perma.cc/47YV-7T3W>].

40. *About W3C, WC3*, <https://www.w3.org/consortium> [<https://perma.cc/V4DL-KRD3>].

41. *See Web Content Accessibility Guidelines (WCAG) Overview*, W3C: WEB ACCESSIBILITY INITIATIVE (updated April 3, 2021), <https://www.w3.org/WAI/standards-guidelines/wcag> [<https://perma.cc/XP2G-42XR>]; Mara’D Smith, *Application of the ADA to Websites: Congress Should Rely on the Standards Created by the World Wide Consortium*, 17 INTELL. PROP. L. BULL. 137, 152–54 (2013); PAUL T. JAEGER, *DISABILITY AND THE INTERNET: CONFRONTING A DIGITAL DIVIDE* 49 (2012).

42. *How Widely Used Is WCAG?*, BUREAU OF INTERNET ACCESSIBILITY (May 28, 2019), <https://www.boia.org/blog/how-widely-used-is-wcag> [<https://perma.cc/52XQ-GFEU>]; *see* Smith, *supra* note 41, at 153.

43. JAEGER, *supra* note 41, at 49.

44. JAEGER, *supra* note 41, at 51. For instance, the latest version of WCAG, released in June 2018, added criteria for accessibility of websites viewed on mobile devices. *What’s New in WCAG 2.1*, W3C: WEB ACCESSIBILITY INITIATIVE, <https://www.w3.org/WAI/standards-guidelines/wcag/new-in-21> [<https://perma.cc/V7K6-XVYH>].

45. All requirements from 2.0 are included in 2.1, and the 2.0 success criteria are included verbatim. *Web Content Accessibility Guidelines (WCAG) Overview*, *supra* note 41. The additional success criteria in 2.1 addresses mobile accessibility, low vision, and cognitive disabilities. *What’s New in WCAG 2.1*, *supra* note 44.

bility, the WCAG are organized into compliance levels with testable success criteria.⁴⁶ Although the WCAG are the de facto global standard, they are not binding standards promulgated by a federal agency. Because of this, businesses have fought—and courts have been wary of—conflating ADA and WCAG compliance.⁴⁷

II. CONFLICTING INTERPRETATIONS OF THE ADA'S DIGITAL REACH

Both Congress's and the DOJ's failures to address web accessibility have resulted in several unanswered questions for the courts. The most significant is one of threshold: whether the ADA even applies to websites. Title III prohibits discrimination on the basis of disability in the full and equal enjoyment of the goods and services of any "place of public accommodation."⁴⁸ But it is unclear whether a business's website qualifies as a place of public accommodation. If it does, the business must make "reasonable modifications" and take "such steps as may be necessary" to ensure that people with disabilities are not excluded from and can fully access the business's website.⁴⁹ This Part surveys the conflicting interpretations of the ADA's digital reach. Section II.A begins with a discussion of a longstanding circuit split from the early days of the ADA. Section II.B then examines how courts have recently resurrected this split by applying it to web accessibility cases. Finally, Section II.C identifies other legal questions surrounding ADA web accessibility litigation and the consequences of leaving these questions unaddressed.

A. Diverging Definitions of Place

Some of the earliest cases interpreting the "place of public accommodation" language of Title III involved ADA challenges to discriminatory insurance policies. In deciding these cases, courts of appeals were divided on whether and to what extent the ADA covered the contents of insurance policies. While all courts of appeals agreed that the insurers' physical offices were places of public accommodation, they disagreed about whether the insurance company itself was a place of public accommodation, and thus whether the policies it offered were covered by the ADA regardless of where and how the policy was purchased.⁵⁰ In other words, courts agreed that the ADA required

46. Daniel Sorger, Note, *Writing the Access Code: Enforcing Commercial Web Accessibility Without Regulations Under Title III of the Americans with Disabilities Act*, 59 B.C. L. REV. 1121, 1133–34 (2018) (explaining that WCAG compliance levels A, AA, and AAA correspond to rising levels of accessibility).

47. See, e.g., *Access Now, Inc. v. Blue Apron, LLC*, No. 17-cv-116, 2017 WL 5186354, at *4 (D.N.H. Nov. 8, 2017).

48. 42 U.S.C. § 12182(a).

49. See *id.* § 12182(b)(2)(A).

50. Compare *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010 (6th Cir. 1997) (agreeing that an insurance office is a public accommodation but emphasizing that the "plaintiff did not seek the goods and services of an insurance office"), and *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612 (3d Cir. 1998) ("The fact that an insurance office is a public accommodation,

insurance companies to grant people with disabilities equal access to their offices but not necessarily equal access to their plans.

1. First, Second, and Seventh Circuits

The First, Second, and Seventh Circuits held that places of public accommodation are not restricted to physical places and do not require a connection to one. In *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England*, the estate of an employee who died from AIDS alleged that the defendant violated the ADA by capping AIDS-related benefits in its insurance plans.⁵¹ The First Circuit held that places of public accommodation were not limited to physical structures after examining the list of twelve categories of public accommodation Congress provided in the statute.⁵² The court reasoned that certain terms in the list, such as "travel service" and "service establishment," did not require a physical outpost.⁵³ Moreover, it would be an "absurd result" for the ADA to protect someone who bought an insurance policy at the insurance office but not someone who purchased it over the phone.⁵⁴ The court also determined that a broad interpretation of "place of public accommodation" aligned with the overarching purpose of the ADA as a "comprehensive national mandate for the elimination of discrimination" against people with disabilities.⁵⁵ Thus, for the court, Congress contemplated that places of public accommodation meant more than physical structures.

The Second Circuit joined the First Circuit a few years later. In *Pallozi v. Allstate Life Insurance Co.*, a couple sued their insurer for refusing to issue them joint life insurance because of their mental disabilities.⁵⁶ The court affirmed that places of public accommodation were not limited to physical places, concluding that it did not matter where the goods or services were sold.⁵⁷ Pointing to the text of the ADA, the court reasoned that Title III applied to services *of* a place of public accommodation, not *in* a place of public accommodation.⁵⁸ It also emphasized the ADA's purpose, suggesting that the statute was meant to guarantee people with disabilities more than "mere physical access."⁵⁹

however, does not mean that the insurance policies offered at that location are . . ."), with *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994) (holding that the ADA does not only protect persons who purchase services at a physical office).

51. *Carparts*, 37 F.3d at 14.

52. *Id.* at 19.

53. *Id.* (quoting 42 U.S.C. § 12181(7)(F)).

54. *Id.*

55. *Id.* (quoting 42 U.S.C. § 12101(b)(1)).

56. *Pallozzi v. Allstate Life Ins.*, 198 F.3d 28, 29 (2d Cir. 1999).

57. *Id.* at 32–33.

58. *Id.* at 33.

59. *Id.* at 32.

Following suit in *Morgan v. Joint Administrative Board*, the Seventh Circuit declined to interpret “place of public accommodation” as requiring a physical place.⁶⁰ It held that the site of the sale was irrelevant to the ADA’s goal of granting people with disabilities equal access, and instead the important factor was that the good or service was offered to the public.⁶¹ In endorsing this broader reading of places of public accommodation, the First, Second, and Seventh Circuits relied more on the ADA’s purpose than on the text of the statute itself.

2. Third, Sixth, and Ninth Circuits

The Third, Sixth, and Ninth Circuits, however, did not take such a broad view. Instead, their interpretation of “place of public accommodation” is limited to physical places. All three circuits heard challenges under Title III to insurance policies that extended different benefits to people with physical rather than mental disabilities.⁶²

In *Parker v. Metropolitan Life Insurance Co.*, the Sixth Circuit relied on the text of the DOJ’s regulations implementing the ADA to conclude that places of public accommodation must be physical places.⁶³ These regulations, promulgated by the DOJ soon after the ADA was enacted, attempted to define terms used in the statute and explain what is required of entities covered under Title III.⁶⁴ The regulations define a place of public accommodation as a “facility operated by a private entity whose operations affect commerce” and fall within one of the ADA’s twelve categories.⁶⁵ Because “facility” is later defined in these regulations as “all or any portion of buildings, structures, sites, complexes . . . or other real or personal property, including the site where the building, property, structure, or equipment is located,” the Sixth Circuit interpreted facility, and in turn “place of public accommodation,” to require a physical place.⁶⁶

In *Ford v. Schering-Plough Corp.*, the Third Circuit joined the Sixth in interpreting place of public accommodations to mean a physical place.⁶⁷ Drawing on the text of the ADA, the Third Circuit noted that Congress enumerated a list of particularized categories to describe a place of public ac-

60. *Morgan v. Joint Admin. Bd.*, 268 F.3d 456, 459 (7th Cir. 2001).

61. *Id.* Although the Seventh Circuit concluded that places of public accommodation include nonphysical places, it ultimately held that the insurance policy at issue in this case was not covered under the ADA because it was not offered to the public.

62. *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1008 (6th Cir. 1997); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612 (3d Cir. 1998); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1107 (9th Cir. 2000).

63. 121 F.3d at 1011–12.

64. See 28 C.F.R. § 36 (2020).

65. *Id.* § 36.104.

66. *Parker*, 121 F.3d at 1010–11 (quoting 28 C.F.R. § 36.104).

67. 145 F.3d at 613–14.

commodation, and all of them seemingly describe physical places.⁶⁸ Rather than be swayed by Congress's inclusion of ambiguous terms in the list like the First Circuit in *Carparts*, the Third Circuit applied the *noscitur a sociis* canon to find that "place of public accommodation" and any other ambiguous terms in the list should be interpreted by reference to nearby words, which are physical places.⁶⁹ The Ninth Circuit endorsed the approach of the Sixth and Third Circuits a few years later in *Weyer v. Twentieth Century Fox Film Corp.*⁷⁰

While these courts of appeals held that places of public accommodation are limited to physical places, they seemed to agree that plaintiffs could still bring a viable claim under Title III by showing a sufficient "nexus" between the discriminatory conduct and a physical place.⁷¹ For example, the Sixth Circuit in *Parker* explained that because the plaintiff accessed her benefits from her employer rather than from the defendant's physical insurance office, there was "no nexus" between the disparity in benefits and the services offered from the physical office.⁷² In the decades after these insurance cases were decided, the passing reference to a nexus by these courts of appeals has developed into a full-fledged nexus test for web accessibility cases.⁷³ In looking for a nexus, lower courts seem to consider how the plaintiff accessed the good or service, whether they could have accessed it from a physical place, and whether the defendant made the goods and services available to the public.

The circuit split on the interpretation of "place of public accommodation" is primarily one of purpose versus text. The First, Second, and Seventh Circuits emphasized the purpose of the ADA and Congress's goal of eliminating discrimination against people with disabilities. These courts took a broad view of "place," looking for equal access, rather than physical access, to the goods and services offered by the place of public accommodation. In contrast, the Third, Sixth, and Ninth Circuits took a textual approach. These courts examined the language of the statute and the DOJ's original regula-

68. *Ford*, 145 F.3d at 614.

69. *Id.*

70. 198 F.3d at 1115 (9th Cir. 2000).

71. *Ford*, 145 F.3d at 612–13 ("Since Ford received her disability benefits via her employment at Schering, she had no nexus to MetLife's 'insurance office' . . ."); *Parker*, 121 F.3d at 1011 ("There is, thus, no nexus between the disparity in benefits and the services which MetLife offers to the public from its insurance office."); *Weyer*, 198 F.3d at 1115 (agreeing with the Third and Sixth Circuits).

72. *Parker*, 121 F.3d at 1011.

73. See, e.g., *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 952 (N.D. Cal. 2006) ("Although a plaintiff may allege an ADA violation based on unequal access to a 'service' of a place of public accommodation, courts have held that a plaintiff must allege that there is a 'nexus' between the challenged service and the place of public accommodation."); *Murphy v. Bob Cochran Motors, Inc.*, No. 19-cv-239, 2020 WL 5757200, at *2 (W.D. Penn. Sept. 28, 2020) (referencing the "nexus test" that district courts use in web accessibility cases); see also Sorger, *supra* note 46, at 1131–32 (describing the nexus test that has evolved since *Parker* and the early insurance cases).

tions implementing it to employ a literal interpretation that required a place of public accommodation to be a physical place or have some nexus to one.

B. Resurrecting the Split

Over time, the disagreement about whether places of public accommodation must be physical places has expanded beyond insurance litigation. Web accessibility cases raise the same difficult question of whether Title III covers business conducted outside of physical spaces.⁷⁴ While overwhelmingly relying on the same arguments rooted in either the ADA's purpose or its text, some courts have added arguments specific to web accessibility or technology, bringing this disagreement into the twenty-first century.

1. District Courts

Most of the cases addressing web accessibility have occurred at the district court level. *Access Now, Inc. v. Southwest Airlines, Co.*, for example, concerned a challenge to the inaccessibility of Southwest Airlines' website.⁷⁵ The court found that the website was not a place of public accommodation, reasoning, in part, that the plain language of the ADA and its regulations did not mention the internet or websites.⁷⁶ On the other hand, in *National Federation of the Blind v. Scribd Inc.*, the court held that the website of an online-only business was a place of public accommodation, pointing to the legislative history of the ADA indicating that Congress intended the ADA to adapt to changes in technology.⁷⁷

Web accessibility cases have also fueled criticism of the ADA nexus test used by the Third, Sixth, and Ninth Circuits.⁷⁸ Specifically, opponents argue that the nexus test has a propensity to produce inconsistent or absurd results when applied to websites. For instance, under the nexus test, the websites of competitors offering the same products can be subject to different standards. Target, because of its brick-and-mortar stores, would be required to make its website accessible, while Amazon would not because it lacks physical customer-facing stores.⁷⁹ The cost of web accessibility might then be reflected in

74. See, e.g., *Robles v. Yum! Brands, Inc.*, No. 16-cv-08211(SS), 2018 WL 566781, at *1–2 (C.D. Cal. Jan. 24, 2018); *Gorecki v. Hobby Lobby Stores, Inc.*, No. CV 17-1131 (SKx), 2017 WL 2957736, at *1–2 (C.D. Cal. June 15, 2017); *Castillo v. Jo-Ann Stores, LLC*, 286 F. Supp. 3d 870, 881 (N.D. Ohio 2018); *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340, 1348–49 (S.D. Fla. 2017).

75. 227 F. Supp. 2d 1312, 1314 (S.D. Fla. 2002).

76. *Access Now*, 227 F. Supp. at 1318.

77. 97 F. Supp. 3d 565, 571, 576 (D. Vt. 2015).

78. See *supra* Section II.A.2.

79. Shah, *supra* note 36 at 228–29. Since Shah's article, Amazon has ventured into opening physical retail stores for certain product types, but this criticism of the nexus test remains. See *Amazon Now Operates Seven Different Kinds of Physical Stores. Here's Why*, CNET, <https://www.cnet.com/news/amazon-now-operates-seven-different-kinds-of-physical-stores-heres-why> [<https://perma.cc/J7XU-5XLA>].

the price of the goods, giving an unfair advantage to businesses that do not operate physical stores.⁸⁰

Applying the nexus test can also result in uneven accessibility across a single company's website, as only those parts of the site that are connected to the physical store would need to be made accessible online.⁸¹ For example, the district court in *Andrews v. Blick Art Materials, LLC* refused to apply the nexus test, reasoning that it would require Blick to only make its website accessible for products available in store but not for online exclusives.⁸² The ability of the nexus test to produce inconsistent or absurd results for similar websites or within the same website hearkens back to the First Circuit's warning about absurd results in *Carparts*, when it said that the ADA should not be construed to only protect those who bought insurance in store.⁸³ Despite this criticism of the nexus test, many district courts continue to look for a sufficient nexus between the inaccessible website being challenged and the defendant's physical stores.⁸⁴

2. Appellate Courts

While the resurrection of the split on whether a place of public accommodation must be a physical place has mostly taken place at the district level, two federal courts of appeals have recently addressed the question. In 2018, the Eleventh Circuit weighed in but did not pick a side of the split. In *Haynes v. Dunkin' Donuts LLC*, rather than decide whether the business's website was a place of public accommodation, the court held that it was covered by the ADA because it was a service that facilitated access to the goods and services Dunkin' Donuts offered.⁸⁵ Though this conclusion resembles the view taken by the Third, Sixth, and Ninth Circuits, the Eleventh Circuit declined to fully embrace the nexus test used by those courts. It did not use the word "nexus," even though it reversed the district court's judgment that the plaintiff failed to allege one.⁸⁶ It also did not mention any other circuit opinions,

80. One example is litigation costs. For instance, after a court certified a class-action lawsuit against Target concerning the accessibility of its website, Target settled for \$6 million. See Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946 (N.D. Cal. 2006); Michelle Meyers, *Target Settles with Blind Patrons over Site Accessibility*, CNET (Aug. 28, 2008, 11:07 AM), <https://www.cnet.com/news/target-settles-with-blind-patrons-over-site-accessibility> [<https://perma.cc/9MEN-22JB>]. Competitors whose websites lack a nexus to physical stores would not incur this cost.

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

82. *Id.*

83. See *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 20 (1st Cir. 1994).

84. See, e.g., *Reed v. CVS Pharmacy, Inc.*, No. CV 17-3877 (SKx), 2017 WL 4457508, at *3 (C.D. Cal. Oct. 3, 2017) (finding the barriers the plaintiff encountered were sufficiently related to CVS's physical space); *Castillo v. Jo-Ann Stores, LLC*, 286 F. Supp. 3d 870, 872 (N.D. Ohio 2018) (concluding a sufficient nexus existed between Jo-Ann's websites and its stores).

85. 741 F. App'x 752, 754 (11th Cir. 2018)

86. *Haynes*, 741 F. App'x at 753-54.

instead relying on its own opinion in *Rendon v. Valleycrest Productions, Ltd.*, in which it said that the Third, Sixth, and Ninth Circuit insurance coverage cases were inapposite.⁸⁷ The *Haynes* decision left many confused, including district courts within the Eleventh Circuit. When applying *Haynes*, these courts have issued conflicting opinions regarding whether websites are places of public accommodations or require a nexus to a physical place.⁸⁸

In stark contrast to the Eleventh Circuit's ambiguity, the Ninth Circuit clearly embraced the nexus test in a web accessibility case six months later, becoming the first federal appellate court to consider whether websites are places of public accommodation in a published opinion. In *Robles v. Domino's Pizza, LLC*, a blind customer sued Domino's, alleging its inaccessible website and mobile application violated the ADA.⁸⁹ Reasoning that the website and application satisfied the nexus test, the Ninth Circuit held that the ADA applied to both.⁹⁰ Domino's filed a petition for certiorari, but the Supreme Court denied it in October 2019, leaving unanswered the threshold question of whether and when the ADA reaches websites.⁹¹

3. The Supreme Court

Although the Supreme Court denied certiorari in *Domino's*, it recently took up a different physical versus virtual presence question. In the 2018 Commerce Clause case *South Dakota v. Wayfair, Inc.*, the Court held that states can require companies that have a sufficient virtual presence in the state to pay sales tax.⁹² *Wayfair* overruled the Court's 1992 holding in *Quill Corp. v. North Dakota*, which required a company to have a physical presence in a state for the imposition of sales taxes.⁹³ The Court explained that when it decided *Quill*, it did not know the ways in which the internet "revolution" would change society and transform the national economy.⁹⁴ The

87. *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279, 1284 n.8 (11th Cir. 2002). In *Rendon*, the Eleventh Circuit held that the television show *Who Wants to Be a Millionaire* used discriminatory screening measures and erected intangible barriers that excluded disabled contestants from participating on the show by using an automated "fast finger" telephone process to select contestants. *Id.* at 1281–86. In *Haynes*, the Eleventh Circuit was again concerned about exclusion and intangible barriers. 741 F. App'x at 754 (holding that Dunkin' Donuts cannot discriminate on the basis of disability, even if its goods and services are intangible).

88. *Compare Gomez v. Gen. Nutrition Corp.*, 323 F. Supp. 3d 1368, 1375–76 (S.D. Fla. 2018) (citing *Haynes* and then engaging in a nexus analysis), *with Fuller v. Webb's Citrus Packing & Candy Factory, Inc.*, No. 18-63044-CIV, 2019 WL 2150813, at *2 (S.D. Fla. May 7, 2019) (declining to dismiss the case due to a lack of nexus because the Eleventh Circuit's opinion in *Haynes* did not require one).

89. 913 F.3d 898, 902 (9th Cir. 2019).

90. *Domino's*, 913 F.3d at 905.

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

92. 138 S. Ct. 2080, 2099, 2100 (2018).

93. *Wayfair*, 138 S. Ct. at 2099.

94. *See id.* at 2097 (remarking that the internet revolution has made *Quill* seem that much more wrong).

Court's change of course in *Wayfair* indicates at least some willingness to interpret a law so as to adapt it to the changes brought by the internet.

And much has changed since Congress enacted the ADA in 1990.⁹⁵ Technology continues to be developed that requires the courts of appeals to weigh in on what constitutes a place of public accommodation.⁹⁶ By denying certiorari in *Domino's*, the Supreme Court all but guaranteed that web accessibility issues would continue to be litigated extensively, with courts often reaching incongruent results. From 2016 to 2019, web accessibility lawsuits filed in federal courts under Title III of the ADA have increased by over 750 percent.⁹⁷

C. *The Supreme Court's Silence*

The Supreme Court's unwillingness to answer the threshold question not only delays resolving the other open legal questions raised by web accessibility litigation. It also creates problems for businesses that want to comply with the ADA and people with disabilities who want to use the internet without barriers.

1. Open Legal Questions

Domino's presented only one of several important questions implicating web accessibility and the ADA. Many companies operate mobile applications in addition to websites, but courts disagree on whether these applications must comply with Title III.⁹⁸ Since the Ninth Circuit answered this in the affirmative, this is another question the Supreme Court could have re-

95. *Thurston v. Midvale Corp.*, 252 Cal. Rptr. 3d 292, 301 (Ct. App. 2019) (stating that though much has changed between Congress enacting the ADA in 1990 and the insurance split a decade later, even more has changed between then and now).

96. *See, e.g., Peoples v. Discover Fin. Servs., Inc.*, 387 F. App'x 179, 183 (3d Cir. 2010) (holding that the communication between a credit-card-processing terminal and a bank is not a public accommodation within the meaning of the ADA); *Earll v. eBay, Inc.*, 599 F. App'x 695, 696 (9th Cir. 2015) (dismissing a challenge to eBay's telephonic identify verification policy for sellers because eBay is not a place of public accommodation); *Stern v. Sony Corp. of Am.*, 459 F. App'x 609, 610 (9th Cir. 2011) (holding that an inaccessible video game is not a facility for purposes of a place of public accommodation); *see also Access Living of Metro. Chi. v. Uber Techs., Inc.*, 958 F.3d 604, 606, 615 (7th Cir. 2020) (avoiding answering whether ridesharing technology is a place of public accommodation by resolving the case on standing grounds).

97. *See* USABLENET, END OF YEAR ADA WEBSITE AND APP LAWSUIT RECAP REPORT (2019), <https://info.usablenet.com/2019-ada-web-accessibility-lawsuit-recap-report> [<https://perma.cc/S8CQ-LJTR>] (showing increase of cases from 262 in 2015 to 2235 in 2019).

98. The Ninth Circuit in *Robles v. Domino's Pizza, LLC* held that the ADA applied to applications in addition to websites. 913 F.3d 898, 904 (9th Cir. 2019). Other courts, as well as the DOJ, have suggested that a business is compliant with the ADA if at least one channel, such as a 24/7 phone line, makes their goods and services accessible. *See, e.g., Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 956 (N.D. Cal. 2006) (explaining that so long as the public accommodation communicates effectively with customers, it can choose among formats and methods of communication).

solved if it had granted certiorari in *Domino's* as it was included in the petition for certiorari.⁹⁹ Another open question is whether web accessibility regulations should apply to online marketplaces like Craigslist, or links on businesses' websites that take customers to inaccessible third-party web pages, such as payment portals.¹⁰⁰ And the meteoric rise of social media raises the question of whether covered entities should be liable for inaccessible content posted to their sites by individual users.¹⁰¹ While these issues have not been litigated to the same extent as the threshold question, they are important topics that will become prominent as web accessibility lawsuits continue to surge.

2. Impact on Affected Communities

The DOJ's failure to promulgate specific web accessibility regulations, the courts' conflicting interpretations of the ADA, and the Supreme Court's silence create problems for the communities the ADA is supposed to serve. The disability community faces serious problems from the lack of federal action on web accessibility. While the disability community has enjoyed success with agency resolutions,¹⁰² court decisions,¹⁰³ and settlement agreements,¹⁰⁴ taken together, these outcomes create a patchwork approach to addressing a complex, widespread problem affecting the daily lives of millions of people. People with disabilities should not have to file a lawsuit to ensure meaningful access to each individual website they want to use. As evidenced by the growth of web accessibility cases, however, that is what they are resorting to in the face of government inaction.

The DOJ's general stance that websites of entities covered under Title III must be accessible, without any more specific guidance, is not enough to push businesses to actually make their websites accessible for these users.¹⁰⁵

99. *Domino's*, 913 F.3d at 904; Petition for Writ of Certiorari, *Domino's Pizza LLC v. Robles*, 140 S. Ct. 122 (2019) (No. 18-1539).

100. See 2010 ANPRM, 75 Fed. Reg. 43,460, 43,465 (proposed July 26, 2010) (suggesting that accessibility regulations would reach third-party links on businesses' websites but not consumer-to-consumer online marketplaces); Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions, 82 Fed. Reg. 60,932 (Dec. 26, 2017) (withdrawing the proposed rule).

101. See 2010 ANPRM, 75 Fed. Reg. at 43,465.

102. See, e.g., *Settlement Agreement Between the United States of America and Carnival Corporation*, ADA.GOV (July 23, 2015), https://www.ada.gov/carnival/carnival_sa.html [<https://perma.cc/W63B-5MYC>]; *Settlement Agreement Between the United States of America and Ahold U.S.A., Inc. and Peapod, LLC*. (Nov. 17, 2014), <https://www.justice.gov/file/163956/download> [<https://perma.cc/EY4N-9DD5>].

103. See, e.g., *Domino's*, 913 F.3d at 905; Nat'l Ass'n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 202 (D. Mass. 2012).

104. See, e.g., *Netflix Settlement*, DISABILITY RTS. ADVOCES. (Apr. 14, 2016), <https://dralegal.org/case/netflix-settlement> [<https://perma.cc/DEY4-JSNS>].

105. See *supra* Section I.B (discussing that the DOJ has consistently maintained that Title III requires a "place of public accommodation" to make its online presence accessible).

A report analyzing one million popular websites found that just 3 percent of those sites met the WCAG 2.0 standards for accessible websites.¹⁰⁶ Similarly, a study of the top one hundred companies in the United States found that fewer than 10 percent had accessible homepages.¹⁰⁷ In the face of the DOJ's failure to promulgate web accessibility regulations, the internet has become overwhelmingly inaccessible to people with disabilities.

An inaccessible internet creates problems for people beyond the disability community as well. Businesses suffer from the lack of federal web accessibility guidelines, too. Although the business community might appear to benefit from the lack of regulation, because the DOJ has repeatedly said that businesses still have a general obligation under the ADA to make their websites accessible, the status quo results in unfavorable outcomes for businesses. First, companies can be subject to inconsistent rulings about whether their website needs to be accessible and if so, which parts of that website must comply with the ADA. In the same year, one district court concluded that Netflix's online streaming services must be accessible, while another held the opposite.¹⁰⁸ For companies with operations that extend outside of one jurisdiction, this is an unworkable result that pushes them to settlements.¹⁰⁹

Second, there is no safe harbor to shield companies from liability as they begin the process of making their websites accessible. This is particularly troubling because, even if a company agrees to make its website accessible under the terms of a settlement with one plaintiff, the company is still open to liability in a suit brought by another plaintiff until that accessibility update is complete.¹¹⁰ This phenomenon is relatively common, as nearly half of the largest retailers in the U.S. faced multiple web accessibility lawsuits from 2017 to 2019.¹¹¹ This exposure to duplicative lawsuits increases litigation

106. *The WebAim Million*, WEBAIM (last updated Mar. 30, 2020), <https://webaim.org/projects/million/#wcag> [<https://perma.cc/ZX34-H728>]. For discussion of the WCAG 2.0 standards, see *supra* Section I.C.

107. JAEGER, *supra* note 41, at 102.

108. *Compare Nat'l Ass'n of the Deaf*, 869 F. Supp. 2d at 202 (holding that Netflix's online streaming service is a place of public accommodation), *with* *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017, 1024 (N.D. Cal. 2012) (holding that the Netflix website is not an actual physical place and therefore not a place of public accommodation).

109. Netflix ended up settling with the National Association of the Deaf and agreed to provide closed captioning for 100 percent of its online streaming videos. See *Consent Decree, Nat'l Ass'n of the Deaf*, 869 F. Supp. 2d 196 (No. 11-cv-30168). A few years later, when threatened with a lawsuit by the American Council of the Blind, Netflix proactively entered another agreement to add audio description services for all Netflix original content and make the website and application accessible to blind users. *Netflix Settlement*, *supra* note 104.

110. *Haynes v. Hooters of Am., LLC*, 893 F.3d 781, 784–85 (11th Cir. 2018) (determining the present action was not moot, even though the defendant was in the process of making its website accessible due to a settlement agreement with another plaintiff).

111. USABLENET, *supra* note 97.

costs for businesses and diverts resources away from actually implementing the accessibility that these companies promised in previous settlements.¹¹²

Third, businesses claim that the lack of concrete federal guidance about web accessibility violates their due process rights.¹¹³ While most courts have rejected this argument, it highlights the problems of fundamental fairness that have resulted from the DOJ telling businesses that their websites must comply with the ADA without telling them how to comply.¹¹⁴ Judging by the proactive steps many businesses are taking to increase the accessibility of their goods and services, businesses seem more frustrated by the lack of clear federal guidelines than the general demand for web accessibility.¹¹⁵

The ADA was initially enacted as a compromise between the business and disability communities,¹¹⁶ but the way that it is currently applied—or not applied—to websites fails to properly serve the needs of either community. The next Part identifies the parties best able to reform the web accessibility landscape and discusses what that reform should look like. Change is needed.

III. NEGOTIATED RULEMAKING AS A VEHICLE FOR WEB ACCESSIBILITY

The current approach to web accessibility is not working. The proliferation of web accessibility lawsuits, the inconsistent responses from the judiciary, and the lack of engagement from the federal government have left all

112. See Appellee's Answer Brief at 29, *Haynes*, 893 F.3d 781 (No. 17-13170) (arguing that affirming the lower court's mootness ruling would allow defendants like Hooters that are "legitimately interested in increasing access to disabled persons" to avoid incurring additional litigation costs).

113. See, e.g., *Robles v. Domino's Pizza LLC*, No. CV-06599(SP), 2017 WL 1330216, at *2 (C.D. Cal. Mar. 20, 2017); *Haynes v. Kohl's Dep't Stores, Inc.*, 391 F. Supp. 3d 1128, 1135 (S.D. Fla. 2018).

114. See, e.g., *Robles v. Domino's Pizza LLC*, 913 F.3d 898, 909 (9th Cir. 2019); *Gorecki v. Hobby Lobby Stores, Inc.*, No. CV 17-1131(SKx), 2017 WL 2957736, at *4 (C.D. Cal. June 15, 2017).

115. Many companies are making efforts to increase accessibility on their own, whether for altruistic or business reasons. For instance, Facebook, a company that relies on users being able to use its platform, rolled out automatic alternative text detection for blind users using proprietary object recognition technology. *Under the Hood: Building Accessibility Tools for the Visually Impaired on Facebook*, FACEBOOK ENG'G (Apr. 4, 2016), <https://engineering.fb.com/io/under-the-hood-building-accessibility-tools-for-the-visually-impaired-on-facebook> [<https://perma.cc/3RYN-3MP3>].

Other companies consult with organizations like the National Association of the Deaf to help make their online presence accessible for users with disabilities. Telephone Interview with Zainab Alkebsi, Pol'y Couns., Nat'l Ass'n of the Deaf (Feb. 21, 2020). Besides the normative reasons for accessible websites, there is also a strong business case. Consumers with disabilities represent a \$1 billion market segment and on average, spend more per trip and shop more often than consumers without disabilities. NIELSEN, REACHING PREVALENT, DIVERSE CONSUMERS WITH DISABILITIES 5, 12 (2016), <https://www.nielsen.com/wp-content/uploads/sites/3/2019/04/reaching-prevalent-diverse-consumers-with-disabilities.pdf> [<https://perma.cc/KMU7-78TJ>].

116. See *supra* note 22 and accompanying text.

actors unsatisfied. In an ideal world, Congress would celebrate the ADA's thirtieth birthday by giving it a facelift—amending it to explicitly require covered entities to make their online presence accessible—and the DOJ would follow by promulgating regulations to implement this mandate.

That is not the world we live in. Over the past thirty years, Congress has repeatedly failed to take action, and the Supreme Court does not seem any more eager to intervene. This leads one to ask, what is the path forward? This problem is too important to leave unresolved, as the internet will only become more central to daily life. The number of people with disabilities will continue to rise as the population ages.¹¹⁷ The flood of complaints filed with agencies and courts will continue to surge, especially after the denial of certiorari in *Domino*'s.

This Part proposes using negotiated rulemaking to bring the business and disability communities together to build consensus for web accessibility. Section III.A explores negotiated rulemaking by explaining the history, benefits, and ebb in use of this regulatory tool. Section III.B identifies the characteristics that make negotiated rulemaking a good fit for web accessibility. Section III.C concludes with a discussion of next steps and specific recommendations for achieving web accessibility using a negotiated rulemaking approach.

A. Overview of Negotiated Rulemaking

Negotiated rulemaking arose as an alternative to traditional notice-and-comment rulemaking. Philip Harter first popularized this term in a 1982 law review article, proposing negotiated rulemaking as a cure for the “malaise” in administrative law and the ossification of rulemaking.¹¹⁸ Under traditional notice-and-comment rulemaking, as governed by the Administrative Procedure Act, the agency makes the initial policy determination, and then responds to comments from industry and public interest groups.¹¹⁹ Negotiated rulemaking flips this script, bringing together these groups before a rule is announced in order to build consensus, engage in give-and-take, and develop a proposed rule to then pass on to the agency.¹²⁰ As the product of negotiated rulemaking is intended to eventually be adopted by the agency

117. Jonathon Hensley, *The High Cost of Digital Discrimination: Why Companies Should Care About Web Accessibility*, GUARDIAN (Dec. 31, 2015, 5:38 PM), <https://www.theguardian.com/sustainable-business/2015/dec/31/digital-discrimination-netflix-disney-target-web-accessibility-doj> [<https://perma.cc/5ESD-QKLU>] (warning that the number of people with temporary or permanent disabilities will increase as the aging population doubles by 2050); see also *Ageing and Disability*, UNITED NATIONS DEP'T ECON. & SOC. AFFS., <https://www.un.org/development/desa/disabilities/disability-and-ageing.html> [<https://perma.cc/RZ93-EQ3L>] (describing the global trends in aging populations and the higher disability rates among older persons).

118. Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 6–7 (1982) (describing the malaise as parties being unhappy with the time, effort, and legitimacy of traditional rulemaking).

119. 5 U.S.C. § 553.

120. Harter, *supra* note 118, at 7.

through notice-and-comment rulemaking, negotiated rulemaking is more accurately understood as a supplement, rather than an alternative, to notice-and-comment rulemaking.¹²¹

Congress first endorsed negotiated rulemaking by passing the Negotiated Rulemaking Act (NRA) in 1990, coincidentally the same year it passed the ADA.¹²² The NRA provides a statutory framework to guide agencies when using negotiated rulemaking. It requires the agency to provide public notice in the Federal Register announcing its intention to use negotiated rulemaking and a list of parties who will participate on the negotiating committee.¹²³ Anyone who believes their interest is not adequately represented on the committee may apply for membership, but the agency is not required to add them.¹²⁴ Other than the public-notice requirement, most of the NRA is phrased in permissive language.¹²⁵ For instance, the NRA permits but does not require the agency to publish the committee's consensus as a rule, though most agencies do.¹²⁶ The NRA explicitly leaves space for innovation and experimentation by parties.¹²⁷

Use of this regulatory innovation comes with benefits. Negotiated rulemaking saves time and expense from the overall rulemaking process by bringing together groups representing disparate interests from the start, so that concerns can be identified before a rule is developed.¹²⁸ These early discussions aim to reduce the number of comments agencies receive on the back end, thereby decreasing the agency's workload in handling and responding to comments.¹²⁹ Negotiated rulemaking also reduces time-consuming and expensive post-rulemaking litigation by having stakeholders develop the rule.¹³⁰ Getting parties to buy in from the beginning offers the

121. Jeffrey S. Lubbers, *Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking*, 49 S. TEX. L. REV. 987, 991 (2008).

122. Danielle Holley-Walker, *The Importance of Negotiated Rulemaking to the No Child Left Behind Act*, 85 NEB. L. REV. 1015, 1040–41 (2007).

123. 5 U.S.C. § 564.

124. *Id.*; see also Gregory L. Pitt, Jr., *An Introduction to Negotiated Rulemaking*, FLA. BAR J., Mar. 2017, at 50, <https://www.floridabar.org/the-florida-bar-journal/an-introduction-to-negotiated-rulemaking> [<https://perma.cc/Z5NL-T95K>] (explaining that an agency's selection of the representative groups comprising the committee and the approval or denial of a committee participation application are permissive).

125. Lubbers, *supra* note 121, at 989.

126. *Id.*

127. 5 U.S.C. § 561.

128. Harter, *supra* note 118, at 28–30.

129. Julia Kobick, *Negotiated Rulemaking: The Next Step in Regulatory Innovation at the Food and Drug Administration?*, 65 FOOD & DRUG L.J. 425, 432 (2010).

130. See Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENV'T L.J. 32, 51 (2000) (explaining that rules produced through negotiated rulemaking have been resistant to substantive challenges); see also Hannah J. Wiseman, *Negotiated Rulemaking and New Risks: A Rail Safety Case Study*, 7 WAKE FOREST J.L. & POL'Y 207, 210 (2017).

additional benefit of increased compliance rates and a decreased need for enforcement actions from the agency, again reducing costs.¹³¹

Negotiated rulemaking adds legitimacy to the process as well.¹³² It infuses technical expertise into the development of the rule, rather than having groups provide information to the agency after the fact.¹³³ It allows industry representatives, public interest groups, and the agency to interact with each other in a direct, dynamic, and iterative way.¹³⁴ This process also promotes more reasonable and moderate decisionmaking. Under the static notice-and-comment rulemaking process, parties only have one opportunity to influence decisionmakers, so they often take extreme positions believing the agency will develop a regulation somewhere in the middle.¹³⁵ And even if the outcome of negotiated rulemaking does not objectively favor their side, merely being involved in the process enhances satisfaction and perceptions of legitimacy among participants.¹³⁶

Even with these benefits, negotiated rulemaking has drawn criticism. Scholars disagree as to whether negotiated rulemaking in practice has actually achieved the reductions in time, cost, and litigation it promised.¹³⁷ Another point of contention is whether negotiated rulemaking leads to agency capture or the exclusion of certain stakeholders from the process.¹³⁸

131. Kobick, *supra* note 129, at 432.

132. Harter, *supra* note 118, at 31.

133. Wiseman, *supra* note 130, at 210–11; *see also* Harter, *supra* note 118, at 28.

134. Kobick, *supra* note 129, at 433.

135. Harter, *supra* note 118, at 19.

136. For instance, in a study of participants in negotiated rulemaking, two-thirds believed their effect on the outcome was substantial. *See* Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENV'T L.J. 60, 63, 67–68 (2000). In another study, researchers found that participants rated their satisfaction with negotiated rulemaking higher than traditional rulemaking on a wide range of criteria. *See* Laura I. Langbein & Cornelius M. Kerwin, *Regulatory Negotiation Versus Conventional Rule Making: Claims, Counterclaims, and Empirical Evidence*, 10 J. PUB. ADMIN. RSCH. & THEORY 599, 602–05, 620–23 (2000).

137. *See* Freeman & Langbein, *supra* note 136, at 128–30 (discussing the impact of negotiated rulemaking on compliance rates as a “matter of speculation” and the attempt to compare post-rulemaking litigation as “involv[ing] considerable guesswork”). *Compare* Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1280–84 (1997) (analyzing rules promulgated by the EPA through negotiated rulemaking to find only a minimal, if not illusory, time savings), *with* Harter, *supra* note 130, at 32, 54–55 (characterizing Coglianese’s research methods as “significantly flawed and therefore misleading”).

138. Agency capture occurs when agencies are dominated by the industries or entities they are charged with regulating. Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1043 (1997). There is some debate about the potential for negotiated rulemaking to lead to agency capture. *Compare* John S. Applegate, *Beyond the Usual Suspects: The Use of Citizens Advisory Boards in Environmental Decisionmaking*, 73 IND. L.J. 903, 917–18 (1998) (explaining that though negotiated rulemaking is open to everyone, it exaggerates existing power imbalances among interested parties and makes participation hard for smaller participants), *and* Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking:*

While the debate between supporters and critics of negotiated rulemaking continues, the actual use of negotiated rulemaking has waned in recent years.¹³⁹ Professor Lubbers attributes this decline to a number of factors. First, the academic criticism described above has thrown the benefits of negotiated rulemaking into question.¹⁴⁰ Second, the Administrative Conference of the United States, the entity Congress chose to serve as a clearinghouse for negotiated rulemaking, suffered from a lack of funding and eventually disbanded.¹⁴¹ Third, negotiated rulemaking requires upfront costs, which can discourage agencies from using it even though it would likely reduce the overall cost of rulemaking.¹⁴² Fourth, the executive branch entity tasked with reviewing regulations, the Office of Information and Regulatory Affairs (OIRA), disfavors negotiated rulemaking because it removes some of OIRA's leverage.¹⁴³ By the time OIRA receives the rule to review, a consensus has already been reached by the negotiating committee, making it harder for OIRA to then seek changes.¹⁴⁴ Finally, some agencies have started using what Lubbers calls "reg-neg lite," a more informal version of negotiated rulemaking, to determine the views of stakeholders without having to follow specific procedures.¹⁴⁵ Other agencies have reverted to traditional rulemaking or turned to other regulatory alternatives.¹⁴⁶ Those agencies that continue to use negotiated rulemaking are usually required to do so by statute.¹⁴⁷ Though negotiated rulemaking has fallen out of vogue in the administrative

An Essay on Management, Games, and Accountability, LAW & CONTEMP. PROBS., Spring 1994, at 185, 233, 253 (arguing that multiparty negotiation seems like a "formula either for stalemate or capture" unless selectively applied), with David Thaw, *Enlightened Regulatory Capture*, 89 WASH. L. REV. 329, 370–71 (2014) (coining the term "Enlightened Regulatory Capture" to describe capture through negotiated rulemaking that enables regulators to harness private expertise to advance public goals).

139. Lubbers, *supra* note 121, at 996, 1005 (describing the waning use of negotiated rulemaking as unfortunate).

140. *Id.* at 1003.

141. *Id.* at 996 (listing the responsibilities Congress gave to this "clearinghouse" pertaining to negotiated rulemaking, including compiling information, collecting data, reporting to Congress, and training agencies).

142. *Id.* at 997.

143. *Id.* at 999. OIRA is an entity that must review all "significant" regulatory action before agency rules can take effect, and it requires agencies to engage in cost-benefit analysis. See *Frequently Asked Questions*, OFF. INFO. & REGULAT. AFFS., <https://www.reginfo.gov/public/jsp/Utilities/faq.jsp> [<https://perma.cc/FHC4-9DUG>].

144. Lubbers, *supra* note 121, at 999 (sharing that a career employee of OIRA divulged "[w]e hate it" when asked about the office's views on negotiated rulemaking).

145. *Id.* at 1001.

146. See *id.* at 987–88.

147. See Coglianese, *supra* note 137, at 1268 n.75 (listing examples of statutes requiring agencies to use negotiated rulemaking). The Department of Education is one such agency that is required by multiple statutes to engage in negotiated rulemaking for rules in certain areas. See, e.g., 20 U.S.C. § 1098a (requiring the Department of Education to convene "regional meetings to obtain public involvement" in drafting regulations and then to submit those draft regulations to a "negotiated rulemaking process").

law world, this Note calls for its revival because it is particularly well suited to address the need for web accessibility.

B. *Fit for Web Accessibility*

While negotiated rulemaking is not suitable for every situation calling for an agency rule, it is a good fit for web accessibility, where traditional avenues for reform have failed and the parties have already demonstrated an ability and willingness to negotiate.

1. Failure of Traditional Avenues

Agencies have had success using negotiated rulemaking in important legal areas that Congress has failed to address or has been slow to address.¹⁴⁸ For instance, in response to Congress's failure to pass legislation addressing the risks accompanying the rise in rail transport of crude oil, agencies including the Federal Railroad Administration and the Pipeline and Hazardous Materials Safety Administration relied on aspects of negotiated rulemaking.¹⁴⁹ Though perhaps not as tangible as the railroad safety risks those agencies faced, the consequences of an inaccessible internet are very real for people with disabilities.

Web accessibility is also a good candidate for negotiated rulemaking because the DOJ already tried, unsuccessfully, to address this issue on its own through traditional notice-and-comment rulemaking.¹⁵⁰ The DOJ's 2010 ANPRM—and subsequent seven years of silence—demonstrates the difficulty of resolving the questions raised by web accessibility through traditional rulemaking. Negotiated rulemaking would provide an alternative format for the DOJ to pursue this regulatory goal, and one that requires consensus building by the interested parties to move the process forward. Rather than issue an open-ended ANPRM and have to respond to thousands of comments, the DOJ could have business and disability groups come together, rank and compare priorities, make concessions, and agree to guidelines.

Of course, after failing to promulgate web accessibility regulations last decade, the DOJ might not want to engage with this issue again. But the DOJ is facing increased pressure to do *something* about web accessibility. Members of Congress have repeatedly sent letters, with increasing urgency, to the DOJ inquiring about its plans to address web accessibility.¹⁵¹ In addition to

148. Wiseman, *supra* note 130, at 212.

149. *Id.*

150. See Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions, 82 Fed. Reg. 60,932 (Dec. 26, 2017).

151. In a June 2018 letter, over 100 members of Congress wrote to express support for the DOJ to provide “guidance and clarity” on web accessibility under the ADA and called out the department’s “abandonment of the effort to write a rule.” Letter from 103 Members of Cong. to Jeff Sessions, Att’y Gen., U.S. Dep’t of Just. (June 20, 2018) (on file with the *Michigan Law Review*). In a September letter, several senators pointedly asked the attorney general for a

receiving political pressure from Congress, federal agencies are also facing logistical pressure from the explosion of web accessibility complaints.¹⁵² These pressures create incentives for the DOJ to turn to alternatives like negotiated rulemaking to facilitate clearer guidelines.¹⁵³ Taken together, the failure of Congress and the DOJ to address this issue through traditional avenues makes negotiated rulemaking an attractive alternative.

2. Historical Willingness to Negotiate

Negotiated rulemaking is a particularly promising proposal for business and disability groups because they have agreed to negotiate standards before. In the last ten years, the disability rights and business communities have already come together to agree on guidelines to make movie theaters more accessible to customers who are blind or deaf. The disability community had been fighting movie theaters to provide captioning for deaf customers and video description for blind customers since the early 2000s.¹⁵⁴ In 2010, the Ninth Circuit held that the ADA required all movie theaters to show movies

briefing on the DOJ's "intentions on this important issue" by the end of the month. Letter from Sen. Charles E. Grassley et al., to Jeff Sessions, U.S. Att'y Gen. (Sept. 4, 2018) (on file with the *Michigan Law Review*). In October, the Assistant Attorney General wrote back, arguing that the DOJ said the ADA applies to the websites of public accommodations over twenty years ago and that the lack of specific requirements gives covered entities flexibility. Letter from Stephen E. Boyd, Assistant Att'y Gen., U.S. Dep't of Just., to Sen. Charles E. Grassley (Oct. 11, 2018) (on file with the *Michigan Law Review*). In July 2019, senators again wrote to the attorney general, reminding him that he committed in his confirmation hearing to study the issue of web accessibility in greater detail. Letter from Sen. Charles E. Grassley et al., to William P. Barr, Att'y Gen., U.S. Dep't of Just. (July 30, 2019) (on file with the *Michigan Law Review*). In this letter, senators asked specific questions about the steps the DOJ plans to take, its view on the WCAG, and its plans to intervene in pending litigation. *Id.*

152. For instance, the Department of Education (DOE) saw a 200 percent increase in web accessibility complaints in 2018. *School Website Accessibility OCR Complaints Continue to Rise*, ECHALK (Mar. 12, 2019), <https://www.echalk.com/blog/2019/3/12/school-website-accessibility-ocr-complaints-continue-to-rise> [<https://perma.cc/S8UC-WY25>]. Unable to respond to this volume, the DOE started to dismiss complaints from individuals who filed more than one complaint, but it reversed course after being sued by disability rights organizations. Erica L. Green, *DeVos Education Dept. Begins Dismissing Civil Rights Cases in Name of Efficiency*, N.Y. TIMES (Apr. 20, 2018), <https://www.nytimes.com/2018/04/20/us/politics/devos-education-department-civil-rights.html> [<https://perma.cc/USP4-XTVL>]; Kimberly Hefling, *Civil Rights Office at Education Makes a Shift on 'Mass Filers' of Complaints*, POLITICO PRO (Nov. 20, 2018, 11:56 AM), <https://subscriber.politicopro.com/article/2018/11/civil-rights-office-at-education-makes-a-shift-on-mass-filers-of-complaints-985443> [<https://perma.cc/KV8J-AYGE>]. The increase in complaints filed with the DOE and courts suggests that the DOJ is being inundated with a similar volume of web accessibility complaints.

153. The DOJ may be disincentivized from engaging in a cooperative rulemaking regime under certain antiregulatory administrations. But if the business community participated in negotiated rulemaking, the DOJ could point to the process as being business driven and business friendly.

154. See, e.g., *Cornilles v. Regal Cinemas, Inc.*, No. Civ. 00-173, 2002 WL 31440885 (D. Or. Jan. 3, 2002); John F. Waldo, *The ADA and Movie Captioning: A Long and Winding Road to an Obvious Destination*, 45 VAL. U. L. REV. 1033, 1042 (2011).

with closed captioning and video description.¹⁵⁵ A few months later, the DOJ issued an ANPRM for movie captioning, but it proposed that only 50 percent of theaters had to be equipped for captioning and video description.¹⁵⁶ Many in the disability community were pleased to see the DOJ get involved, but they were also disappointed by the lower standard.¹⁵⁷

In response to the DOJ's ANPRM, four deaf-rights organizations met with the National Association of Theater Owners (NATO) in August 2014 to negotiate a joint recommendation.¹⁵⁸ They reached a consensus where the advocacy organizations compromised on the number of captioning and description devices theaters should have on hand in return for NATO agreeing to support equipping 100 percent of screens for captioning.¹⁵⁹ In their joint comment, NATO and the advocacy organizations also agreed to certain commitments. For example, NATO agreed to work with movie distributors and device equipment manufacturers to drive compliance on the supply side.¹⁶⁰ In 2016, the DOJ released its final rule that required every screen to be equipped to support captioning and description, and in its press release it recognized the joint comment submitted by NATO and the deaf rights organizations.¹⁶¹ Because the parties rather than the DOJ initiated this negotiation, it is not technically an example of negotiated rulemaking. It does, however, demonstrate that disability and business groups are willing and able to come together and use negotiation to influence the DOJ's ultimate rule.

155. *Arizona ex rel. Goddard v. Harkins Amusement Enters.*, 603 F.3d 666, 675 (9th Cir. 2010).

156. *See* Nondiscrimination on the Basis of Disability; Movie Captioning and Video Description, 75 Fed. Reg. 43,467, 43,473–74 (proposed July 26, 2010) (to be codified at 28 C.F.R. pt. 36).

157. Telephone Interview with John Waldo, Founder, Wash. State Commc'n Access Project (Feb. 14, 2020).

158. A.G. Bell Ass'n, Ass'n of Late Deafened Adults, Hearing Loss Ass'n of Am., Nat'l Ass'n of the Deaf & Nat'l Ass'n of Theatre Owners, Comment Letter on Proposed Rule Regarding Movie Captioning and Video Description (Nov. 21, 2014) [hereinafter Joint Comment], https://www.nad.org/wp-content/uploads/2017/07/Joint_NPRM_Filing_RIN_1190-AA63_A.pdf [<https://perma.cc/RB7Z-XPLU>].

159. Telephone Interview with John Waldo, *supra* note 157.

160. *See* Joint Comment, *supra* note 158.

161. Press Release, U.S. Dep't of Just., Justice Department Revises Regulations to Require Closed Movie Captioning and Audio Description for People with Disabilities (Nov. 22, 2016), <https://www.justice.gov/opa/pr/justice-department-revises-regulations-require-closed-movie-captioning-and-audio-description> [<https://perma.cc/QHU6-W8F2>] (“[T]he department received over 1,500 comments . . . , including a comment on the NPRM that was jointly submitted by advocacy groups representing individuals with hearing disabilities and the movie theater industry.”).

C. Next Steps for Web Accessibility

Of course, there are significant differences between making movies accessible and making the internet accessible. The negotiation process for movie theater captioning involved fewer players and only one industry group. It also involved fewer and more concrete questions, such as the number of screens to make accessible or the number and type of devices that theaters should have on hand. And the negotiation happened organically, within the confines of traditional notice-and-comment rulemaking, rather than through negotiated rulemaking. But these differences need not dissuade the DOJ from applying negotiated rulemaking to web accessibility. This section addresses those differences and discusses the specific next steps for achieving web accessibility through negotiated rulemaking.

1. Composition of the Committee

Under negotiated rulemaking, one of the first decisions the DOJ would have to make is which parties to include in the negotiating committee. Web accessibility touches virtually every industry, and the DOJ would be unable to convene a committee of unlimited size. To limit the players involved, “Big Tech,” which refers to Google, Facebook, Amazon, Microsoft, and Apple, should take the lead in representing business and industry groups, like NATO did in the movie captioning process.¹⁶² Big Tech is well positioned to play this role. Many of the big technology companies view accessibility as a competitive edge and an opportunity to increase their user bases.¹⁶³ Since Big Tech will stand to benefit, they should be the ones with the responsibility of driving the process forward. Further, Big Tech has the clout and market power to set standards that others must follow.¹⁶⁴ And Big Tech has already

162. Big Tech is most commonly known as those five companies. See, e.g., Will Oremus, *Big Tobacco. Big Pharma. Big Tech?*, SLATE (Nov. 17, 2017, 8:00 AM), <https://slate.com/technology/2017/11/how-silicon-valley-became-big-tech.html> [<https://perma.cc/RZ76-D6AE>]; Farhad Manjoo, *Tech’s ‘Frightful 5’ Will Dominate Digital Life for Foreseeable Future*, N.Y. TIMES (Jan. 20, 2016), <https://www.nytimes.com/2016/01/21/technology/techs-frightful-5-will-dominate-digital-life-for-foreseeable-future.html> [<https://perma.cc/ALY4-ZMNG>].

163. *The Business Case for Digital Accessibility*, W3C: WEB ACCESSIBILITY INITIATIVE, <https://www.w3.org/WAI/business-case> [<https://perma.cc/A3S8-7XPT>] (describing how addressing accessibility is good for business, including specific case studies of Apple and Google). This view of accessibility as a competitive edge for large tech companies was consistently repeated in individual, off-the-record interviews with software developers at Amazon, Google, and Facebook.

164. For instance, Google noticed in 2010 that users were increasingly accessing websites from mobile devices, but most websites were not optimized for mobile viewing. Google began prioritizing websites that had mobile-optimized design in its search indexing, and then mobile-optimized design became the norm for all websites. Alessia Pizzoccheri, *Demystifying the Cost of Accessible Websites: Is Accessibility Worth the Commitment?*, F. ONE (Aug. 30, 2019), <https://www.forumone.com/ideas/demystifying-the-cost-of-accessible-websites-is-accessibility-worth-the-commitment> [<https://perma.cc/R5VY-K9PQ>]. In the web accessibility context, Apple and Google could set a minimum threshold of accessibility and reject any mobile appli-

demonstrated its ability to use this clout and market power in a coordinated fashion to bring about political change by removing users, including President Trump, after the insurrection at the U.S. Capitol in January 2021.¹⁶⁵

These companies also have the resources to make web accessibility a reality. From a headcount perspective, they have robust global accessibility teams, many with employees already participating in the W3C process to maintain and update the WCAG.¹⁶⁶ From a software perspective, they have the infrastructure to create accessible technology and tools that have downstream impact, making it easier for smaller companies and individual developers to create accessible content of their own.¹⁶⁷ Like NATO, Big Tech could agree to commitments to increase the accessibility on the supply side, such as agreeing to build open-source tools that would make it easier for smaller companies to comply with any specific rules derived from negotiated rulemaking. If Big Tech pledged to create free tools that could be used by small businesses to make their websites accessible, this evening of the playing field would assuage the concern of lawmakers who are worried about the disparate impact of web accessibility requirements on small businesses, which have fewer resources and developers to throw at the problem.¹⁶⁸

And Big Tech taking the lead in negotiating for the business side does not necessarily require the exclusion of other business groups. Small businesses could be represented on the negotiating committee by national organizations like the U.S. Chamber of Commerce, which raised concerns about the impact of the rules on small businesses in the 2010 ANPRM.¹⁶⁹

cations created for iOS or Android that fail to meet this bar. Amazon could set accessibility standards for the millions of companies that use Amazon Web Services to host their websites.

165. Sarah Frier, *Bans on Parler and Trump Show Big Tech's Power over Web Conversation*, BLOOMBERG (Jan. 10, 2021, 8:06 PM), <https://www.bloomberg.com/news/articles/2021-01-11/parler-trump-bans-show-big-tech-s-power-over-web-conversation> [<https://perma.cc/73D6-SXDF>].

166. See, e.g., *Technology Is Most Powerful When It Empowers Everyone*, APPLE, <https://www.apple.com/accessibility> [<https://perma.cc/R6Q9-X2YS>]; Eve Andersson, *The Accessibility Team Helping Make Our Products Work for Everyone*, GOOGLE: THE KEYWORD (Oct. 1, 2018), <https://www.blog.google/outreach-initiatives/accessibility/accessibility-team-helping-make-our-products-work-everyone> [<https://perma.cc/5YV6-5Q79>].

167. As an example, Google created Google Lighthouse, an open-sourced automated tool to help developers test the accessibility of the websites they create and improve their performance and quality. *Lighthouse*, GOOGLE DEVELOPERS (July 23, 2020), <https://developers.google.com/web/tools/lighthouse> [<https://perma.cc/7UUD-7CG7>] (“Lighthouse . . . has audits for performance, accessibility, progressive web apps, SEO and more.”); see also Katharine Schwab, *Chrome's New AI Feature Solves One of the Web's Eternal Problems*, FAST CO. (Oct. 9, 2019), <https://www.fastcompany.com/90414687/chromes-new-ai-feature-solves-one-of-the-webs-eternal-problems> [<https://perma.cc/XD3G-YSU9>] (discussing the launch of a new feature that enables Google Chrome to automatically label images for blind users).

168. See *supra* note 151 and accompanying text.

169. Chamber of Com. of the U.S., Comment Letter on 2010 ANPRM (Jan. 24, 2011), <https://www.regulations.gov/document/DOJ-CRT-2010-0005-0324> [<https://perma.cc/8CWN-UNKH>].

Negotiated rulemaking between Big Tech and stakeholders from the disability community could serve as a floor, not a ceiling, for achieving web accessibility. After these groups met and made initial high-level agreements, the DOJ could encourage separate sector-by-sector negotiation for any industry groups that sought industry-specific commitments. Subsequent sector-by-sector negotiation could enable stakeholders to focus on more specific and concrete commitments just as the advocates and NATO were able to do. For example, social media platforms could agree on specific requirements for content uploaded by individual users. News organizations could agree to acceptable timelines for captioning to be added to news videos. Disability advocacy organizations already target companies by industry in their litigation and negotiation efforts.¹⁷⁰ Negotiated rulemaking could simply serve as a starting point for more comprehensive negotiation among industry and disability groups.

2. Substantive Proposals

While this Note focuses on advocating for a particular approach to reform rather than a specific outcome, there are a few concrete proposals that the group negotiating a consensus should adopt. The consensus should recognize compliance with the WCAG as a safe harbor, meaning that any website complying with the WCAG would meet its affirmative obligation under the ADA.¹⁷¹ This safe harbor would match state law initiatives and provide companies clamoring for clear guidelines with a set of specific standards to follow.¹⁷² A safe harbor provision would also free the group from the difficult task of setting technical guidelines, which would become quickly outdated as new technology evolved. Helpfully, the W3C takes care of updating the WCAG guidelines, so neither the DOJ nor the negotiating committee would have to devote resources to updating them.¹⁷³

170. For instance, after the National Association of the Deaf settled with Netflix, the association then targeted Netflix's competitors, ultimately obtaining 100 percent captioning on all major video streaming services. Amanda Robert, *A Tangled Web: ADA Questions Remain over Web Accessibility Cases and the Lack of DOJ Regulations*, ABA J., July–Aug. 2019, at 17.

171. See discussion *supra* Section I.C.

172. California's assembly introduced a bill in February 2020 that would allow companies who meet WCAG AA guidelines to enjoy a presumption of compliance with state law. Assemb. 2123, 2019–2020 Leg., Reg. Sess. (Cal. 2020). The bill was not passed before the end of the legislative session in November 2020 and has not been reintroduced. *AB-2123 Accessibility: Internet Website*, CAL. LEGIS. INFO., https://leginfo.ca.gov/faces/billStatusClient.xhtml?bill_id=201920200AB2123 [<https://perma.cc/VEG6-JQL7>]. A bill in Virginia would have also made compliance with WCAG 2.0 AA sufficient to meet the obligations of state law, but the governor vetoed it on other grounds. H.D. 2296, 2019 Leg., Reg. Sess. (Va. 2019); Press Release, Ralph Northam, Governor, Commonwealth of Virginia, Governor Northam Vetoes Legislation to Change Virginians with Disabilities Act (May 3, 2019), <https://www.governor.virginia.gov/newsroom/all-releases/2019/may/headline-840397-en.html> [<https://perma.cc/AP6G-CJQM>].

173. JAEGER, *supra* note 41, at 49.

The negotiators should also agree to exempt businesses from website accessibility requirements if those businesses can show that such requirements would unduly burden them. This exemption would bring small businesses to the table and assuage the concerns of the members of Congress who wrote to the DOJ.¹⁷⁴ It is also consistent with the overarching architecture of the ADA, under which entities can point to an undue burden to avoid captioning movies or building ramps.¹⁷⁵ That said, the negotiators should clearly define what counts as an “undue burden” in the web accessibility context in order to avoid the disputes over the term’s meaning that arise in other areas of ADA litigation.¹⁷⁶

Finally, the negotiated rulemaking committee should agree to specific timelines for achieving web accessibility. In the 2010 ANPRM, the DOJ suggested an effective date of six months for the publication of any new website and two years for existing websites.¹⁷⁷ A bifurcated approach that gives more time to existing websites than new websites to comply would be reasonable, given that costs are lower for making a new website accessible than for retrofitting an old one.¹⁷⁸ This “old” versus “new” distinction aligns with the ADA’s approach to physical accessibility, which treated new and existing construction differently when the Act was enacted.¹⁷⁹ An extended timeline for existing content would also reduce incentives for companies to simply remove rather than update older material.¹⁸⁰

The committee might also consider using a sliding scale that would impose different timelines for different categories of covered entities based on page views. This would enable a local restaurant to have more time to make its website accessible than a national chain, a fairness concern raised in the ANPRM by commenters representing small businesses.¹⁸¹ While the disability community may view a sliding scale approach to effective dates as a significant concession to businesses, it is a preferable option to another decade without national reform.¹⁸²

174. See *supra* note 151.

175. See, e.g., 42 U.S.C. §§ 12132, 12182.

176. Waldo, *supra* note 154, at 1038.

177. 2010 ANPRM, 75 Fed. Reg. 43,460, 43,466 (proposed July 26, 2010).

178. See *supra* note 41 and accompanying text.

179. See SAMUEL R. BAGENSTOS, *DISABILITY RIGHTS LAW: CASES AND MATERIALS* 20 (3d ed. 2021) (describing the statute’s old-new distinction that results in a lighter burden for facilities constructed before the effective date).

180. Am. Bankers Ass’n, Comment Letter on 2010 ANPRM (Jan. 24, 2011), <https://www.regulations.gov/document/DOJ-CRT-2010-0005-0331> [<https://perma.cc/3Y53-MKQZ>].

181. See *id.*; Chamber of Com. of the U.S., *supra* note 169.

182. Further, as larger actors make their websites and applications accessible, this might shift norms and expectations in a way that creates competitive pressure for the rest of the players to follow, regardless of the timeline proposed through negotiated rulemaking. See *supra* note 164 and accompanying text for a discussion of how competitive pressure made mobile-optimized websites the norm.

CONCLUSION

Web accessibility is critical for people with disabilities to fully participate in modern society. There is mounting pressure to do *something* about web accessibility, but little consensus about what should be done and by whom. The COVID-19 pandemic and its effects on daily life have further highlighted the need for an accessible internet. Despite the issue's importance, all branches of the federal government have repeatedly declined to directly address the issue. Members of Congress, receiving pressure from people with disabilities and businesses alike, have been asking the DOJ to take action. The DOJ, after initiating an ANPRM and then withdrawing it seven years later, has opted to let the judiciary answer. Meanwhile, the Supreme Court seems content to leave the lower courts divided, even while they are being inundated with web accessibility complaints. In the face of this uncertainty and inaction, this Note argues for reviving negotiated rulemaking, a regulatory innovation from the 1980s, to work toward web accessibility. Negotiated rulemaking presents an attractive procedural path for the DOJ to drive the process forward, while empowering the groups most impacted to build consensus for a more accessible internet.

