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The Rise of ADA Title III: How Congress and the Department of Justice Can Solve Predatory Litigation

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HOW CONGRESS AND THE DEPARTMENT OF JUSTICE CAN SOLVE PREDATORY LITIGATION

INTRODUCTION

On December 13, 2018, ten art galleries, all beginning with the letter "A," were sued in New York federal court under Title III of the Americans with Disabilities Act (the ADA) by a blind man alleging the galleries' websites were inaccessible to visually impaired persons.[1] Then, on December 14, the plaintiff went on to sue art galleries beginning with the letter "B," continuing in this systematic fashion over several days, all the way up to the letter "H."[2] But, the lawsuits did not end there. The rest of the alphabet was then covered by another blind man, working with the same lawyers that represented the first plaintiff.[3] Thousands of other private businesses in New York alone are facing similar website accessibility lawsuits, filed primarily by the same fifteen law firms.[4] This raises the question: Are these lawsuits an overdue move toward civil rights for the visually disabled, or are they a way for law firms to make "an easy payday?"[5]

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[1] Elizabeth A. Harris, *Galleries from A to Z Sued over Websites the Blind Can't Use*, N.Y. TIMES (Feb. 18, 2019), https://www.nytimes.com/2019/02/18/arts/design/blind-lawsuits-art-galleries.html?auth=login-email&login=email [https://perma.cc/9RMJ-ND3B]; *see, e.g.*, Class Action Complaint & Demand for Jury Trial at 1–2, Tucker v. Adelson Galleries, Inc., No. 1:18-cv-11673 (S.D.N.Y. Dec. 13, 2018); Class Action Complaint & Demand for Jury Trial at 1–2, Tucker v. Agora Gallery, Inc., No. 1:18-cv-11675 (S.D.N.Y. Dec. 13, 2018).

[2] *See* Harris, *supra* note 1; *e.g.*, Class Action Complaint & Demand for Jury Trial at 1–2, Tucker v. Baahng Gallery, Inc., No. 1:18-cv-11734 (S.D.N.Y. Dec. 14, 2018); Class Action Complaint & Demand for Jury Trial at 1–2, Tucker v. Helly Nahman Gallery, Inc., No. 1:18-cv-11963-DAB (S.D.N.Y. Dec. 18, 2018).

[3] *See* Harris, *supra* note 1; Class Action Complaint & Demand for Jury Trial at 1–2, Dawson v. Mark Borghi Fine Art, Inc., No. 1:19-cv-00527 (S.D.N.Y. Jan. 17, 2019).

[4] *See* Minh N. Vu et al., *Number of Federal Website Accessibility Lawsuits Nearly Triple, Exceeding 2250 in 2018*, SEYFARTH ADA TITLE III NEWS & INSIGHTS (Jan. 31, 2019), https://www.adatitleiii.com/2019/01/number-of-federal-website-accessibility-lawsuits-nearly-triple-exceeding-2250-in-2018/ [https://perma.cc/SYM9-XCHB] (at least 2,258 ADA Title III website accessibility lawsuits were filed in federal court in 2018, and "[t]he number of New York federal website accessibility lawsuits" were "brought primarily by fifteen law firms/lawyers").

[5] Sara Randazzo, *Lawsuits Surge over Websites' Access for the Blind*, WALL STREET J. (Feb. 17, 2019, 10:00 AM), https://www.wsj.com/articles/lawsuits-surge-over-websites-access-for-the-blind-11550415600 [https://perma.cc/ZA4F-38L3].

Congress enacted the ADA in 1990 to afford equal opportunities for individuals with disabilities and "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."[6] Since its enactment, the ADA has been a major source of litigation[7] and, in 2018, cases brought under the ADA increased three-fold from the previous year.[8] In the past, disabled plaintiffs have brought lawsuits to demand that businesses become "more physically accessible, by adding ramps, widening doorways or lowering countertops."[9] Yet, with today's culture and commerce increasing reliance on the internet,[10] there has been an increase in website accessibility lawsuits where plaintiffs allege violations of Title III of the ADA, as was the case with the lawsuits against several New York art galleries described above.[11]

Title III of the ADA states, "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any *place of public accommodation* by any person who owns, leases (or leases to), or operates a place of public accommodation."[12] It additionally lists twelve private types of entities that are considered public accommodations,[13] yet none of those enumerated entities includes

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[6] 42 U.S.C. § 12101(b)(2).

[7] Mark Pulliam, *The ADA Litigation Monster*, CITY J. (Spring 2017), https://www.city-journal.org/html/ada-litigation-monster-15128.html [https://perma.cc/4DDQ-ZPR2]; *see also* Rudy Gomez & Elizabeth M. Rodriguez, *"Drive-by" Lawsuits Under the Americans with Disabilities Act Continue to Rise—Part I*, FORDHARRISON: NEWS & INSIGHTS (Aug. 7, 2018), https://www.fordharrison.com/drive-by-lawsuits-under-the-americans-with-disabilities-act-continue-to-rise [https://perma.cc/MQ78-PX9W] ("'Drive-by' lawsuits under the Americans with Disabilities Act (ADA) are more prevalent than ever and continue to rise. . . . During the last five years, one plaintiff alone filed more than 1,000 lawsuits against businesses in a cross-section of industries.").

[8] *See* Vu et al., *supra* note 4 ("[T]he number of website accessibility lawsuits . . . filed in federal court under Title III of the ADA exploded in 2018 to at least 2258—increasing by 177% from 814 such lawsuits in 2017").

[9] *See* Harris, *supra* note 1.

[10] Millions of Americans are spending enormous amounts of time every day on the internet and while the internet is easily available to many people in today's society, approximately 32.2 million Americans are visually disabled and face difficulties accessing websites of private businesses. *Facts and Figures on Adults with Vision Loss*, AM. FOUND. FOR THE BLIND, https://www.afb.org/research-and-initiatives/statistics/adults [https://perma.cc/MHT9-PLCJ]; Joseph Johnson, *United States: Number of Online Users 2015-2025*, STATISTA (Jan. 27, 2021), https://www.statista.com/statistics/325645/usa-number-of-internet-users/ [https://perma.cc/8FBX-ETUK].

[11] "[F]ederal web accessibility lawsuits increased by 30 percent in 2018 over 2017." Amihai Miron, *3 Steps to Get Ahead of ADA Web Accessibility Issues*, LAW360: EXPERT ANALYSIS (Feb. 12, 2019, 3:55 PM), https://www.law360.com/articles/1127409/3-steps-to-get-ahead-of-ada-web-accessibility-issues [https://perma.cc/8B24-5XK8]; *see supra* notes 1–3 and accompanying text.

[12] 42 U.S.C. § 12182(a) (emphasis added).

[13] These entities will only be subject to the requirements of the ADA if they affect commerce. 42 U.S.C. § 12181(7).

the internet.[14] When Congress enacted the ADA in 1990, the internet was still in its infancy and Congress did not anticipate how prevalent the internet would soon become.[15] Consequently, the need for "governing accessibility to [virtual] public accommodations" such as websites was not contemplated by the legislature.[16] With the legislature providing only statutory guidance for businesses' physical locations, Congress has left it to the courts to interpret the ADA as applied to websites.[17] As these website accessibility suits are increasingly filed against businesses, they touch upon a common issue: whether the meaning of "place of public accommodation" includes websites, or if that language is limited to physical spaces.[18]

Federal courts are split on this issue.[19] The Courts of Appeals for the Third, Sixth, and Ninth Circuit have held that places of public accommodation must be physical places, but if there is a sufficient "nexus"[20] between a challenged service, such as a website, and the physical place of public accommodation, then it is subject to the ADA.[21] While the Court of Appeals for the Eleventh Circuit has also held that places of public accommodation must be physical places, it has expressly rejected the nexus approach, and to be subject to the ADA a

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[14] Some examples of the twelve categories listed by Congress include places of lodging, establishments "serving food or drink," auditoriums, laundromats, parks and zoos, places of entertainment, and places of education. 42 U.S.C. § 12181(7).

[15] Jason P. Brown & Robert T. Quackenboss, *The Muddy Waters of ADA Website Compliance May Become Less Murky in 2019*, HUNTON EMP. & LAB. PERSP. (Jan. 3, 2019), https://www.huntonlaborblog.com/2019/01/articles/public-accommodations/muddy-waters-ada-website-compliance-may-become-less-murky-2019/ [https://perma.cc/PAY3-SF9B].

[16] *See* Steve Roppolo, *Facing 'Drive-By' or 'Surf-By' ADA Website Lawsuits*, LAW.COM (Dec. 17, 2018, 1:47 PM), https://www.law.com/texaslawyer/2018/12/17/facing-drive-by-or-surf-by-ada-website-lawsuits/ [https://perma.cc/DF58-5DEJ].

[17] *See* Brown & Quackenboss, *supra* note 15.

[18] Gregory Grisham, *Website Inaccessibility: The New Wave of ADA Title III Litigation*, 20 FED. SOC'Y REV. 66, 68 (2019).

[19] *See id.* at 68–71. *Compare* Nat'l Ass'n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 201–02 (D. Mass. 2012) (holding Netflix's website is a place of public accommodation because "[t]he ADA covers services 'of' a public accommodation"), *with* Cullen v. Netflix, 880 F. Supp. 2d 1017, 1024 (N.D. Cal. 2012) (holding Netflix's website is not a place of public accommodation because Netflix "is not 'an actual physical place'" and has no nexus to one because it is available only on the internet).

[20] A sufficient nexus was found to exist between Target's brick-and-mortar store and its website because Target.com "is heavily integrated with," and "operates in many ways as a gateway to[,] the stores." Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 955 (N.D. Cal. 2006). "For example, through Target.com, a customer can access information on store locations and hours, refill a prescription or order photo prints for pick-up at a store, and print coupons to redeem at a store." *Id.* at 949.

[21] *See* Peoples v. Discover Fin. Servs., Inc., 387 F. App'x 179, 183 (3d Cir. 2010) (holding that a place of public accommodation "is limited to physical accommodations"); Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1010 (6th Cir. 1997) (holding a "public accommodation" only refers to a "physical place"); Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114 (9th Cir. 2000) (holding that "some connection between the good or service complained of and an actual physical place is required").

website must impose an "intangible barrier" to an individual in accessing the goods and services of a physical place of public accommodation.[22] In contrast, the Court of Appeals for the First, Second, and Seventh Circuit have found that a place of public accommodation does not need to be a physical space and, so a website is considered a place of public accommodation regardless if it has any connection to a physical space.[23] The varied conclusions of the circuit courts as to the proper interpretation of "place of public accommodation" under the ADA has caused increased uncertainty and confusion among businesses.[24]

Another issue then arises: If a website is a place of public accommodation, or has a sufficient nexus to a physical space, then what must a company do to comply with the ADA? While businesses have specific guidance as to the standards that apply to their physical premises, the Department of Justice (DOJ), the agency responsible for enforcing the ADA,[25] has not promulgated formal accessibility standards for websites.[26] Thus, in addition to the uncertainty fostered by the circuit courts' differing interpretation of "place of public accommodation," there is also a lack of clarity due to the DOJ's failure to provide federal standards for website compliance under the ADA.[27] Though the

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[22] Gil v. Winn-Dixie Stores, Inc., 17-13467, 2021 U.S. App. LEXIS 10024, at *19, 23–24, 26 (11th Cir. Apr. 7, 2021) (declining "to adopt a 'nexus' standard" and holding that "websites are not a place of public accommodation under Title III of the ADA" and "Winn-Dixie's website does not constitute an 'intangible barrier' to [plaintiff's] ability to access and enjoy fully and equally" the services of the place of accommodation).

[23] *See* Carparts Distrib. Ctr., Inc. v. Auto Wholesaler's Ass'n of New Eng., 37 F.3d 12, 19 (1st Cir. 1994) (holding establishments of "public accommodation" are not limited to actual physical structures); *Nat'l Ass'n of the Deaf*, 869 F. Supp. 2d at 202 (holding that a "website is a place of public accommodation . . . even if those services are accessed exclusively in the home"); Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28, 32 (2d Cir. 1999) (holding "Title III's mandate that the disabled be accorded 'full and equal enjoyment of the goods, [and] services . . . of any place of public accommodation' suggests to us that the statute was meant to guarantee them more than mere physical access" (alterations in original)); Andrews v. Blick Art Materials, LLC, 268 F. Supp. 3d 381, 393 (E.D.N.Y. 2017) (holding that "[i]t is unambiguous that under Title III of the ADA, [the website] is a place of public accommodation"); Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999) (holding "the owner or operator of a . . . Web site, or other facility (whether in physical space or in electronic space that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do" (internal citation omitted)).

[24] *See* Brown & Quackenboss, *supra* note 15.

[25] 42 U.S.C. § 12186(b) ("the Attorney General shall issue regulations").

[26] *See* Amanda Robert, *ADA Questions Remain Over Web Accessibility Cases and the Lack of DOJ Regulations*, ABA J. (July 1, 2019, 2:15 AM), http://www.abajournal.com/magazine/article/ada-web-accessibility-doj-regulations [https://perma.cc/Y4U3-JJTK] ("The DOJ announced plans to propose web accessibility regulations in 2010 but withdrew those plans in December 2017."); *see also* Kim Krause Berg, *Website Accessibility & the Law: Why Your Website Must Be Compliant*, SEARCH ENGINE J. (Jan. 9, 2019), https://www.searchenginejournal.com/website-accessibility-law/285199/#close [https://perma.cc/3UCP-GUFH].

[27] *See* Robert, *supra* note 26; Letter from Stephen E. Boyd, Assistant Att'y Gen., Office of Legislative Affairs, U.S. Dep't of Justice, to Rep. Ted Budd, U.S. House of Representatives (Sept. 25, 2018) [hereinafter Sept. 2018 Letter], https://www.adatitleiii.com/wp-

DOJ has recommended the technical guidelines provided by the Web Content Accessibility Guidelines (WCAG), these guidelines have not been formally adopted and are not the law.[28] Due to these ambiguities, businesses are unsure if their websites are covered by Title III of the ADA and what they would need to do to ensure compliance with the ADA.[29]

This lack of guidance on website accessibility has fostered predatory litigation against all types of businesses, such as the several New York City art galleries mentioned above.[30] When such legal claims are made, most businesses will settle early in the lawsuit rather than spend money on litigation.[31] Going to trial is too risky for businesses when there are no set standards, or a "checklist" with which they can be confident they complied.[32] This litigation avoidance strategy is amplified by the ADA's fee-shifting structure which entitles the plaintiff to recover their attorney fees.[33] Furthermore, in some states, such as New York, civil rights statutes allow for plaintiffs to collect damages in addition to legal fees, creating the potential to further incentivize predatory litigation.[34] While it is essential that

content/uploads/sites/121/2018/10/DOJ-letter-to-congress.pdf [https://perma.cc/CGL5-Y7DR] ("[T]he ADA applies to public accommodations' websites" and "[a]bsent the adoption of specific technical requirements for websites through rulemaking, public accommodations have flexibility in how to comply with the ADA's general requirements of nondiscrimination and effective communication.").

[28] The WCAG is developed by the World Wide Web Consortium, a private body of web accessibility experts. WCAG 2.0 AA is considered to be "generally-accepted." Kristina M. Launey & Minh N. Vu, *W3C Publishes Expanded Web Content Accessibility Guidelines*, SEYFARTH ADA TITLE III NEWS & INSIGHTS (June 6, 2018), https://www.adatitleiii.com/2018/06/world-wide-web-publishes-expanded-web-accessibility-guidelines/ [https://perma.cc/PSP9-NXD8]; *see e.g.*, Consent Decree at 5, Nat'l Fed'n of the Blind v. HRB Dig. LLC, No. 1:13-cv-10799-GAO (D. Mass. Mar. 24, 2014), 2014 WL 4999221 [hereinafter HRB Consent Decree] (requiring the defendant's website to conform to WCAG 2.0 AA standards).

[29] *See* Ryan Donovan, *Finding Solutions to Predatory Litigation Alleged Under the ADA*, CREDIT UNION TIMES (Feb. 23, 2018, 7:00 PM), https://www.cutimes.com/2018/02/23/finding-solutions-to-predatory-litigation-alleged-under-ada/?slreturn=20210317233201 [https://perma.cc/M8TQ-SWWS]; Brown & Quackenboss, *supra* note 15.

[30] *See supra* notes 1–3 and accompanying text.

[31] Ira Steinberg, *So Your Website Has Been Hit With a Disability Access Claim, Now What?*, GREENBERG GLUSKER (Feb. 3, 2021), https://www.jdsupra.com/legalnews/so-your-website-has-been-hit-with-a-5194026/ [https://perma.cc/X52J-ULN9].

[32] *Id.*; *see also* Toni Cannady, *Avoiding The Website Accessibility Shakedown*, ABA BANKING J. (Feb. 6, 2017), https://bankingjournal.aba.com/2017/02/avoiding-the-website-accessibility-shakedown/ [https://perma.cc/GG7V-ASWP].

[33] Under 42 U.S.C. § 12188(a)(1), a private party is entitled to the remedies set forth in Section 204(a) of the Civil Rights Act of 1964. 42 U.S.C. § 12188(a)(1); Civil Rights Act of 1964, Pub. L. No. 88-352, § 204(a), 78 Stat. 241, 244 (codified at 42 U.S.C. § 2000a-3(a)). Therefore, a private party may receive injunctive relief, such as requiring the business to rectify the Title III violation, and may be awarded attorney's fees in the court's discretion, but cannot be awarded financial damages. 42 U.S.C. § 2000a-3(a)–(b).

[34] *See* N.Y. Exec. Law § 297(9); LAWSUIT REFORM ALL. OF N.Y., SERIAL PLAINTIFFS: THE ABUSE OF ADA TITLE III 5 (2018), https://lrany.org/wp-content/uploads/2016/07/ADA-STUDY-FINAL-3-13-2018.pdf [https://perma.cc/8RW5-5E8J] [hereinafter SERIAL PLAINTIFFS].

disabled persons have equal access to the internet, the lack of guidance on how websites should comply with the ADA and the ability for plaintiffs to collect generous attorney fees has perpetuated and incentivized the issue of predatory litigation.

This note argues that to bring an end to the predatory litigation under Title III of the ADA, Congress must amend the ADA to clearly include all websites as a place of public accommodation, following the approaches of the First, Second, and Seventh Circuit Courts of Appeals. Additionally, this note argues that the DOJ must provide regulatory guidance on the standards for website compliance with the ADA, and suggests a possible regulatory scheme based on the WCAG standards.

Part I introduces the ADA, discusses its background, and provides an analysis of the rising number of lawsuits under Title III. Part II discusses the current circuit split over the interpretation of "place of public accommodation," and will further exemplify the need for clearer standards by discussing two similar lawsuits that were brought against Netflix but resulted in different outcomes. Part III will describe the various website accessibility standards, including a description of the WCAG guidelines, an overview of the DOJ's past and current position on website compliance standards, and where businesses currently stand regarding website accessibility. Finally, Part IV proposes that Congress should amend the ADA to clarify the scope of the law's applicability to websites. This solution requires that the DOJ promulgate regulations in which the level of website compliance will depend upon the website's intended use.

I. BACKGROUND: THE ADA

A. What is the ADA?

Congress passed the ADA in 1990—and later amended it in 2008—for the purpose of eliminating discrimination against individuals with disabilities in a variety of settings.[35] At the time the ADA was passed, Congress found that approximately 43 million Americans had "one or more physical or mental disabilities," and that number was increasing.[36] Additionally, Congress found that society "tended to isolate and segregate individuals with disabilities."[37]

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[35] 42 U.S.C. § 12101(b); H.R. Rep. No. 101-485, pt. 4, at 23 (1990), *reprinted in* 1990 U.S.C.C.A.N. 512, 512.

[36] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(a)(1), 104 Stat. 327, 328.

[37] Americans with Disabilities Act of 1990 § 2(a)(2).

According to the ADA, an individual has a disability if they have a "physical or mental impairment that substantially limits one or more major life activities of such individual."[38] Hence, a person with a vision impairment is protected by the ADA.[39] The ADA is divided into four titles covering different areas of public life, including employment, public services, public accommodations, and miscellaneous provisions.[40] Title III of the ADA governs public accommodations, and prohibits them from discriminating based on an individual's disability.[41] A "public accommodation" includes a private business whose operations affect commerce, and which falls into one of twelve enumerated categories.[42] The general prohibition clause of Title III mandates that "any person who owns, leases (or leases to), or operates a place of public accommodation" must not discriminate against individuals with disabilities "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations" of the entity.[43]

In certain circumstances, the ADA also requires affirmative action by the place of public accommodation to correct any violations, provided such action does not "result in an undue burden" or "fundamentally alter the nature of the good, service, facility, privilege, advantage or accommodation."[44] For example, places of public accommodation must "remove architectural barriers, and communication barriers that are structural in nature," and transportation barriers where such removal is readily achievable; or, if this is not possible then the entity must "make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods."[45] The ADA also mandates that public accommodations provide auxiliary aids and services, and "make reasonable modifications in policies, practices, or procedures, when . . . necessary."[46] When a place of public accommodation

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[38] 42 U.S.C. § 12102(1)(A).

[39] BLINDNESS AND VISION IMPAIRMENTS IN THE WORKPLACE AND THE ADA, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, (MAY 7, 2014), https://www.eeoc.gov/laws/guidance/blindness-and-vision-impairments-workplace-and-ada# [https://perma.cc/G9HX-S3MK] ("The Centers for Disease Control and Prevention (CDC) define[s] 'vision impairment' to mean that a person's eyesight cannot be corrected to a 'normal level.'").

[40] *See* 42 U.S.C. §§ 12101–213. Some examples of the miscellaneous provisions include state immunity, technical assistance, "[f]ederal wilderness areas," and "alternative means of dispute resolution." §§ 12202, 12206–07, 12212.

[41] *See* Brown & Quackenboss, *supra* note 15.

[42] 42 U.S.C. § 12181(7); *see supra* note 14 and accompanying text.

[43] 42 U.S.C. § 12182(a).

[44] 42 U.S.C. § 12182(b)(2)(A)(iii).

[45] *Id.*

[46] *Id.*

fails to comply, the ADA gives a person protected by its mandates a private cause of action against the violator, discussed in more detail in the following section.[47]

B. Title III and the Rise of Lawsuits

For a plaintiff to state a claim under Title III of the ADA, the complaint must allege "(1) that [plaintiff] is disabled within the meaning of the ADA; (2) that defendants own, lease, or operate a place of public accommodation; and (3) that defendants discriminated against [plaintiff] by denying [plaintiff] a full and equal opportunity to enjoy the services defendants provide."[48] Furthermore, for a private plaintiff to have standing to bring a Title III claim, the plaintiff must allege both that the plaintiff was discriminated against in the past and that there exists a sufficient likelihood he or she will suffer such discrimination again.[49] The threat of future discrimination must be "real and immediate—as opposed to a merely conjectural or hypothetical—threat of future injury."[50] Additionally, a plaintiff does not have to be a bona fide patron to have standing—a plaintiff's motives for filing suit are not taken into account by the judge.[51] Therefore, even if a plaintiff is considered an ADA "tester," he or she can still have standing to bring a lawsuit. [52]

Title III gives only limited legal remedies to plaintiffs that sue under its cause of action. A plaintiff's sole remedy is to recover attorney's fees and costs, as well as to obtain injunctive relief, in which a court will direct a business to remedy the alleged wrongs.[53] Although individual plaintiffs may not sue for damages under the provisions of the ADA, there still is an

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[47] *See infra* notes 48–52 and accompanying text.

[48] Camarillo v. Carrols Corp., 518 F.3d 153, 156 (2d Cir. 2008).

[49] Houston v. Marod Supermarkets, Inc., 733 F.3d 1323, 1328 (11th Cir. 2013) ("The 'injury-in-fact' demanded by Article III requires an additional showing when injunctive relief is sought. In addition to past injury, a plaintiff seeking injunctive relief 'must show a sufficient likelihood that he will be affected by the allegedly unlawful conduct in the future.'").

[50] *Id.* at 1329 (emphasis omitted).

[51] Benjamin S. Briggs & Cynthis Sass, *Websites and Mobile Applications: Do They Comply With Title III of the Americans With Disabilities Act?*, FLA. B.J., Sept./Oct. 2016, at 40, 44, https://www.floridabar.org/the-florida-bar-journal/websites-and-mobile-applications-do-they-comply-with-title-iii-of-the-americans-with-disabilities-act/ [https://perma.cc/4WJW-UWKP].

[52] *Id.* (An ADA "tester" is someone "who travels to businesses solely to evaluate ADA compliance"); *see Houston*, 733 F.3d at 1334 (holding that the "Plaintiff's tester motive behind his visits to the [Defendant's store] does not foreclose standing for his claim under 42 U.S.C. §§ . . . 12188(a)(1) of Title III").

[53] At the court's discretion, "the prevailing party, other than the United States," may recover "a reasonable attorney's fee, including litigation expenses and costs." 42 U.S.C. § 12205. "[A] civil action for preventive relief, including an application for a permanent or temporary injunction . . . may be instituted by the person aggrieved" 42 U.S.C. § 2000a-3(a)–(b).

incentive for lawyers to bring lawsuits to recover attorney's fees from the defendant.[54] Courts have consistently treated ADA lawsuits like civil rights cases under Title VII,[55] in which "a prevailing plaintiff always recovers fees, but a prevailing defendant can only recover fees if the plaintiff's claims were groundless or without foundation."[56] This unequal potential for recovery gives plaintiffs an advantage over the defendants and can contribute to meritless lawsuits.[57] These lawsuits have essentially become "cookie-cutter" lawsuits, in which the same language is used in each action, with the only major change being the parties' names, thereby making it a minimal investment of time and resources for plaintiff firms.[58] Attorneys take advantage of the similarities in these cases, charging high attorney fees with the opportunity to recover them from the defendant.[59] This situation can be illustrated by two New York attorneys that claimed $425 per hour in fees, or approximately $15,000 per case, and filed up to ten cases in one day.[60]

The cost of carrying out a lawsuit is expensive, which is why very few lawsuits will actually go to trial.[61] Defendants look to settle the case rather than pay the costs of litigation and the

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[54] Arlene Haas, *Essential Guide to ADA Title III Enforcement: Private Party Lawsuits*, BURNHAM: THE FINAL REVIEW (Jan. 10, 2017, 8:00 AM), https://www.burnhamnationwide.com/final-review-blog/essential-guide-to-ada-title-iii-enforcement-private-party-lawsuits [https://perma.cc/2UB5-E24J].

[55] Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on "race, color, religion, sex, [and] national origin." 42 U.S.C. § 2000e-2.

[56] Richard M. Hunt, *Attorneys Fees in ADA and FHA Cases—It's Time for Fairness*, ACCESSIBILITY DEF. (Jan. 22, 2014), http://accessdefense.com/?p=595 [https://perma.cc/PG6W-ZZ8U].

[57] *See* Pulliam, *supra* note 7.

[58] *See* SERIAL PLAINTIFFS, *supra* note 34, at 5; Samuel D. Levy & Martin S. Krezalek, *A Call for Regulation: The DOJ Ignored Website Accessibility Regulation and Enterprising Chaos Ensued*, N.Y. L.J. (Nov. 9, 2018, 2:35 PM), https://www.law.com/newyorklawjournal/2018/11/09/a-call-for-regulation-the-doj-ignored-website-accessibility-regulation-and-enterprising-chaos-ensued/ [https://perma.cc/2Y2K-HD6C]. A federal court Judge, Sterling Johnson Jr., noted the great similarity among these cases by characterizing them as "boilerplate." Mosi Secret, *Judge Rebukes 2 Lawyers Profiting From U.S. Disability Law*, N.Y. TIMES (Mar. 29, 2013), https://www.nytimes.com/2013/03/30/nyregion/judge-rebukes-lawyers-profiting-from-us-disability-law.html [https://perma.cc/3D89-6V8Y].

[59] *See* Secret, *supra* note 58.

[60] *Id.*

[61] *See* Sheri Byrne-Haber, *ADA Lawsuit Costs are WAY More Than Just the Settlement*, MEDIUM (Aug. 30, 2019), https://medium.com/@sheribyrnehaber/ada-lawsuit-costs-are-way-more-than-just-the-settlement-7f2aaccfe1e7 [https://perma.cc/8RZH-9A5Z] (explaining "costs associated with defending a digital accessibility lawsuit or action from the Department of Justice"); *see also* John W. Egan & Seyfarth Shaw LLP, *New York Judge Criticizes Plaintiff's ADA Firm For Refusing to Discuss Early Settlement and Engaging in Fee-Churning Litigation Tactics*, SEYFARTH ADA TITLE III NEWS & INSIGHTS (Oct. 2, 2019), https://www.adatitleiii.com/2019/10/new-york-judge-criticizes-plaintiffs-ada-firm-for-refusing-to-discuss-early-settlement-and-engaging-in-fee-churning-litigation-tactics/ [https://perma.cc/V699-2P7B].

attorney fees, which can amount to tens of thousands of dollars.[62] Still, on average, businesses pay out $16,000 for each settlement.[63] Lawyers are aware that these lawsuits ultimately end in settlements, which exacerbates the problematic filing of ADA lawsuits seeking quick settlements.[64] James Link, a civil litigation attorney, stated "[t]he lawsuits are filed to settle them. They have never been about taking a case to trial, and frankly most people can't afford to take a case to trial. . . . that's how [the] [Plaintiffs' attorneys] make their money."[65] New York State Senator Diane Savino referred to the plaintiffs' attorneys as "'ambulance-chaser[s]' who are 'exploiting loopholes in the law' to look for quick settlements" with "the potential to bankrupt small business[es]."[66]

The early days of ADA Title III lawsuits consisted of "drive-by" lawsuits requiring attorneys and clients to drive around town from business to business to find physical places that had minor ADA violations.[67] Today, however, there is a new, much easier target: "surf-by" lawsuits.[68] With technology's help, plaintiffs and plaintiffs' attorneys can simply search the Internet for inaccessible websites from the convenience of anywhere and then file lawsuits alleging violations under Title III.[69] In 2018, there were at least 2,258 website accessibility lawsuits filed in federal courts, a 177 percent increase from 2017.[70] Of those lawsuits, 1,564 were filed in New York federal courts alone, and most commonly by the same six attorneys.[71]

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[62] *See* Hunt, *supra* note 56; *ADA Website Compliance Lawsuits: Recent and High-Profile*, LOVATA (Mar. 5, 2018), https://lovata.com/blog/ada-website-compliance-lawsuits-recent-and-high-profile.html [https://perma.cc/LY84-ZYX4] ("While an ADA retaliation claim does not warrant compensation and punitive damages, lawyers are able to pursue compensation for their client's legal fees, which may range from such amounts as $25,000 to astonishing digits.").

[63] *See* SERIAL PLAINTIFFS, *supra* note 34, at 5.

[64] One attorney, Lynn Hubbard III, has filed, by his own estimates, 1,500 ADA lawsuits in the decade before 2009, and ninety-five percent of the time it ended in a settlement. Carol J. Williams, *Legal Hell on Wheels*, L.A. TIMES (Jan. 5, 2009, 12:00 AM), https://www.latimes.com/archives/la-xpm-2009-jan-05-me-adasuits5-story.html [https://perma.cc/NVK8-BK93].

[65] *See* SERIAL PLAINTIFFS, *supra* note 34, at 5 (fourth alteration in original).

[66] John W. Egan et al., *New York Lawmakers Plan to Address Website Accessibility*, SEYFARTH ADA TITLE III NEWS & INSIGHTS (May 20, 2019), https://www.adatitleiii.com/2019/05/new-york-lawmakers-plan-to-address-website-accessibility/ [https://perma.cc/NP8B-SJFH].

[67] Jeanette Coleman, *ADA Compliance: The Rise of Surf-By Lawsuits*, AXCET HR (May 6, 2019), https://blog.axcethr.com/is-your-website-vulnerable-to-a-surf-by-lawsuit [https://perma.cc/X7VJ-3K3K].

[68] *Id.*; Cory L. Andrews, *Egregious ADA-Litigation Scheme Highlights Need for Clarity On Law's Application Online*, WLF LEGAL PULSE (Oct. 15, 2019), https://www.wlf.org/wp-content/uploads/2019/10/10152019Andrews_WLFLegalPulse.pdf [https://perma.cc/ABL6-TKU4].

[69] *Id.*

[70] *See* Vu et al., *supra* note 4.

[71] *Id.*

The ease of bringing these lawsuits combined with the potential to recoup thousands of dollars in legal fees[72] or receive a hefty settlement has led to an increase in the number of annual filings of ADA Title III lawsuits by more than 300 percent over five years.[73] Moreover, of all the Title III filings, the majority of lawsuits are brought in the same ten districts, with California, Florida, and New York leading the numbers.[74] Not only do the claims come from a small number of states, but they are often brought by the same lawyers and plaintiffs who are considered "frequent fliers" because they regularly bring lawsuits against multiple businesses and include similar accusations in each complaint.[75] Within eighteen months one plaintiff filed more than 150 lawsuits, and that same plaintiff's attorney said 90 percent of his business is from the same approximately twelve disabled clients.[76]

Website compliance cases in New York federal courts surged after judges in the Eastern District Court and Southern District Court in *Andrews v. Blick Art Materials, LLC* and *Markett v. Five Guys Enterprises LLC,* respectively, allowed website accessibility cases to proceed to discovery.[77] Although the Second Circuit Court of Appeals never considered a website accessibility case specifically, it has held that access to a place of public accommodation under the ADA consists of "more than mere physical access."[78] In *Andrews*, the New York district court relied upon the Second Circuit's broad interpretation of the ADA in

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[72] Judges may use their discretion in deciding whether attorney's fees will be awarded to a prevailing plaintiff. *See, e.g.*, Access 4 All, Inc. v. Grandview Hotel Ltd. P'ship, No. CV 04-4368 (TCP) (MLO), 2006 U.S. Dist. LEXIS 15603, at *10 (E.D.N.Y. Mar. 6, 2006) (stating that because the Plaintiff and Plaintiff's attorneys filed dozens of Title III actions in federal courts that all involved "identical legal issues and similar factual issues[,] [t]he duplicitous nature of the litigation warrants a reduction in" the award of attorneys' fees).

[73] *See* Egan et al., *supra* note 66.

[74] MANHATTAN INST. FOR POLICY RESEARCH, CTR. FOR LEGAL POLICY, TRIAL LAWYERS, INC.: WHEELS OF FORTUNE—A REPORT ON THE LITIGATION INDUSTRY'S DISABILITY PRACTICE 10 (Nov. 21, 2014) [hereinafter WHEELS OF FORTUNE], https://media4.manhattan-institute.org/pdf/tli_update12.pdf [https://perma.cc/E8SB-XBRR] (from 2005 to 2013, California filed 7,188 "Accommodation-Based ADA Lawsuits," Florida filed 3,303, and New York, filed 1,322). California continues to be a popular jurisdiction for Title III lawsuits because a plaintiff can add a state law civil rights claim which provides for a minimum of $4,000 in statutory damages in addition to any attorney's fees. Cal. Civ. Code § 52.

[75] *See* WHEELS OF FORTUNE, *supra* note, at 74 ("An academic study . . . determined that in all but one of the top ADA-litigation districts . . . the Top Lawyer accounted for over half of all filings."); *see also* SERIAL PLAINTIFFS, *supra* note 34, at 11 (table listing serial plaintiffs in Title III lawsuits for periods ending September 1, 2017).

[76] *See* Williams, *supra* note 64.

[77] *Id.*; *see* Andrews v. Blick Art Materials LLC, 268 F. Supp. 3d 381, 405 (E.D.N.Y. 2017); Markett v. Five Guys Enters. LLC, No. 17-cv-788 (KBF), 2017 U.S. Dist. LEXIS 115212, at *5–6 (S.D.N.Y. July 21, 2017).

[78] Pallozi v. Allstate Life Ins. Co., 198 F.3d 28, 32 (2d Cir. 1999).

Pallozi.[79] The district court joined the First and Seventh Circuits and held that websites are subject to the ADA, regardless of whether they have a close nexus to a physical location.[80]

II. CIRCUIT SPLIT: WHETHER A "[P]LACE OF [P]UBLIC [A]CCOMMODATION" IS LIMITED TO WEBSITES WITH A CONNECTION TO A PHYSICAL PLACE

An individual alleging a violation of Title III of the ADA must show proof that the "defendant[] own[s], lease[s], or operate[s] a *place of public accommodation*."[81] Federal circuits are split on whether all websites constitute a "place of public accommodation." The Third, Sixth, and Ninth Circuit Courts of Appeals have adopted the nexus theory, where "a place of public accommodation" is limited to physical places, and only discriminatory conduct that has a "nexus" to a physical location will fall within the ADA's protection.[82] Thus, in these circuits a website is considered a public accommodation only if it has a nexus to a physical location. Similarly, the Eleventh Circuit Court of Appeals has also held that a place of public accommodation must be a physical place, but it has expressly rejected the nexus approach and requires that a website create an "intangible barrier" to its services to be subject to the ADA.[83] In contrast, the First, Second, and Seventh Circuit Courts of Appeals interpret "place of public accommodation" more broadly and do not require a connection to a physical structure.[84] In these cases, a website may be a place of public accommodation regardless of whether there is any connection to a physical space.

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[79] *Andrews*, 268 F. Supp. 3d at 392 (noting that in *Pallozi*, the Second Circuit rejected the defendant's argument that the ADA's sole concern was physical access and stated "the statute was meant to guarantee [disabled persons] more than mere physical access" (quoting *Pallozi*, 198 F.3d at 32)).

[80] *See id.* at 393 ("This district court, as it must, adopts the Second Circuit's sensible approach to the ADA. It is unambiguous that under Title III of the ADA, dickblick.com is a place of public accommodation.").

[81] Camarillo v. Carrols Corp., 518 F.3d 153, 156 (2d Cir. 2008) (emphasis added) (listing elements of a Title III claim); Andrews, 268 F. Supp. 3d at 387 (same).

[82] *See, e.g.*, Peoples v. Discover Fin. Servs., Inc., 387 F. App'x 179, 183 (3d Cir. 2010); Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1010–11 (6th Cir. 1997); Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114–15 (9th Cir. 2000).

[83] Gil v. Winn-Dixie Stores, Inc., 17-13467, 2021 U.S. App. LEXIS 10024, at *19, 23–24, 26 (11th Cir. Apr. 7, 2021).

[84] *See e.g.*, Carparts Distrib. Ctr., Inc. v. Auto Wholesaler's Ass'n of New Eng., 37 F.3d 12, 19–20 (1st Cir. 1994); Nat'l Ass'n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 200 (D. Mass. 2012); *Pallozzi*, 198 F.3d at 32; *Andrews*, 268 F. Supp. 3d at 393; Nat'l Fed. of the Blind v. Scribd Inc., 97 F. Supp. 3d 565, 573 (D. Vt. 2015); Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999).

A. Websites are not "Places of Public Accommodation" Approach

Federal courts in the Third, Sixth, Ninth and Eleventh Circuits have found the ADA to be unambiguous, holding that "places of public accommodation" are only physical places.[85] The circuit courts reached this conclusion by focusing mainly on the statute's text.[86] The statute sets forth an extensive list of private entities that are considered "public accommodations" for the purposes of the ADA and, using the principle *noscitur a sociis,* the courts have interpreted "place of public accommodation" by looking to the accompanying words.[87] Since each item on the list of examples in the statute is an actual physical place, these courts have held that "public accommodation" must be a physical place.[88] Discrimination only exists if there is a sufficient "nexus" or "some connection between the good or service complained of and an actual physical place."[89]

Consequently, although a website is not itself a public accommodation, the Third, Sixth and Ninth Circuit Courts have held if there is a sufficient nexus between the services, goods, or privileges provided by it and an actual physical place, then the website must comply with Title III.[90] This means that Title III does not apply to web-based businesses.[91] For example, in *National Federation for the Blind v. Target, Inc.*, a class of visually impaired plaintiffs sued Target, alleging its website was inaccessible.[92] Applying the "nexus theory," the California Northern District Court denied Target's motion to dismiss after finding that there

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[85] *Andrews*, 268 F. Supp. 3d at 388–89 (describing the approach taken by the Third, Sixth, Ninth, and Eleventh Circuits).

[86] *Id.*

[87] *Parker*, 121 F.3d at 1014; 42 U.S.C. § 12181(7); *see also Noscitur a Sociis*, MERRIAM-WEBSTER LAW DICTIONARY, https://www.merriam-webster.com/legal/noscitur%20a%20sociis [https://perma.cc/B6L4-4MX4] ("[T]he meaning of an unclear or ambiguous word (as in a statute or contract) should be determined by considering the words with which it is associated in the context.").

[88] *See, e.g.*, *Weyer*, 198 F.3d at 1114 ("Title III provides an extensive list of 'public accommodations' in [§]12181(7) . . . . All the items on this list, however, have something in common. They are actual, physical places where goods or services are open to the public, and places where the public gets those goods or services."); *Parker*, 121 F.3d at 1010–11; *Nat'l Fed. of the Blind*, 97 F. Supp. 3d at 568–69.

[89] *Weyer*, 198 F.3d at 1114–15; *Andrews*, 268 F. Supp. 3d at 388.

[90] *See* Briggs & Sass, *supra* note 51; Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 955–56 (N.D. Cal. 2006).

[91] *See* Briggs & Sass, *supra* note 51.

[92] *Target*, 452 F. Supp. 2d at 949–50 ("According to plaintiffs . . . . [p]rotocols for designing an accessible internet site rely heavily on 'alternative text' . . . . A blind individual can use screen reader software, which vocalizes the alternative text and describes the content of the [webpage]. Similarly, if the screen reader can read the navigation links, then a blind individual can navigate the site with a keyboard instead of a mouse. Plaintiffs allege that Target.com lacks these features that would enable the blind to use Target.com.").

was a sufficient nexus between the website's goods and services and those provided in the physical Target stores, stating "the challenged service here is heavily integrated with the brick-and-mortar stores and operates in many ways as a gateway to the stores."[93] In contrast, when that same court applied the nexus theory in a lawsuit against Facebook, the court dismissed the lawsuit because "Facebook operates only in cyberspace, and is thus [] not a 'place of public accommodation' as construed by the Ninth Circuit."[94] Similarly, the Ninth Circuit dismissed an action brought against eBay, reasoning that "eBay's services are not connected to any 'actual, physical place.'"[95]

Although the Eleventh Circuit has expressly rejected the "nexus" standard, in *Gil v. Winn-Dixie Stores, Inc.* it has held that a website, while not itself a public accommodation, still may fall under the protection of the ADA if it acts as an "intangible barrier" to a disabled individual's ability to access the goods and services of the website's "operative place of public accommodation."[96] In *Gil* the court distinguished the case from its prior ruling in *Rendon v. Valleycrest Productions* which held that the game show's telephone selection system violated the ADA because it operated as an "intangible barrier" to the hearing-impaired contestants' ability to access the game show.[97] Unlike the telephone system in *Rendon,* the website in *Gil* was not the sole point of entry for individuals looking to access the services of its physical stores, nor did it prevent the plaintiff from shopping at the physical stores.[98] Thus, the plaintiff's inability to access the website did not constitute an intangible barrier in violation of the ADA.[99]

B. The "Websites as Places of Public Accommodations Approach"

Courts within the First, Second and Seventh Circuit Courts of Appeals take a broader approach to interpreting "places of public accommodation."[100] These courts have concluded that "places of public accommodation" are not limited

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[93] *Id.* at 953, 954–55.

[94] Young v. Facebook, Inc., 790 F. Supp. 2d 1110, 1115 (N.D. Cal. 2011).

[95] Earll v. eBay, Inc., 599 Fed. App'x 695, 696 (9th Cir. 2015) (alteration omitted).

[96] Gil v. Winn-Dixie Stores, Inc., 17-13467, 2021 U.S. App. LEXIS 10024, at *19, 23–24, 26 (11th Cir. Apr. 7, 2021).

[97] *Id.* at *20–23.

[98] *Id.* at *22–23.

[99] *Id.* at *23–24.

[100] Andrews v. Blick Art Materials, LLC, 268 F. Supp. 3d 381, 390–93 (E.D.N.Y. 2017) (describing the approach taken by the First, Second, and Seventh Circuits).

to physical places by looking to the language of the statute as well as Congress's purpose in enacting the ADA.[101] The language of Title III is construed broadly by these courts "to effectuate its purpose of providing a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[102]

For example, in *Carparts Distribution Center v. Automotive Wholesaler's Association*, the First Circuit looked to the statutory term "travel service."[103] The court reasoned that because "travel service," a business that often did not have a physical location, is included among the list of examples of "public accommodations" in the statute, Congress clearly contemplated including services that did not "require a person to physically enter an actual physical structure."[104] Furthermore, these courts reason that the plain language of the statute "covers the services 'of' a public accommodation, [rather than] services 'at' or 'in' a public accommodation[,]" therefore, clearly indicating public accommodations are not limited to physical structures.[105] These courts have also concluded that the broader interpretation is consistent with the "core meaning" of the text, which is that an owner of a business "that is open to the public [must]not exclude disabled persons" and that "Congress intended that people with disabilities have equal access to the array of goods and services offered by private establishments and made available to those who do not have disabilities."[106] Under this approach, courts in these circuits have concluded that all websites, even those that are solely web-based and lack any connection to a physical structure, are covered by Title III.[107]

C. Netflix Case Study Reveals the Need for Clearer Standards

The divergent approaches taken by different jurisdictions in applying the ADA to websites has led to conflicting results in

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[101] *See e.g.*, Carparts Distrib. Ctr., Inc. v. Auto Wholesaler's Ass'n of New Eng., 37 F.3d 12, 19 (1st Cir. 1994); Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28, 32 (2d Cir. 1999); Nat'l Ass'n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 200 (D. Mass. 2012); Andrews, 268 F. Supp. 3d at 390, 393; Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999).

[102] Nat'l Fed'n of the Blind v. Scribd, Inc., 97 F. Supp. 3d 565, 573 (D. Vt. 2015).

[103] *Carparts*, 37 F.3d at 19.

[104] *Id.*

[105] *Nat'l Ass'n of the Deaf*, 869 F. Supp. 2d at 201.

[106] Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999); *Carparts*, 37 F.3d at 19.

[107] *See, e.g.*, *Nat'l Ass'n of the Deaf*, 869 F. Supp. 2d at 201–02.

litigation.[108] This dichotomy has ultimately left businesses uncertain as to what their obligations are under Title III of the ADA.[109] The extent to which Title III applies to a website depends largely upon the jurisdiction in which the claim is brought.[110] These inconsistencies are best illustrated by two lawsuits involving Netflix, where the plaintiffs alleged that they were denied equal access to the online streaming service due to their disability.[111]

In *Cullen v. Netflix*, the U.S. District Court for the Northern District of California applied the Ninth Circuit's "nexus" approach.[112] The court held that because Netflix "is not 'an actual physical place'" and has no nexus to one because it is available only on the internet, it is not a place of public accommodation.[113] In contrast, applying the broader precedent of the First Circuit, the U.S. District Court of Massachusetts held that Netflix's website is a place of public accommodation.[114] Thus, the different approaches taken by the different circuit courts has led to the same website being considered a place of public accommodation in one jurisdiction, but not in the other.

With circuits split on this issue, the time is ripe for the Supreme Court to issue a ruling that clarifies whether all websites are places of public accommodation. Although businesses have been hoping for some insight and clarity from the Supreme Court, it does not seem like it will be coming anytime soon since the Court recently denied certiorari for a case dealing with the exact issue.[115] In 2016, a blind individual brought a lawsuit against Domino's Pizza, alleging he was not able to browse the company's website with a screen reader in violation of the ADA.[116] After applying the nexus theory, the Court of Appeals for the Ninth Circuit ruled that the ADA applies to Dominos' website and app, which connected customers to the physical restaurants, and permitted the lawsuit to proceed.[117] But on October 7, 2019, in a much "anticipated decision," the Supreme Court denied Domino's Pizza's petition asking it to resolve

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[108] *Compare Nat'l Ass'n of the Deaf*, 869 F. Supp. 2d at 201–02 (holding Netflix's website is a place of public accommodation because "[t]he ADA covers services 'of' a public accommodation"), *with* Cullen v. Netflix, 880 F. Supp. 2d 1017, 1024 (N.D. Cal. 2012) (holding Netflix's website is not a place of public accommodation because Netflix "is not 'an actual physical place'" and has no nexus to one because it is available only on the internet).

[109] *See* Robert, *supra* note 26.

[110] *See* Briggs & Sass, *supra* note 51.

[111] *See Nat'l Ass'n of the Deaf*, 869 F. Supp. 2d at 202*; Cullen*, 880 F. Supp. 2d at 1024.

[112] *Cullen*, 880 F. Supp. 2d at 1023–24.

[113] *Id.* at 1024.

[114] *Nat'l Ass'n of the Deaf*, 869 F. Supp. 2d at 202.

[115] *See generally* Robles v. Domino's Pizza, LLC, 913 F.3d 898 (9th Cir. 2019) (holding the ADA applies to Dominos' website and app based on the nexus theory), cert. denied, 140 S. Ct. 122 (2019); *see also* Andrews, *supra* note 68.

[116] *Robles*, 913 F.3d at 902.

[117] *Id.* at 905.

the split.[118] Thus, the Supreme Court struck down any hope within the business community that it would bring some clarity "or at least minimize [] the tsunami of website accessibility lawsuits that have hit public accommodations nationwide."[119]

III. WEBSITE ACCESSIBILITY STANDARDS

Websites with a nexus to a physical location, such as the websites of Domino's and Target, must comply with Title III in either of the circuit analyses. However, websites existing solely on the internet, such as Facebook and eBay, need only comply with Title III in the circuits that follow the broader approach and do not require there to be a nexus. Along with the circuit split over whether all websites are a "public accommodation" for purposes of the ADA, businesses are also left in the dark about what qualifies as an accessible website due to the DOJ's failure to provide guidance by promulgating formal regulations.[120]

If a business's website is covered by Title III, then what standards apply? For a blind or visually impaired individual to use a website they will need to use assistive technology such as screen readers, braille displays, and speech recognition software.[121] Issues such as the inability to access a website through the keyboard, pop-up dialogs, cluttered pages containing moving text, and failure to use alternative text all make a website inaccessible to a blind or visually impaired person.[122]

Without guidance, a business does not know to what extent it must ensure its website does not present any of these obstacles to accessibility. Despite attempts to provide website accessibility guidance throughout the years,[123] the DOJ, which is the agency responsible for implementing ADA regulations, has consistently failed to promulgate uniform standards for

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[118] Minh N. Vu & Seyfarth Shaw LLP, *Supreme Court Declines to Review Ninth Circuit Decision in Robles v. Domino's, Exposing Businesses to More Website Accessibility Lawsuits*, SEYFARTH ADA TITLE III NEWS & INSIGHTS (Oct. 7, 2019), https://www.adatitleiii.com/2019/10/supreme-court-declines-to-review-ninth-circuit-decision-in-robles-v-dominos-exposing-businesses-to-more-website-accessibility-lawsuits/ [https://perma.cc/KB3K-A42T].

[119] *Id.*

[120] *See* Pulliam, *supra* note 7; Brown & Quackenboss, *supra* note 15.

[121] "A screen reader is a program that analyzes the layout and content of a website and provides a text to speech translation." E Foley, *Understanding Assistive Technology: How Does a Blind Person use the Internet?*, LEVEL ACCESS BLOG, https://www.levelaccess.com/understanding-assistive-technology-how-does-a-blind-person-use-the-internet/ [https://perma.cc/3LND-5C7T]. A braille display "translates text into braille and enables a . . . [person] to read text using their fingers." *Id.* Speech recognition software enables a person to use their voice to "navigate, type, and interact with websites." *Id.*

[122] *Id.*

[123] *See* Krause Berg, *supra* note 26.

businesses to follow.[124] The numerous existing techniques available to make a website more accessible,[125] coupled with the technical challenges and high costs that may accompany achieving web accessibility,[126] has led to great uncertainty within the business community on what steps they should take to avoid having to defend a lawsuit.[127] Fortunately, the DOJ does not need to look very far in order to find a workable template from which to derive its future regulations.

A. The WCAG Guidelines

The World Wide Web Consortium (W3C), founded in 1994, is an international organization with the goal of making the internet accessible to all by developing a "single shared standard for web content accessibility."[128] To further this goal, W3C published the Web Content Accessibility Guidelines (WCAG), which provides guidance on "mak[ing] web[sites] more accessible to [individuals] with disabilities."[129] WCAG 2.0 was first published on December 11, 2008, and was later updated on June 5, 2018 with WCAG 2.1 to add success criteria.[130] If a website conforms to WCAG 2.1 standards, it also conforms to WCAG 2.0 standards.[131] Generally, the disabled community has

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[124] 42 U.S.C. § 12186(b); *see* Miron, *supra* note 11.

[125] *How to Ensure Website Compliance with Accessibility Standards*, ESSENTIAL ACCESSIBILITY (June 7, 2019), https://www.essentialaccessibility.com/blog/how-to-ensure-website-compliance-accessibility-standards/ [https://perma.cc/76BU-YYXZ] ("[W]eb accessibility takes into account all the alternative methods of using technology [such as] keyboard input and screen readers . . . other specialized software, different web browsers, and specialty hardware like switches."); *Make Your Websites More Accessible*, NAT'L DISABILITY AUTHORITY, http://nda.ie/resources/accessibility-toolkit/make-your-websites-more-accessible/ [https://perma.cc/EG59-N6ST].

[126] Mike Cristancho, *How To Make Your Site ADA Compliant*, SHERO COMM. (Aug. 18, 2017), https://gauge.agency/articles/how-to-make-your-site-ada-compliant/ [https://perma.cc/W76L-EJUX] ("The average cost to make a small or medium-sized eCommerce store ADA accessible ranges between $27,000 and $50,000, depending on the size of the website.").

[127] *See* Levy & Krezalek, *supra* note 58.

[128] *Web Content Accessibility Guidelines (WCAG) Overview*, W3C WEB ACCESSIBILITY INITIATIVE (WAI), http://www.w3.org/WAI/standards-guidelines/wcag/ [https://perma.cc/6NWD-D7R7] [hereinafter *WCAG Overview*]; *W3C Mission*, W3C, https://www.w3.org/Consortium/mission [https://perma.cc/XJG7-VVSD].

[129] *See WCAG Overview*, *supra* note 128.

[130] *Id.* Some examples of the additional criteria include changes to the orientation, requiring that the orientation be interchangeable between landscape and portrait, and changes to the reflow, requiring a site to reorganize to maintain readability when zoomed in. Sam Stemler, *What's the Difference Between WCAG 2.0 and WCAG 2.1*, ACCESSIBLE METRICS (Sept. 25, 2018), https://www.accessiblemetrics.com/blog/whats-the-difference-between-wcag-2-0-and-wcag-2-1/ [https://perma.cc/X8TS-8BVZ].

[131] "WCAG 2.0 and WCAG 2.1 are both existing standards[,] [thus] WCAG 2.1 does not . . . supersede WCAG 2.0[,]" but the W3C suggests following the latest version. *See WCAG Overview*, *supra* note 128. The WCAG 2.0 A and AA guidelines are a requirement for all federal agency websites under Section 508 of the Rehabilitation Act. Minh N. Vu, *WCAG 2.0 AA is the New Accessibility Standard for Federal Agency Websites*, SEYFARTH ADA TITLE III

agreed that websites in compliance with the latest WCAG standards are considered fully accessible.[132]

The WCAG includes accessibility recommendations for a "wide range of disabilities, [such as] visual, auditory, physical, speech, cognitive, language, learning, and neurological disabilities."[133] To make websites more accessible to people with disabilities, WCAG 2.1 provides layers of guidance which includes: principles, guidelines, success criteria and sufficient and advisory techniques.[134] The principles state that a website must be perceivable, operable, understandable, and robust in order for an individual with a disability to use the website.[135] With each principle a list of guidelines is set out to instruct website owners how to make the site's content available and accessible for as many people as possible, while also ensuring the content can adapt to different individuals' sensory, physical and cognitive abilities.[136] Finally, the success criteria specifically describes what a website must do to conform to this standard.[137]

The success criteria comprises different levels of conformance, Level A, AA, and AAA, with WCAG 2.1 A being the minimum level of conformance, and WCAG 2.1 AAA being the maximum level of conformance.[138] As the level increases, so does the complexity and the number of requirements with which to comply.[139] These guidelines have been very helpful in providing technical requirements that websites can follow to become more accessible to individuals with disabilities.[140] The WCAG 2.0 Level AA guidelines are considered the "generally-accepted" set

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NEWS & INSIGHTS (Jan. 10, 2017), https://www.adatitleiii.com/2017/01/wcag-2-0-aa-is-the-new-accessibility-standard-for-federal-agency-websites/ [https://perma.cc/5GME-FKBL].

[132] *See* Miron, *supra* note 11.

[133] *Web Content Accessibility Guidelines (WCAG) 2.1, Introduction*, W3C RECOMMENDATION (June 5, 2018), https://www.w3.org/TR/WCAG21/#intro [https://perma.cc/HE9T-G87K] [hereinafter *WCAG 2.1 Introduction*].

[134] *Id.*

[135] Perceivable means the "[i]nformation and user interface components must be presentable to users in ways they can perceive." *Id.* Operable means the "[u]ser interface components and navigation must be operable." *Id.* Understandable means "[i]nformation and the operation of user interface must be understandable." *Id.* Lastly, robust means "[c]ontent must be robust enough that it can be interpreted by [] a wide variety of user agents, including assistive technologies." *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.* A website cannot partially meet a WCAG level, it must meet *every* guideline. *WCAG Levels: What's the Difference?*, MY ACCESSIBLE WEBSITE, https://myaccessible.website/blog/wcaglevels/wcag-levels-a-aa-aaa-difference [https://perma.cc/H9L2-2KJC].

[139] *Id.*

[140] Dennis Kirwan, *WCAG Compliance: What to Know, and How to Get Started on Making Your Website Accessible to All*, FORBES (Aug. 7, 2019, 7:00 AM), https://www.forbes.com/sites/forbesagencycouncil/2019/08/07/wcag-compliance-what-to-know-and-how-to-get-started-on-making-your-website-accessible-to-all/#13cf78885c69 [https://perma.cc/3HE3-5FH5].

of requirements for website accessibility.[141] This general acceptance is evidenced by the numerous countries, state and local governments, companies, and educational institutions that have adopted the WCAG 2.0 standards.[142]

Aside from the requirement that federal agency websites conform to WCAG 2.0 A and AA guidelines,[143] the standards have also been influential in the judicial system.[144] Some courts have ordered injunctive relief that requires defendants to bring their websites into conformity with the WCAG 2.0 standards, often favoring the WCAG 2.0 Level AA standards.[145] In *Andrews v. Blick Art Materials, LLC,* the court referred to the Level AA standards as "'a stable, referenceable technical standard' that . . . applies broadly to different web technologies now existing . . . and can also be implemented with future technologies."[146] Although these guidelines are influential, there still is no legal requirement that a website must comply with them, apart from individually applicable court injunctions.[147]

B. The DOJ's Changing Position on Website Accessibility Standards

With the internet just emerging at the time the ADA was enacted, the DOJ did not expressly set guidelines for websites;[148] yet, "it has consistently stated that websites must be accessible to disabled persons."[149] The DOJ first took the position that websites of entities subject to the ADA must be accessible to disabled individuals in 1996 with a letter written by the

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[141] *See* Launey & Vu, *supra* note 28; *see also Make Your Websites More Accessible*, *supra* note 125.

[142] The WCAG 2.0 guidelines have been adopted by countries, state and local governments, such as New York City, and Washington, companies, and educational institutions. Andrews v. Blick Art Materials, LLC, 286 F. Supp. 3d 365, 381 (E.D.N.Y. 2017). Thirteen countries have adopted WCAG 2.0 guidelines, and numerous other countries have adopted derivatives of it. *Id.*

[143] *See* Vu, *supra* note 131.

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

[145] *See id.* ("[Plaintiff] does not seek to impose liability based on Domino's failure to comply with WCAG 2.0. Rather, Robles merely argues—and we agree—that the district court can order compliance with WCAG 2.0 as an equitable remedy."). *See e.g.*, *Andrews*, 286 F. Supp. 3d at 385–86 (approving a settlement between the parties requiring the defendant to make its website comply with the WCAG 2.0 Level AA standards and stating, "the guidelines that the parties have chosen to adopt, the WCAG 2.0 Level AA, appear to be universally accepted").

[146] *See id.* at 381–82.

[147] *See id.* at 385–86 (accepting the parties' settlement for the defendant to comply with WCAG 2.0 Level AA standards because as the court stated "as of now [there are] no competing standards from the Federal Government"); *see also* Levy & Krezalek, *supra* note 58.

[148] *See* Grisham, *supra* note 18, at 67.

[149] *See* Brown & Quackenboss, *supra* note 15.

Assistant Attorney General.[150] The letter does not, however, address whether a business that operates exclusively on the internet is covered by the ADA.[151] Since then, the DOJ has maintained its position that websites must be accessible to disabled persons by issuing consent decrees, filing amicus briefs, and statements of interest, but the DOJ still never formally articulated any binding regulations.[152]

It seemed as though some guidance would be provided on July 26, 2010, when the DOJ published an advance notice of proposed rulemaking (ANPRM) with the intent of establishing requirements for website accessibility under Title III of the ADA.[153] The DOJ noted the need for regulations regarding website accessibility[154] based on findings that voluntary standards such as WCAG have proved inadequate, businesses and individuals have repeatedly called upon the DOJ to take action, and courts have reached inconsistent decisions.[155] The ANPRM sought comment on the adoption of the web accessibility guidelines set forth in WCAG 2.0 for website compliance under Title III.[156]

After soliciting the public's comments and leaving businesses hopefully waiting for seven years, the DOJ abandoned the ANPRM.[157] On July 21, 2017, the Trump administration placed

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[150] *See* Letter from Deval L. Patrick, Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice to Sen. Tom Harkin, U.S. Senate (Sept. 9, 1996) [hereinafter Sept. 1996 Letter], https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/tal712.txt [https://perma.cc/8YEX-4Z5D]; Grisham, *supra* note 18, at 67; *see also* 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, 1136 (2018).

[151] *See* Sept. 1996 Letter, *supra* note 150.

[152] *See* Grisham, *supra* note 18, at 67; *see, e.g.*, Brief for the U.S. as Amicus Curiae in Support of Appellant, at 4–5, Rendon v. Valleycrest Prods., Ltd., 294 F.3d 1279 (11th Cir. 2002) (No. 01-11197), 2001 WL 34094038; Statement of Interest of the United States of America in Opposition to Defendant's Motion for Judgment on the Pleadings, at 4, Nat'l Ass'n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196 (D. Mass. 2012) (No. 3:11-cv-30168), 2012 WL 1834803.

[153] Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460, 43460 (proposed July 26, 2010) (to be codified at 28 C.F.R. pts. 35, 36); *see also* Grisham, *supra* note 18, at 67.

[154] "For years, businesses and individuals with disabilities alike have urged the Department to provide guidance on the accessibility of Web sites of entities covered by the ADA. . . . [A] clear requirement that provides the disability community consistent access to Web sites and covered entities clear guidance on what is required under the ADA does not exist." Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460, 43464.

[155] *Id.* at 43463–64.

[156] *Id.* at 43464–65.

[157] Minh N. Vu, *DOJ Places Website Rulemaking on the "Inactive" List*, SEYFARTH ADA TITLE III NEWS & INSIGHTS (July 21, 2017), https://www.adatitleiii.com/2017/07/doj-places-website-rulemaking-on-the-inactive-list/ [https://perma.cc/LG8F-STNL].

the DOJ's ADA Title III rulemaking for websites on the "inactive" list,[158] and a few months later the ANPRM was withdrawn.[159] The notice of withdrawal stated "[t]he Department is evaluating whether promulgating regulations about the accessibility of Web information and services is necessary and appropriate."[160] Although the DOJ stated it would continue to assess whether developing specific standards is necessary,[161] there was no movement under the Trump Administration.[162] President Biden, however, has vowed to enforce the ADA aggressively, leading the industry to speculate that the DOJ will renew its engagement in Title III ADA enforcement.[163]

Although no regulations have been promulgated and the ANPRM has been withdrawn with little explanation, the DOJ has frequently endorsed WCAG guidelines and relied upon them as an appropriate measure for website accessibility.[164] The DOJ's endorsement is exemplified in its consent decree in *National Federation of the Blind v. HRB Digital LLC*, where the defendants were ordered to bring their website into compliance with WCAG 2.0 AA standards.[165] However, in the absence of a clear technical standard in the ADA, a website is not in violation of the ADA if it does not follow a specific standard such as the WCAG. This was made clear in a letter written by Assistant Attorney General Stephen E. Boyd, in which he recognized that, absent formal regulations, "public accommodations have flexibility" in complying

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158 *Id*.

159 Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions, 82 Fed. Reg. 60932, 60932 (Dec. 26, 2017), https://www.govinfo.gov/content/pkg/FR-2017-12-26/pdf/2017-27510.pdf [https://perma.cc/3L4Y-RFAG].

160 *Id*.

161 *Id*.

162 "Under the Donald Trump administration, the DOJ not only didn't open any website or mobile accessibility investigations, investigations that were pending from the Obama administration were shelved." Kris Rivenburgh, *The Biden Effect: Expect DOJ Action in Digital Accessibility*, ESSENTIAL ACCESSIBILITY (Jan. 16, 2021), https://www.essentialaccessibility.com/blog/biden-effect-doj-digital-accessibility [https://perma.cc/Z6LG-976Y]. *See* Robert, *supra* note 26.

163 *The Biden Plan for Full Participation and Equality for People with Disabilities*, https://joebiden.com/disabilities/ [https://perma.cc/2F57-VBC2]; *see* Minh N. Vu, & Kristina M. Launey, *How Will DOJ Enforce Title III of the ADA in a Biden Administration?*, SEYFARTH ADA TITLE III NEWS & INSIGHTS (Nov. 17, 2020), https://www.adatitleiii.com/2020/11/how-will-doj-enforce-title-iii-of-the-ada-in-a-biden-administration/ [https://perma.cc/GM7Z-QBYZ]; Lisa A. Zaccardelli et al., *Website Accessibility: Is your Business's Online Presence Exposing You to Litigation Risk?*, HINCKLEY ALLEN (Feb. 23, 2021), https://www.hinckleyallen.com/publications/website-accessibility-is-your-businesss-online-presence-exposing-you-to-litigation-risk/ [https://perma.cc/2LHM-97NX].

164 *See, e.g.*, HRB Consent Decree, *supra* note 28, at 5 (ordering H & R Block to conform its website and mobile applications to WCAG 2.0 AA standards); Settlement Agreement Between the U.S. & Ahold U.S.A., Inc. & Peapod, LLC, at 5, DJ No. 202-63-169, https://www.justice.gov/file/163956/download https://www.ada.gov/peapod_sa.htm [https://perma.cc/HGG8-5HBG] (ordering Peapod to ensure its website conforms to WCAG 2.0 AA standards).

165 *See* HRB Consent Decree, *supra* note 28, at 5.

with the ADA and they are not required to comply with any specific voluntary technical standards.[166] This position was also validated by the Ninth Circuit in *Robles v. Domino's Pizza*, where the court stated that Domino's was not liable because it failed to comply with the WCAG 2.0, but if the defendant had followed WCAG 2.0 they could have prevented the suit, and the guidelines could be used as an equitable remedy.[167]

This idea of "flexibility" in website compliance is not wholly new, as it was implicitly included in the APRNM when the DOJ stated that entities covered by the ADA can offer a compliant alternative, such as a "staffed telephone line."[168] The fact that the DOJ acknowledges that website compliance is flexible signals that the issue is not whether a website has complied with any specific set of standards, such as a requirement to comply with WCAG guidelines, but whether a disabled individual can access the "goods, services, and benefits" of a public accommodation through its website.[169] Thus, although the DOJ has affirmed time and again that public accommodations must make their websites accessible, without the agency promulgating specific standards it remains unknown as to how to make websites accessible.[170]

C. Where Businesses Stand on ADA Lawsuits

Without guidelines to assess their website accessibility compliance under the ADA, businesses are an easy target, or as some may describe themselves, "sitting ducks," for lawsuits under Title III.[171] Many business owners want to make their websites compliant with the ADA, yet without guidance, they are unaware how to do so. An owner of one of the art galleries that was sued for not have an accessible website, Mr. Borghi, described that he would be "happy to make his gallery's website accessible," but he was unsure what technical requirements would make his website considered fully compliant.[172]

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166 *See* Sept. 2018 Letter, *supra* note 27.

167 *See* Robles v. Domino's Pizza, LLC, 913 F.3d 898, 907–08 (9th Cir. 2019).

168 Minh N. Vu, *DOJ Says Failure to Comply With Web Accessibility Guidelines is Not Necessarily a Violation of the ADA*, SEYFARTH ADA TITLE III NEWS & INSIGHTS (Oct. 2, 2018), https://www.adatitleiii.com/2018/10/doj-says-failure-to-comply-with-web-accessibility-guidelines-is-not-necessarily-a-violation-of-the-ada/ [https://perma.cc/WV6U-4AG5].

169 *Id.*

170 *Id.*

171 Kim Krause Berg, *How Your Company Can Prevent ADA Website Accessibility Lawsuits*, SEARCH ENGINE J. (May 17, 2019), https://www.searchenginejournal.com/prevent-accessibility-website-lawsuit/306055/#close [https://perma.cc/8JKW-5HAC].

172 *See* Harris, *supra* note 1.

Compounding this lack of knowledge, the costs associated with adjusting a website to comply with nonexistent standards can be expensive, especially for small to midsized businesses.[173] For example, "[m]erely reviewing a website's coding and metadata to determine its compatibility with a blind user's screen-reading software can cost $50,000."[174] This easily may be out of the budget for many small businesses.[175] The cost can and does vary greatly, however, due to the custom nature of websites, and some websites may be able to comply for a much lower price.[176] With the complex technology involved in website accessibility,[177] most business owners and their employees do not understand how to make their website comply with the ADA, thus requiring them to hire outside aid.[178] One source warns that due to the high demand for easy and inexpensive compliance solutions, there are many "short-cut solution providers" trying to take advantage of that demand, which often fail to truly provide website accessibility for disabled individuals.[179]

The cost is not strictly limited to the initial work that is required to make a website compliant, as businesses are also advised to participate in ongoing auditing and maintenance for a monthly fee.[180] Each time something new is added to the website, such as a new photo or link, it too must be accessible, thus triggering extra costs with each addition.[181] Further, the WCAG guidelines—which are extremely complex and specific—

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[173] *See* Randazzo, *supra* note 5 ("Overhauling a website to make it work seamlessly with screen readers can cost from several thousand to several hundred thousand dollars, depending on the complexity."); *see also* Kris Rivenburgh, *Cost of Making Your Website Accessible, ADA Compliant is Workable*, MEDIUM (Nov. 22, 2018), https://medium.com/@krisrivenburgh/cost-of-making-your-website-accessible-ada-compliant-is-workable-fe108b8d4151 [https://perma.cc/3M6N-ZSVY] (describing the different aspects that a remediation company will look at in determining the cost for remediation of an inaccessible website).

[174] *See* Pulliam, *supra* note 7.

[175] *Id.*

[176] *See* Rivenburgh, *supra* note 173. The price range to make a website accessible can be from "a few thousand dollars to upwards of a million dollars." Marc Avila, *The Cost of Making Your Website* Accessible 3 MEDIA WEB (Jan. 30, 2020), https://www.3mediaweb.com/blog/the-cost-of-making-your-website-accessible/ [https://perma.cc/ANK6-SA62].

[177] *Introduction to Web Accessibility*, W3C WEB ACCESSIBILITY INITIATIVE (WAI), https://www.w3.org/WAI/fundamentals/accessibility-intro/ [https://perma.cc/QP8A-QQNJ].

[178] *See* Ricardo Alvarado, Comment, *Online Businesses Beware: ADA Lawsuits Demand Website Accessibility for Blind Plaintiffs*, 21 SMU SCI. & TECH. L. REV. 259, 283–84 (2018).

[179] *How Much Does ADA Website Compliance Cost?*, ACCESSIBILITY WORKS (Nov. 7, 2019), https://www.accessibility.works/blog/how-much-does-ada-website-compliance-cost/ [https://perma.cc/RB6H-FYAG].

[180] Kristen Bachmeier, *How Much Does ADA Website Compliance Cost*, ATILUS BLOG (May 1, 2019), https://www.atilus.com/ada-website-compliance-cost/ [https://perma.cc/C82S-235S].

[181] *See* Levy & Krezalek, *supra* note 58.

are easily implemented by a Fortune 500 company, but may not be appropriate for a small or midsized company.[182]

Aside from the costs described above, businesses acquire another large, unquantifiable cost due to the lack of clear standards: customer value.[183] With nearly one in every five people diagnosed with a disability, people with disabilities comprise a decent portion of a business's potential customer base.[184] A business's reputation within the disabled community can be greatly harmed by a lawsuit for discrimination.[185] Additionally, nine out of ten people will walk away without complaining about a website's inaccessibility, leaving businesses unaware of potential customers being driven to its competitors.[186] Seventy-one percent of disabled individuals will simply leave a website if it is too difficult to use, again causing them to turn to a company's competitors and hurting the company's bottom line.[187] One study found that difficulties in using websites resulted in a loss of approximately $14.4 billion per year in the United Kingdom.[188]

Ultimately, the leading issue here is that even if small and midsized businesses make the investment in website accessibility, which could be thousands of dollars as described above, there still is no guarantee that the website will be ADA compliant because there are no formal standards for businesses to follow.

IV. HOW TO END PREDATORY LITIGATION UNDER THE ADA

Since a business cannot simply check off boxes to ensure its website complies with the ADA, a business that is sued will end up settling in the vast majority of cases.[189] Although a settlement may result in an award of attorneys' fees and an injunction requiring the defendant to make its website compliant, that is not always the case.[190] Either way, this is not the most efficient method to accomplish overall website accessibility, and disabled individuals

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[182] *See* Pulliam, *supra* note 7.

[183] *See* Byrne-Haber, *supra* note 61.

[184] Ryan Robinson, *How Website Accessibility Affects Online Businesses in 2019 and How To Respond*, FORBES (Sept. 25, 2019, 11:49 AM), https://www.forbes.com/sites/ryanrobinson/2019/09/25/website-accessibility-online-business/#45aa64929c19 [https://perma.cc/K66S-FXTP].

[185] *See* Byrne-Haber, *supra* note 61.

[186] *See* Robinson, *supra* note 184.

[187] *Id.*

[188] *Id.*

[189] Casey L. Raymond, Note, *A Growing Threat to the ADA: An Empirical Study of Mass Filings, Popular Backlash, and Potential Solutions Under Titles II and III*, 18 TEX. J. ON CIV. LIBERTIES & CIV. RTS. 235, 253 (2013).

[190] *See id.* ("[A]t least two members of Congress have argued that private litigants settle cases with terms that do not require the defendants to be compliant with the ADA").

should not have to rely on their ability to bring a lawsuit to have equal access to businesses' websites.

The previous sections have identified two issues that conjoin to foster predatory litigation. The first is a circuit split on the proper interpretation of "place of public accommodation"—specifically, whether a website may be considered a public accommodation regardless of any connection to a physical space. The second is the lack of federal standards for website accessibility. Accordingly, the DOJ must not only promulgate these standards, but Congress also must amend the ADA to more specifically define its scope with respect to websites. This two-step solution is the most effective remedy because it has the ability to provide clearer guidelines while also filling the gaps in the law that cause both the confusion among businesses and the circuit split among courts.

A. Amending the ADA

After concluding that the meaning of "disability" had been defined too narrowly by the courts, Congress enacted the ADA Amendments Act of 2008.[191] These amendments, however, failed to address the issue of website accessibility. In order to bring clarity to all parties involved, Congress should amend the ADA again so as to be consistent with the approach of the courts in the First, Second, and Seventh Circuit Courts of Appeals.[192] More specifically, the amendments should explicitly expand the scope of the ADA to include websites as a public accommodation, regardless of whether they have any nexus to a physical location. Congress must provide clarity to judicial interpretations of the ADA, which, as a remedial statute, must be interpreted broadly in order to achieve its purpose of providing "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[193] As the e-commerce market is rapidly growing in the United States,[194] and

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[191] *Questions and Answers About the Department of Justice's Final Rule Implementing the ADA Amendments Act of 2008*, ADA.GOV, https://www.ada.gov/regs2016/adaaa_qa.html [https://perma.cc/89MW-JYYH].

[192] *See supra* Section II.B.

[193] 42 U.S.C. § 12101(b)(1); *see* Andrews v. Blick Art Materials, LLC, 268 F. Supp. 3d 381, 395 (E.D.N.Y. 2017).

[194] With COVID-19 altering the way many people shop, the growth of e-commerce has "massively accelerated." John Koetsier, *COVID-19 Accelerated E-Commerce Growth '4 to 6 Years'*, FORBES (June 12, 2020, 10:43 AM), https://www.forbes.com/sites/johnkoetsier/2020/06/12/covid-19-accelerated-e-commerce-growth-4-to-6-years/?sh=67736bed600f [https://perma.cc/7UMS-9XYM]. According to a report released in June 2020, total online spending in May 2020 hit $82.5 billion, which is a seventy-seven percent increase from the previous year. *Id.* COVID-19 also led online spending on Cyber Monday to hit a new record of

with numerous large retailers such as Etsy and Amazon existing solely in the digital world, it would be inconsistent with the purposes of the ADA to exclude web-only businesses from the definition of public accommodation.[195]

Exempting websites that participate in commerce but do not have a nexus to a physical place would exclude individuals with disabilities from a huge aspect of "mainstream American life based on the Internet."[196] Hence, rather than furthering the purpose of eliminating discrimination, requiring a nexus to a physical place would "severely frustrate Congress's intent" in enacting the ADA.[197] Since these businesses are only accessible via the internet, if the website is not accessible to the disabled, then individuals with disabilities would clearly be denied from the "full and equal enjoyment of the goods, services, [] [and] privileges" afforded by that business.[198] For all these same reasons, free social media sites, such as Facebook and Twitter, should also be required to comply with the ADA, even though they may not offer goods and services.[199]

Aside from aligning with the purposes behind the enactment of the ADA, the application of the ADA to all websites is consistent with the statute's text and structure.[200] Proponents of the nexus theory argue that because the statutory examples of public accommodations are all physical places, then discrimination as defined by the ADA can only exist if there is a nexus to a physical place.[201] This argument is unfounded in light of the legislative history, because it is clear that Congress intended for the ADA to "adapt [with] changes in technology" over time and it did not intend that the list of examples be

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$10.8 billion, "the largest U.S. online shopping day ever." Saheli Roy Choudhury, *More People are Doing Their Holiday Shopping Online and this Trend is Here to Stay*, CNBC (Dec. 14, 2020, 10:31 PM), https://www.cnbc.com/2020/12/15/coronavirus-pandemic-has-pushed-shoppers-to-e-commerce-sites.html [https://perma.cc/NV7Z-ZP4H].

195 *See* 42 U.S.C. § 12101(b); *Andrews*, 268 F. Supp. 3d at 395–96.

196 *Andrews*, 268 F. Supp. 3d at 395.

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

198 42 U.S.C. § 12182(a).

199 Although social media sites are free, they generate an enormous amount of revenue. "In 2019, social network advertising revenue in the United States amounted to 36.14 billion U.S. dollars" and the amount is expected to rise to 50.89 billion dollars in 2021. A Guttmann, *Social Network Advertising Revenues in the United States from 2017 to 2021*, STATISTA (Nov. 23, 2020), https://www.statista.com/statistics/271259/advertising-revenue-of-social-networks-in-the-us/ [https://perma.cc/727L-RQQE]. Specifically, Facebook ads in 2019 generated about $1,393.50 to $2,787 from the average North American monthly active user. Kevin Rooke, *The Cost of Social Media*, KEVIN ROOKE (Apr. 25, 2020), https://www.kevinrooke.com/post/the-cost-of-social-media [https://perma.cc/6YG3-6GJH].

200 *See supra* Section II.B.

201 *See supra* Section II.A.

exhaustive.[202] For example, in discussing the list of categories, the Senate stated that "within each of these categories, the legislation only lists a few examples and then, in most cases, adds the phrase 'other similar' entities. The committee intend[ed] that the 'other similar' terminology should be construed [] consistent with the intent of the legislation . . . ."[203]

In contrast to the argument by supporters of the nexus theory, the statute's text actually supports including all websites regardless of whether they have a nexus to a physical location. As explained earlier, the ADA states that it covers services "of" a public accommodation, and the use of the word "of" is crucial.[204] By using "of" rather than "at" or "in," it indicates that the public accommodation need not be a physical place.[205] Title III is entitled "Public Accommodations and Services Operated by Private Entities," and the section that prohibits discrimination is titled "Prohibition of Discrimination by Public Accommodations."[206] Neither of these titles include the word "place" before "public accommodation."[207] Thus, as one court articulated, the word "place" was never meant to limit the reach of the statute; it was likely used just "because there was no other less cumbersome way to describe businesses that offer those particular goods or services to the public."[208]

It is therefore clear that businesses that exist solely on the internet must be required to comply with the ADA and be accessible to all individuals, regardless of their disabilities. But, without this being clearly stated in the ADA, interpreting its scope has been tasked to judges that take different viewpoints in their interpretations, ultimately leading to the circuit split.[209] A fresh amendment of the ADA that defines all websites as public accommodations is necessary to fully resolve the uncertainty created by the circuit split.

B. The DOJ Must Promulgate Web Accessibility Standards

An amendment of the ADA alone, without more, will not solve the problem of predatory litigation. Under either of the

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202 Nat'l Ass'n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 200–01 (D. Mass. 2012).

203 *Id.* at 201 (quoting S. Rep. No. 116, at 59 (1990)).

204 *See supra* Section II.B.

205 *Nat'l Ass'n of the Deaf*, 869 F. Supp. 2d 196, 201 (D. Mass. 2012).

206 Andrews v. Blick Art Materials, LLC, 268 F. Supp. 3d 381, 393 (E.D.N.Y. 2017).

207 *Id.*

208 Nat'l Fed'n of the Blind v. Scribd Inc., 97 F. Supp. 3d 565, 572 (D. VT. 2015).

209 Amanda Robert, *Judges Handling ADA Lawsuits over Websites Not Waiting on DOJ Regulations*, FORBES (Mar. 29, 2016, 9:11 AM), https://www.forbes.com/sites/legalnewsline/2016/03/29/judges-handling-ada-lawsuits-over-websites-not-waiting-on-doj-regulations/#6d33f0775e0f [https://perma.cc/KA54-CDF5].

circuit courts' analyses of "place of public accommodation," many websites will need to comply with Title III of the ADA.[210] Although the DOJ has consistently held that the ADA applies to websites of public accommodations, the DOJ has never formally stated what a website must do to comply with the ADA.[211] Clearer standards are in the best interest of businesses that fear being sued, as well as disabled individuals who wish to have equal access to all websites. Additionally, if businesses have formal standards that they can follow, more disabled individuals will be able to access their websites, increasing the website's exposure and, in the case of e-commerce, a business's sales.

Since website compliance can range in both complexity and cost,[212] the standards should not be one size fits all. Rather than requiring every business to follow standards of the same rigor, the standards should differ based on the type of website or what is provided on it. Because many reputable countries and academic institutions have already adopted the WCAG, it logically follows that the standards should be based on the widely recognized and "generally-accepted," WCAG 2.0 guidelines.[213] The proposed standards should require that all websites covered by the ADA must, at a minimum, comply with the WCAG 2.0 Level A standards. Meeting these standards should not be overly burdensome for businesses since level A is the lowest level and therefore will require less complexity, directly correlating to lower costs.[214] Websites required to comply with this standard would be those that facilitate commerce, such as by providing information pertaining to the business, but do not actively participate in e-commerce. Allowing for the lower standards is justified for these websites because there are no goods or services available for purchase from the website.

There should be an exception in which businesses achieving a specific minimum amount of revenue must comply with the higher, level AA standards. For example, large social media sites such as Facebook and Twitter do not participate in e-commerce, yet are widely used and have a large annual revenue,[215] which would

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[210] *See e.g.*, Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 954–55 (N.D. Cal. 2006); *Nat'l Ass'n of the Deaf*, 869 F. Supp. 2d at 200.

[211] *See* Pulliam, *supra* note 7.

[212] *See* Randazzo, *supra* note 5; *Introduction to Web Accessibility*, *supra* note 177.

[213] *See* Launey & Vu, *supra* note 28.

[214] *See* Rivenburgh, *supra* note 173.

[215] Facebook's revenue in 2020 was $85.965 billion. H. Tankovska, *Facebook: Annual Revenue 2009-2020*, STATISTA (Feb. 5, 2021), https://www.statista.com/statistics/268604/annual-revenue-of-facebook/ [https://perma.cc/6687-EE2Q]. Twitter's annual revenues reached nearly $3.46 billion in 2019. H. Tankovska, *Global Twitter Revenue 2010-2019*, STATISTA (Jan. 27, 2021), https://www.statista.com/statistics/204211/worldwide-twitter-revenue/ [https://perma.cc/6AFW-WPWQ].

require them to comply with Level AA standards rather than just level A. Therefore, a disabled individual would not be excluded from the "full and equal enjoyment" of the goods, services, and privileges afforded by those businesses.[216]

If the website participates in e-commerce and offers goods and services directly from the website, it should be required to comply with the WCAG 2.0 Level AA standards. If an individual who is not disabled has the ability to purchase clothes, shoes, or any other good or service on a business' website, then the same opportunity must be afforded to a disabled individual in order for the purpose of the ADA to be accomplished.[217] Additionally, if Congress amends the ADA as recommended, then *every* website that directly transacts with customers, regardless of whether it has a connection to a physical location, must comply with the level AA standards.[218]

The W3C has also issued Level AAA standards, which are considered to be the most accessible standards.[219] That being said, these standards are highly complex and may not be feasible for many websites, even those of large businesses.[220] Note 2 of the WCAG 2.0 even provides "[i]t is not recommended that Level AAA conformance be required as a general policy for entire sites because it is not possible to satisfy all Level AAA Success criteria for some content."[221] Thus, Level AAA standards should not be required by any businesses under the ADA. But, since these standards help to make websites more accessible and further the purpose of the ADA, there should be incentives provided for businesses that strive to make their websites comply with Level AAA guidelines.

The best way to provide these incentives is in the form of additional tax credits. Currently, all businesses that comply with the ADA may receive a tax deduction under Section 190 of the IRS Code, and small businesses also may receive a tax credit under Section 44 of the IRS code.[222] Both the tax credit and tax deduction allow eligible

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[216] 42 U.S.C. § 12182(a).

[217] *See, e.g.*, Lisa M. Schaffer, *Playboy Sued by Blind Man Wanting to Read the Articles*, FINDLAW (Nov. 30, 2018, 3:20 PM), https://blogs.findlaw.com/legally_weird/2018/11/playboy-sued-by-blind-man-wanting-to-read-the-articles-1.html [https://perma.cc/SAM9-ACAV] ("Donald Nixon, who is legally blind, filed a lawsuit against Playboy. . . .claim[ing]. . . . he can't purchase online Playboy branded 'hoodies (and) jogger pants.'").

[218] *See supra* Section IV.A.

[219] *See WCAG 2.1 Introduction*, *supra* note 133.

[220] *Web Content Accessibility Guidelines (WCAG) 2.0, Conformance Requirements*, W3C RECOMMENDATION (Dec. 11, 2008), https://www.w3.org/TR/WCAG20/#conformance-reqs [https://perma.cc/3WUA-FPCE].

[221] *Id*.

[222] *ADA IRS Tax Credits and Deductions*, ADA.GOV, https://www.ada.gov/taxcred.htm [https://perma.cc/NWC9-ZNRV].

businesses to claim expenses related to accessibility.[223] In addition to the already standing tax credits and deductions, if a business brings its website to compliance with WCAG 2.0 AAA standards, it should be allowed an additional tax credit that covers the expenditures incurred by the business in reaching those website accessibility standards. With such an incentive in place, websites will be more inclined to attempt greater website compliance beyond the already required Level AA standards.

CONCLUSION

Although the number of website accessibility lawsuits alleging violations under Title III of the ADA is drastically increasing, these suits do little to serve the purposes of the ADA.[224] The ADA aims to ensure that disabled individuals have the same opportunities, rights, and access as every other individual in the United States.[225] But, in the absence of formal regulations for website compliance, the ADA is inefficient and creates an unfair burden on businesses that do not have guidelines to follow to make their websites comply.[226] The DOJ's failure to promulgate standards has left courts to interpret the ADA themselves, resulting in the uncertain circuit split.[227] This great uncertainty, alongside businesses' fear of the high costs of litigation means that most lawsuits end in settlements and do little to improve website accessibility.[228] Therefore, the ADA has been inadequate in serving the people it was intended to protect, as well as the people it is enforced against.

The proposed amendment to the ADA would more clearly define the ADA's scope and applicability to websites. It would not only bring clarity to a greatly muddled issue, but also better serve the purposes behind the enactment of the statute: equality for the disabled.[229] Furthermore, the DOJ's promulgation of clear

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[223] The tax credit can cover up to $10,250 of eligible expenditures in a year, and applies to businesses with either 30 or fewer employees, or revenues in the prior tax year of $1,000,000 or less. *Id.* The tax deduction applies to all businesses and can be claimed for expenses caused by alterations or barrier removals for a "maximum deduction of $15,000 per year." *Id.*

[224] Minh N. Vu & Samuel Sverdlov, *Members of Congress Urge DOJ to Declare that Private Website Accessibility Lawsuits Violate Due Process*, SEYFARTH ADA TITLE III NEWS & INSIGHTS (June 21, 2018), https://www.adatitleiii.com/2018/06/member-of-congress-urge-doj-to-declare-that-private-website-accessibility-lawsuits-violate-due-process/ [https://perma.cc/MW9E-P9XS].

[225] *See* 42 U.S.C. § 12101(b).

[226] *See* Krause Berg, *supra* note 171.

[227] *See* Robert, *supra* note 209.

[228] *See* Letter from Members of Cong. to Jeff Sessions, Att'y Gen., U.S. Dep't of Justice (June 20, 2018), https://www.adatitleiii.com/wp-content/uploads/sites/121/2018/06/ADA-Final-003.pdf [https://perma.cc/79UA-PGUU].

[229] *See* 42 U.S.C. § 12101(b).

and effective standards for website compliance would afford businesses the opportunity to understand the steps they must take to comply with the ADA. DOJ standards would also allow for a large segment of the population, the disabled, to access the goods, services, and opportunities businesses' websites provide.

With this solution, the disabled will no longer face discrimination when attempting to access websites, and businesses will be able to bring their websites into compliance with set standards. Businesses will no longer fear lawsuits because they will have a clear understanding of what they must do to comply with the ADA. Lastly, courts will make uniform decisions when provided with clarity and much-needed guidance on how to evaluate whether a website is covered by and complies with the ADA. Accessibility is equality, and as the internet has become embedded in every aspect of our lives, Congress and the DOJ must take action to both afford disabled individuals equal access to websites and to protect businesses—like the New York art galleries—from paying for their inability to comply with nonexistent standards.

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