
How the COVID-19 Pandemic Made the Nexus Requirement Obsolete: The Inter-Circuit Conflict of Website Accessibility Under ADA Title III

Anna Schaldenbrand

Follow this and additional works at: <https://via.library.depaul.edu/law-review>



Part of the [Law Commons](#)

Recommended Citation

Anna Schaldenbrand, *How the COVID-19 Pandemic Made the Nexus Requirement Obsolete: The Inter-Circuit Conflict of Website Accessibility Under ADA Title III*, 73 DePaul L. Rev. 155 (2023)

Available at: <https://via.library.depaul.edu/law-review/vol73/iss1/7>

This Notes & Comments is brought to you for free and open access by the College of Law at Digital Commons@DePaul. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Digital Commons@DePaul. For more information, please contact digitalservices@depaul.edu.

HOW THE COVID-19 PANDEMIC MADE THE NEXUS REQUIREMENT OBSOLETE: THE INTER-CIRCUIT CONFLICT OF WEBSITE ACCESSIBILITY UNDER ADA TITLE III

I. INTRODUCTION

You want to buy your weekly groceries from Target. Now close your eyes. You use a screen reader to open Target.com, but once you are on the website, you are lost. The search bar is not tagged as a search bar, so the screen reader makes a generic announcement, like “text input.”¹ The menus are not tagged with attributes that equate to “menu” or “navigation,” so the screen reader does not find this navigation landmark.² Even if you managed to get to the “Grocery” section of the website, the pictures of the different grocery categories like “Meat & Seafood” and “Dinner in Minutes” do not have alternative text options that would allow the screen reader to read the descriptions of the pictures to you.³ You are left with two options: either call Target to place your order over the phone or go to a different company’s website and hope that it has accessibility features.⁴

This is a reality faced every day by as many as 4.9% of American adults who have some sort of vision impairment.⁵ This number does not account for the experiences that individuals who are deaf or have mobility limitations face as they attempt to use websites. When the Americans with Disabilities Act (ADA) was signed in 1990, the internet

1. *Compliance Audit*, ACCESSIBLE (Feb. 14, 2023), https://acsbase.com/reports/63ec195c04e93f000fc990ff?whitelabel=false&utm_medium=email&_hsmi=90649158&_hsenc=p2ANqtz-_0Q_t7uO-vc-EdQ-vZ7yeMLTLVwjSpxp6u03tOYt5e770IpvwmJRExIuW97_DTq5viyn9LiDu6hAw4ZsWq5dJTk0avBQ&utm_source=hs_email [https://perma.cc/T3XH-FRUQ].

2. *Id.*

3. *Id.*

4. Notably, Target has already been at the center of a website accessibility lawsuit in *Nat’l Fed’n of the Blind v. Target Corp.*, in which the plaintiffs alleged that Target.com impeded full and equal access to the brick-and-mortar Target stores. *Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 956 (N.D. Cal. 2006). Target settled the case in 2008 and agreed to modify Target.com. Michele Astor-Pratt, “Let’s Get ‘Phygital’”: *How the Collision of Physical and Digital Commerce Compels the End of the Nexus Standard in ADA Adjudication*, 63 B.C. L. REV. 2227, 2243 n.83 (2022). The accessibility issues found on Target.com in 2023 highlight the related issues of enforcement of and compliance with accessibility standards.

5. Geoff Cudd, *57 Web Accessibility Statistics*, DON’T DO IT YOURSELF, <https://ddi.co/web-accessibility-statistics/> [https://perma.cc/8GZ2-HSHM] (last visited July 22, 2023).

was a novel concept that was just beginning to take shape.⁶ Yet, from 2000 to 2023, internet usage increased by 1,355%.⁷ During this time, businesses began to provide goods and services through their websites, presenting questions about whether ADA Title III, which covers the physical stores, would also cover the businesses' websites.⁸ This Note examines the different holdings reached by the circuit courts in answering this question.

Part II of this Note provides an overview of the ADA's history, statutory language, and the congressional intent behind the statute. It provides a survey of the circuit split on whether Title III covers non-physical spaces. Part III of this Note argues that to create a uniform standard and to comply with the purpose of the ADA, Title III coverage should be read to include the websites of all businesses. It examines how changes in business operations resulting from the COVID-19 pandemic affected, and will continue to affect, people with disabilities' access to goods and services online and how this change has made the nexus requirement obsolete. The result is that website accessibility for customers with disabilities has become a more prominent and pervasive issue. Lastly, Part IV assesses the impact of requiring all private entities' websites to comply with Title III would have on customers with disabilities, businesses, and the courts.

II. BACKGROUND

Congress enacted the ADA to broaden the scope of protections for people with disabilities in many aspects of life.⁹ As a result, public accommodations are bound by regulations outlined in the ADA.¹⁰ While the internet has become an integral part of daily life, neither the Department of Justice (DOJ) nor the Supreme Court have issued a binding rule that would apply Title III of the ADA to businesses' websites.¹¹ Because of this, there is a divide among the circuit courts over whether it should apply, with some courts holding that Title III always applies, some courts holding that it never applies, and some

6. Jonathan Lazar & David Ferleger, *A Reconceptualization of Website Accessibility Under the ADA: Resolving the Inter-Circuit Conflict Post-Pandemic*, 39 SANTA CLARA HIGH TECH. L.J. 63, 65 (2022).

7. Cudd, *supra* note 5.

8. *See infra* Part III.B.

9. *Laws, Regulations & Standards*, ADA.gov, <https://www.ada.gov/law-and-regs/> [<https://perma.cc/27PJ-PVBV>] (last visited July 22, 2023).

10. *Id.*

11. *See infra* Part II.B; Ella G. Clifford, *Remaining Barriers to Accessibility: Americans with Disabilities Act and Websites*, B.C. INTELL. PROP. & TECH. F. 1, 7 (2022).

courts holding that it applies only if the nexus requirement has been satisfied.¹²

A. Overview of the ADA and its Purpose

Congress enacted the ADA on July 26, 1990, in light of findings that people with disabilities continually encounter a broad range of discrimination.¹³ The United States' goals for individuals with disabilities are to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals."¹⁴ Title III applies to public accommodations, which includes twelve categories of private entities, such as restaurants, grocery stores or other sales establishments, museums, and golf courses.¹⁵ Under Title III, public accommodations cannot discriminate against an individual "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations"¹⁶ Discrimination also includes:

[A] failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.¹⁷

B. Application of Title III to Websites and the Uncertain Technical Standards

While it is well established that Title III applies to the physical locations of private entities, its application to these businesses' websites is unsettled.¹⁸ Website accessibility is not mentioned in either the ADA or its regulations. In 1996, the DOJ indicated that Title III should apply to websites, but this pronouncement was only in the form of guidance.¹⁹ In its 2014 Statement of Interest in *New v. Lucky Brand Dungarees Store*,

12. See *infra* Part II.C.

13. Brief for the United States as Amicus Curiae in Support of Appellant at 5, *Rendon v. Valleycrest Prod., Ltd.*, 294 F.3d 1279 (11th Cir. 2002) (No. 01-11197 HH) [hereinafter Brief for the United States]. The ADA is divided into five titles that apply to different aspects of life: employment; public services; public accommodations; telecommunications; and a miscellaneous section. 42 U.S.C. § 12101.

14. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(a)(7).

15. *Id.* § 12181(7).

16. *Id.* § 12182(a).

17. *Id.* § 12182(b)(2)(A)(iii).

18. See *infra* Part II.C.

19. Lazar & Ferleger, *supra* note 6, at 74.

Inc., the DOJ restated this position by noting that, even if accessibility standards had not been defined for specific technology, Title III would still apply because it would be impossible for the ADA's drafters to predict technologies that would be used by public accommodations.²⁰ In 2010, the DOJ began to draft rulemaking that would apply Title III accessibility standards to private entities' websites, but this process was stalled and formally withdrawn in 2017.²¹ The DOJ published additional guidance in 2022, indicating that it continues to push more businesses to increase website accessibility through statements of interest, enforcement matters, and settlements with private entities.²² For example, the DOJ reached a settlement with Rite Aid Corporation to ensure that the company's website was accessible for those scheduling vaccine appointments.²³ The DOJ emphasized that "[i]naccessible web content means that people with disabilities are denied equal access to information. An inaccessible website can exclude people just as much as steps to an entrance to a physical location."²⁴

There are numerous ways a website can be inaccessible. Those who have limited vision or are color-blind may not be able to read the text if there is inadequate color contrast between the text and the background.²⁵ Screen readers cannot announce the color displayed on the screen unless there is a text label, so if information is conveyed through color cues, like using red text to indicate required fields, a blind user will not know what information that color is meant to convey.²⁶ Alternative text, or "alt text," is used to describe the purpose or content of a picture, illustration, or chart.²⁷ If it is not provided, then a blind user will not understand the content and purpose of the image.²⁸ The lack of captions on videos prevents users who are deaf or hard of hearing from understanding information communicated in the video, and mouse-only

20. *Id.*

21. See *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations*, 75 Fed. Reg. 43460, 43465 (proposed July 26, 2010) (to be codified at 28 C.F.R. pts. 35, 36);

Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions, 82 Fed. Reg. 60932 (Dec. 26, 2017) (to be codified at 28 C.F.R. pts. 35, 36).

22. *Justice Department Issues Web Accessibility Guidance Under the Americans with Disabilities Act*, U.S. DEP'T OF JUSTICE (June 23, 2022), <https://www.justice.gov/opa/pr/justice-department-issues-web-accessibility-guidance-under-americans-disabilities-act> [<https://perma.cc/N4F8-N6J4>].

23. *Id.*

24. *Guidance on Web Accessibility and the ADA*, ADA.GOV (Mar. 18, 2022), <https://www.ada.gov/resources/web-guidance/> [<https://perma.cc/AY6S-TYR6>].

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

navigation or lack of keyboard navigation prevents users who cannot grasp a mouse or trackpad from accessing online content.²⁹

The DOJ has consistently taken the position that Title III applies to websites of public accommodations.³⁰ Despite this position, the DOJ has not provided a formal rule or guidance on the technical standards required for private entities' websites.³¹ As part of the proposed rule-making in 2010, the DOJ suggested either the international guidelines Web Content Accessibility Guidelines (WCAG) 2.0, which are recognized international guidelines, or the 508 Standards, which provide accessibility guidelines for federal agencies.³² As a result, private entities are left without sufficient guidance on technical standards for accessibility.³³ Moreover, it has been left to the courts to decide whether Title III applies to non-physical spaces, such as websites.³⁴

C. Diverging Views of the Circuit Courts

Under current federal law, circuit courts disagree on whether Title III of the ADA is limited to physical spaces. The early cases that established the circuit split were not centered on website accessibility, but they demonstrate how the circuit courts interpreted the term “places of public accommodation” through different statutory interpretations.³⁵ The minority view of the First and Seventh Circuits holds that Title III accessibility requirements always apply to goods and services regardless of whether they are connected to a physical location.³⁶ The Third, Sixth, Ninth, and Eleventh Circuits represent the majority view, which requires a nexus, or connection, between the goods or services complained of and a physical place for Title III to apply.³⁷ Finally,

29. *Id.*

30. ADA.gov, *supra* note 24.

31. Youlan Xiu, *What Does Web Accessibility Look Like Under the ADA?: The Need for Regulatory Guidance in an E-Commerce World*, 89 GEO. WASH. L. REV. 400, 404 (2021).

32. 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, 43465 (proposed July 26, 2010) (to be codified at 28 C.F.R. pts. 35, 36).

33. Xiu, *supra* note 31, at 413.

34. *See infra* Part II.C.

35. *Compare* *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114–15 (9th Cir. 2000) (using the plain language of Title III and the doctrine of *noscitur a sociis*), *with* *Magee v. Coca-Cola Refreshments USA, Inc.*, 833 F.3d 530, 533–36 (5th Cir. 2016) (using the plain and common meanings of the term “establishment,” the doctrines of *noscitur a sociis* and *eiusdem generis*, and other sources), *with* *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994) (going beyond the plain meaning of the word by considering agency regulations and public policy concerns).

36. Xiu, *supra* note 31, at 416.

37. *Id.* at 415.

the Fifth Circuit holds that Title III is limited to actual, physical locations only.³⁸ Subsections C.1–3 will analyze the minority view, the majority view, and the third view, respectively.

1. The Minority View: First and Seventh Circuits

Under the minority view, Title III accessibility requirements always apply to goods and services regardless of whether they are associated with a physical store or location.³⁹

In *Carparts Distribution Center, Inc. v. Auto Wholesaler's Association, Inc.*, the First Circuit held that the term “public accommodations” under Title III was not limited to physical structures.⁴⁰ The court began with an analysis of the plain language used for the listed private entities.⁴¹ While the plain meaning for some of the enumerated entities did require a physical structure for people to enter, there was no explicit requirement described in Title III that required physical structures with physical boundaries.⁴² To illustrate this finding, the court analyzed the inclusion of “travel service” as an entity in the listed public accommodations.⁴³ The First Circuit reasoned that many travel services do not require customers to enter their stores, and they conduct the majority of their business by telephone or mail.⁴⁴ The court extended this illustration to reason that it was plausible that other service establishments also do not require customers to enter their facilities, but rather conduct business by mail or phone.⁴⁵

Since the terms “place” and “establishment” could refer to physical and non-physical locations, the First Circuit held that “public accommodations” was ambiguous.⁴⁶ Next, under its ambiguity analysis, the court considered agency regulations and public policy concerns, which led the court to confirm that the term was not limited to physical structures.⁴⁷ The First Circuit reasoned that it would be “irrational” for the ADA to protect people who purchase goods and services in a physical office, but not protect those who purchase the same goods

38. *Magee*, 833 F.3d at 533–36.

39. Xiu, *supra* note 31, at 416–17.

40. *Carparts Distrib. Ctr., Inc.*, 37 F.3d at 19.

41. *Id.*

42. *Id.* at 20.

43. *Id.* at 19.

44. *Id.*

45. *Id.*

46. *Carparts Distrib. Ctr., Inc.*, 37 F.3d at 19.

47. *Id.*

and services by phone or mail.⁴⁸ “Congress could not have intended such an absurd result.”⁴⁹

The First Circuit expounded on congressional intent with the legislative history of the ADA.⁵⁰ The purpose of the ADA was to eliminate the day-to-day discrimination against individuals with disabilities.⁵¹ Congress intended to provide equal access to goods and services from private entities to those with disabilities.⁵² A narrow interpretation of Title III to only cover physical entities, while excluding protection for the sale of goods and services over the phone or by mail, would run afoul of the purposes of the ADA and would frustrate Congress’s intent to extend the protection of people with disabilities’ enjoyment of goods and services.⁵³ Accordingly, the First Circuit held that Title III was not limited to physical structures.⁵⁴

Likewise, the Seventh Circuit has also held that Title III does not require physical spaces for accommodation protections. In *Doe v. Mutual of Omaha Insurance Company*, the court held that the plain, core meaning of Title III was that owners or operators of public facilities, including websites, cannot exclude people with disabilities from entering.⁵⁵ In a subsequent case, the Seventh Circuit re-affirmed its finding from *Doe* that the term “public accommodation” in Title III does not denote a physical space: “[t]he site of the sale is irrelevant to Congress’s goal of granting the disabled equal access to sellers of goods and services.”⁵⁶

In *Pallozzi v. Allstate Life Insurance Company*, the Second Circuit reasoned that Title III was meant to guarantee more than physical access to particular types of businesses.⁵⁷ In this case, the plaintiffs alleged that an insurance company discriminated against them by refusing to issue a joint life insurance policy.⁵⁸ The court held that Title III covered entities were obliged to provide persons with disabilities physical access, and could not refuse to sell them goods by reason of discrimination against their disability.⁵⁹ The scope of this holding was more limited than the referenced *Parker* and *Ford* cases because, in *Pallozzi*, the nexus

48. *Id.*

49. *Id.*

50. *Id.*

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

52. *Carparts Distrib. Ctr., Inc.*, 37 F.3d at 19 (quoting S. REP. NO. 116, at 58 (1989)).

53. *Id.* at 20.

54. *Id.* at 19.

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

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

57. *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 32–33 (2d Cir. 1999).

58. *Id.* at 29.

59. *Id.* at 32–33.

to a physical space was “obvious,” so the court ended its analysis there.⁶⁰ While the Second Circuit has not yet considered a case where Title III would apply to non-physical spaces only, some district courts have argued that *Pallozzi* could be extended to a company imposing barriers to access its online merchandise.⁶¹

For example, in *National Federation of the Blind v. Scribd*, the district court considered whether Scribd, a digital reading subscription service, was a place of public accommodation.⁶² Scribd argued that it did not operate any physical locations that were open to the public, and, as such, the ADA did not apply to its website and mobile apps.⁶³ The district court emphasized the ADA’s legislative history and noted that the internet now plays a critical role in the personal and professional lives of Americans.⁶⁴ Using a liberal construction of the listed categories, the court held that Scribd was a place of public accommodation.⁶⁵

Similarly, in *National Association of the Deaf v. Netflix, Inc.*, the district court held that “places of public accommodation” should be construed liberally to effectuate congressional intent, and the fact that “web-based services” was not included as a specific example of a public accommodation was irrelevant because those services did not exist at the time the ADA was passed in 1990.⁶⁶ Further, the court reasoned that “excluding businesses that sell services through the Internet from the ADA would run afoul of the purposes of the ADA.”⁶⁷ Based on the *Carparts* decision, the district court held that Netflix’s website was a place of public accommodation.⁶⁸

2. *The Majority View: Third, Sixth, Ninth, and Eleventh Circuits*

For Title III to apply to a non-physical space, the majority view requires a physical nexus, or connection, between the goods and services complained of and a brick-and-mortar store.⁶⁹ For example, there is a nexus if a first-aid kit is sold online and in-store, but if it is only sold online, then there is no nexus. These circuits have all rejected, either

60. Nat’l Fed’n of the Blind v. Scribd Inc., 97 F. Supp. 3d 565, 570–71 (D. Vt. 2015) (citing *Pallozzi*, 198 F.3d at 32).

61. *Id.* at 571.

62. *Id.* at 567.

63. *Id.*

64. *Id.* at 573–75.

65. *Id.* at 576.

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

67. *Id.* at 200 (internal quotations omitted) (quoting *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n, Inc.*, 37 F.3d 12, 20 (1st Cir. 1994)).

68. *Id.* at 202.

69. Xiu, *supra* note 31, at 415.

explicitly or by implication, the holding in *Carparts*.⁷⁰ Early decisions on the application of Title III to nonphysical or intangible goods and services were based on a series of employer-provided insurance cases that helped refine the nexus theory.⁷¹

In *Ford v. Schering-Plough Corporation*, the Third Circuit considered whether a former employee's claim that her insurance policy was in violation of the ADA had merit under Title III.⁷² The court first reasoned that the plain meaning of Title III was that a public accommodation was a place, which was consistent with the finding that the listed examples of public accommodations were all places.⁷³ The Third Circuit next reasoned that restricting "public accommodations" to physical spaces was consistent with the jurisprudence of Title II of the Civil Rights Act of 1964, which proscribes racial and religious discrimination in public accommodations.⁷⁴ Further, this narrow reading was consistent with the DOJ's regulations, which state that the purpose of the ADA's public accommodation requirements is to ensure access to the goods offered by the public accommodation rather than to change the goods or services being offered.⁷⁵ Since the Third Circuit found the plain meaning unambiguous, it did not analyze the ADA's legislative history.⁷⁶ The court also rejected the *Carparts* holding based on the doctrine of *noscitur a sociis*.⁷⁷ Under this doctrine, a term is interpreted based on the context of the accompanying words to avoid expanding the scope beyond what Congress had defined in the act.⁷⁸ When considered in the context of the listed examples, the Third Circuit reasoned that the term "public accommodation" did not refer to non-physical places.⁷⁹ Thus, the Third Circuit held that the disability benefits complained of were not physical places and did not qualify as a public accommodation.⁸⁰

In the similar case of *Parker v. Metro Life Insurance Company*, the Sixth Circuit considered whether a public accommodation must be a physical space in the context of a case concerning employer-based insurance.⁸¹ The Sixth Circuit stated that the clear connotation of the words in 42 U.S.C. § 12181(7) was that a public accommodation was

70. *Id.* at 414 n.95.

71. *Id.* at 415.

72. *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 603–04 (3rd Cir. 1998).

73. *Id.* at 612.

74. *Id.* at 613.

75. *Id.*

76. *Id.* at 613.

77. *Id.* at 613–14 (discussing *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1014 (6th Cir. 1997); *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n, Inc.*, 37 F.3d 12, 19–20 (1st Cir. 1994)).

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

79. *Id.*

80. *Id.* at 612–13.

81. *Parker*, 121 F.3d at 1010.

a physical space because each listed example was a physical place.⁸² The court disputed that the inclusion of the term “travel service” was not meant by Congress to include entities other than physical spaces because Congress likely had no better term to use than “service.”⁸³ The Sixth Circuit reasoned that interpreting the listed public accommodations to include non-physical places would be to ignore both the text of the statute and the canon of *noscitur a sociis*, and accordingly rejected the *Carparts* holding.⁸⁴ The court held that the plaintiff’s insurance policy was not covered by Title III because Title III covers physical places.⁸⁵

In *Weyer v. Twentieth Century Fox Film Corporation*, the Ninth Circuit joined the Third and Sixth Circuits in holding that an insurance company that issued an employer-provided disability plan was not a place of public accommodation.⁸⁶ The court considered the statute’s plain language and the canon of *noscitur a sociis*.⁸⁷ The Ninth Circuit reasoned that all of the listed public accommodations were actual, physical locations where the public can get goods and services.⁸⁸ Further, when considered in the context of the other enumerated accommodations, the Ninth Circuit concluded that some connection, or nexus, between the goods or services complained of and an actual physical place was required.⁸⁹

In *National Federation of the Blind v. Target Corp.*, the district court found a sufficient nexus when the plaintiffs alleged the inaccessibility of Target.com denied the full and equal enjoyment of the goods and services offered in Target stores.⁹⁰ However, the court limited the application of Title III to only the parts of Target.com that directly corresponded to a physical Target store.⁹¹ Any parts of the website that had information and services unrelated to Target stores did not need to comply with Title III.⁹²

Several district courts in the Ninth Circuit have held that Title III does not apply to internet-only retailers or service providers. Some district courts held that a website was not a place of public accommodation because it was not a physical place.⁹³ Other courts applied the nexus

82. *Id.* at 1014.

83. *Id.*

84. *Id.*

85. *Id.* at 1011 n.3.

86. *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1115 (9th Cir. 2000).

87. *Id.* at 1114–15.

88. *Id.* at 1114.

89. *Id.*

90. *Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 954–56 (N.D. Cal. 2006).

91. *Id.*

92. *Id.*

93. *See, e.g., Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017, 1023–24 (N.D. Cal. 2012); *Earll v. eBay, Inc.*, No. 5:11-cv-00262-JF (HRL), 2011 WL 3955485, at *2 (N.D. Cal. Sept. 7, 2011).

theory, holding a website was not a place of public accommodation because a website by itself was not a physical place and there was not a sufficient connection between it and a physical location.⁹⁴

The Eleventh Circuit found that such a connection existed in *Haynes v. Dunkin' Donuts LLC*.⁹⁵ The plaintiff alleged Dunkin' Donuts violated Title III because the company's website was not compatible with any screen reading software.⁹⁶ The plaintiff stated that Dunkin' Donuts's website provided access to and information about the goods and services offered in the physical stores, like store locations and gift cards.⁹⁷ The court found that the website was a service that facilitated the use of the stores.⁹⁸ The ADA provides that the goods and services offered by Dunkin' Donuts's stores, which are places of public accommodations, must be accessible, even if those goods and services were intangible.⁹⁹ The Eleventh Circuit reasoned that the failure to make those services accessible because of the absence of auxiliary aids and services, like screen readers, would deny, exclude, or otherwise treat blind people differently than other individuals.¹⁰⁰

3. *The Remaining View: Fifth Circuit*

Similar to the majority view, the Fifth Circuit also rejected the *Carparts* holding and requires a physical space for the application of Title III, but, unlike the majority view, the Fifth Circuit does not apply a nexus analysis.¹⁰¹ Rather, the Fifth Circuit provides the most restrictive interpretation of Title III by limiting its application to only physical spaces.¹⁰²

In *Magee v. Coca-Cola Refreshments*, the plaintiff brought a Title III claim against Coca-Cola alleging that the company's vending machines were inaccessible to him and other users who were blind due to the machines' entirely visual interface.¹⁰³ The court considered whether vending machines were places of public accommodation based on the plaintiff's contention that the vending machines were "sales

94. See, e.g., *Jancik v. Redbox Automated Retail, LLC*, No. SACV 13-1387-DOC (RNBx), 2014 WL 1920751, at *7 (C.D. Cal. May 14, 2014); *Ouellete v. Viacom*, No. CV 10-133-M-DWM-JCL, 2011 WL 1882780, at *4-5 (D. Mont. Mar. 31, 2011); *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1114-16 (N.D. Cal. 2011).

95. *Haynes v. Dunkin' Donuts LLC*, 741 F. App'x 752 (11th Cir. 2018).

96. *Id.* at 753.

97. *Id.* at 754.

98. *Id.*

99. *Id.*

100. *Id.* (quoting 42 U.S.C. § 12182(b)(2)(A)(iii)).

101. *Xiu, supra* note 31, at 414.

102. *Magee v. Coca-Cola Refreshments USA, Inc.*, 833 F.3d 530, 533-36 (5th Cir. 2016).

103. *Id.* at 530-31.

establishments.”¹⁰⁴ The Fifth Circuit used multiple doctrines of statutory interpretation including the plain and common meanings of the term “establishment,” the doctrines of *noscitur a sociis* and *ejusdem generis*, the statute’s legislative history, and DOJ guidance.¹⁰⁵ Under the doctrine of *ejusdem generis*, when a general word follows a list of specifics, the word will be interpreted to include only items of the same class as those listed.¹⁰⁶

The term “establishment” is used six times in 42 U.S.C. § 12181(7), and, each time it is used, it is provided in the context of other physical establishments.¹⁰⁷ Using the doctrines of statutory interpretation, the court restricted the meaning of “establishment” to be of the same type as the enumerated places in each sub-section.¹⁰⁸ For example, 42 U.S.C. § 12181(7)(E) lists “[a] bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental *establishment*[.]”¹⁰⁹ The plaintiff argued that “sales establishment” within this sub-section should apply to vending machines.¹¹⁰ The court disagreed because the term followed a list of retailers that occupy physical stores, whereas vending machines are found within physical stores along with the other goods and services the stores provide.¹¹¹

The court also relied on the fact that the Third, Sixth, and Ninth Circuits held that all terms provided in 42 U.S.C. § 12181(7) were actual, physical places.¹¹² Based on this and the common meaning of “establishment,” which defines an establishment as a business and the physical space it occupies, the court concluded that vending machines were not physical businesses.¹¹³ The Fifth Circuit further noted that its holding comported with the ADA’s legislative history and the DOJ’s guidance.¹¹⁴ The examples of the term “sales establishment” provided in the legislative history and the DOJ’s examples of additional facilities were all actual stores.¹¹⁵ Thus, the court concluded that vending machines were not places of public accommodation because Title III only includes physical spaces.¹¹⁶

104. *Id.* at 532.

105. *Id.* at 533–36.

106. *Id.* at 534.

107. *Id.*

108. *Magee*, 833 F.3d at 533–34.

109. *Id.* at 534 (quoting 42 U.S.C. § 12181(7)(E) (emphasis added)).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 534–35.

114. *Magee*, 833 F.3d at 535.

115. *Id.* at 536.

116. *Id.*

III. ANALYSIS

The First and Seventh Circuits' interpretations best align with the goals and purposes of the ADA.¹¹⁷ Additionally, the nexus requirement became obsolete due to the growing trend of online business, which substantially increased during the COVID-19 pandemic.¹¹⁸ To create a uniform application of Title III, either the Supreme Court should issue a binding decision, or the DOJ should promulgate regulatory guidance stating that Title III does apply to non-physical spaces and establishing the specific technical requirements for accessibility.

A. *Statutory Interpretation of Title III Supports the Minority Approach*

In cases where statutory construction is at issue, courts must first determine whether the language at issue has a plain and unambiguous meaning by examining the context of the statute as a whole.¹¹⁹ As evidenced by the circuit split, there is more than one reasonable interpretation of the language at issue here, and courts can go beyond the text and its context to understand the statute's meaning.¹²⁰

Further, the canons of construction do not resolve the ambiguity.¹²¹ The courts under the majority view and the Fifth Circuit used the doctrines of *noscitur a sociis* and *ejusdem generis* in their interpretations of Title III.¹²² The defendant in *National Federation of the Blind v. Scribd* also relied on these doctrines to argue that, because the specific examples in the statute are physical locations, the statute must be construed to only include physical spaces.¹²³ The court rejected the defendant's argument because it believed that Congress had no better or less cumbersome way to describe businesses than by using the word "place" in the listed examples.¹²⁴ Additionally, at the time the ADA was enacted in 1990, it was plausible that a travel service might operate exclusively over the phone or by mail, so the inclusion of "travel service," as the First Circuit in *Carparts* noted, arguably means that "place" or "establishment" could refer to services provided offsite, such as the internet.¹²⁵ Lastly, requiring a nexus to a physical location would lead to

117. See *infra* Part III.A.

118. See *infra* Part III.B.

119. Nat'l Fed'n of the Blind v. Scribd Inc., 97 F. Supp. 3d 565, 567–68 (D. Vt. 2015).

120. *Id.* at 571.

121. *Id.* at 571–72 (citing Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 368 (2d Cir. 2006)).

122. See *supra* Part II.C.2–3.

123. *Scribd Inc.*, 97 F. Supp. 3d at 572.

124. *Id.*

125. *Id.*

absurd results where customers who buy goods by phone, mail, or from someone going door to door would not be covered by Title III, but a customer buying those same goods from a store would be.¹²⁶

Since the canons of construction do not resolve the ambiguity, the courts can use legislative history or other extrinsic evidence of Congress's intent.¹²⁷ The Committee Reports from the House of Representatives state that the twelve categories of public accommodations should be "construed liberally, consistent with the intent of the legislation that people with disabilities should have equal access to an array of establishments."¹²⁸ Further, the Committee Reports state that it was "critical" to define public accommodation more broadly than it was defined in the Civil Rights Act of 1964 because discrimination against people with disabilities is not limited to specific categories of public accommodation.¹²⁹ Additionally, the Committee Reports provide that, even though the twelve categories are exhaustive, the listed examples within each category are only a representative sample.¹³⁰ Most categories include a catch-all phrase that must be construed liberally to effectuate congressional intent.¹³¹

Notably, the Committee Reports state that "the types of accommodations and services, under all of the titles of this bill, should keep pace with the rapidly changing technology of the times."¹³² The DOJ noted in a Statement of Interest that it would have been impossible for Congress to have anticipated the advances in technology that would be used by public accommodations at the time the ADA was drafted.¹³³ The fact that "web-based services" is not listed as a specific example of a place of public accommodation is irrelevant because these services did not exist in 1990.¹³⁴ Thus, courts should not construe the scope of Title III to be limited to the technology that was available at the time the ADA was passed in 1990.

126. *Id.* at 572–73; *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n, Inc.*, 37 F.3d 12, 20 (1st Cir. 1994).

127. *Scribd Inc.*, 97 F. Supp. 3d at 573. Textualism is a theory of statutory interpretation that focuses on the words of a statute, whereas intentionalism, or purposivism, use legislative history to interpret statutes to understand congressional intent. Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1125–26 (2010).

128. H.R. REP. NO. 101-485, pt. 2, at 100 (1990).

129. *Id.* at 35.

130. *Id.* at 100.

131. *Scribd Inc.*, 97 F. Supp. 3d at 571 (citing *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 201 (D. Mass. 2012)).

132. H.R. REP. NO. 101-485, at 108.

133. ADA.gov, *supra* note 24; Lazar & Ferleger, *supra* note 6, at 74.

134. *Netflix*, 869 F. Supp. 2d at 200–01.

The minority approach of the First and Seventh Circuits aligns with the purposes and goals of the ADA.¹³⁵ The First Circuit stated that a narrow interpretation of the bare language that limits Title III to physical spaces would frustrate Congress's intent that individuals with disabilities have equal access to and full enjoyment of the goods and services available indiscriminately to other members of the public.¹³⁶ This more expansive interpretation of the plain language better serves the purpose of the ADA because it would include the "other forms of exclusion" that Congress noted in its findings when drafting the ADA.¹³⁷

B. *The Nexus Requirement is Now Obsolete*

Furthermore, the nexus requirement is obsolete. From 2000 to 2023, internet usage increased by 1,355%.¹³⁸ During this time, both individuals and businesses increased their online presence, and many businesses began offering the sale of goods and services on websites. The *Parker, Ford*, and *Weyer* cases were respectively decided in 1997, 1998, and 2000, at a time when business was customarily conducted in-person.¹³⁹ Even if the business had options for online shopping or online ordering, many still had a brick-and-mortar store that was open to the public. In a survey conducted among small-businesses, researchers found that only 23.4% of businesses reported that they never conducted in-person interactions prior to the COVID-19 pandemic.¹⁴⁰ Thus, the nexus requirement was still relevant because it could be applied to the typical business operation. During the pandemic, business operations had to change drastically. While some remained open to the public, many others closed their doors and operated on an online-only platform or a limited in-person manner. In the survey, 59.2% of businesses shifted more of their business activities online, and overall, 61.7% of businesses increased their online presence during the pandemic.¹⁴¹

One issue with the nexus requirement is demonstrated by this shift in business operations. When business models were adjusted by closing

135. *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n, Inc.*, 37 F.3d 12, 20 (1st Cir. 1994); *Morgan v. Joint Admin. Bd.*, 268 F.3d 456, 459 (7th Cir. 2001).

136. *Carparts Distrib. Ctr. Inc.*, 37 F.3d at 19–20.

137. Brief for the United States, *supra* note 13, at 6.

138. Cudd, *supra* note 5.

139. *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1011 (6th Cir. 1997); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 614 (3rd Cir. 1998); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1104 (9th Cir. 2000).

140. Georgij Alekseev et al., *The Effects of COVID-19 on U.S. Small Businesses: Evidence from Owners, Managers, and Employees* 1, 6 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27833, 2020), https://www.nber.org/system/files/working_papers/w27833/w27833.pdf [https://perma.cc/WR5W-PFUB].

141. *Id.* at 2, 9.

physical locations and offering online-only services, the nexus requirement no longer applied to these private entities because the nexus between a physical location and the website was severed. Thus, only businesses in the First and Seventh Circuits were required to continue to provide accessible websites for those businesses. During the COVID-19 pandemic, consumers had to rely on websites for essential services like ordering their groceries, managing their medications at pharmacies, banking, and tele-health doctor's appointments. Restaurants with closed dining rooms would offer online ordering for delivery or curb-side pick-up. While quarantine restrictions have faded and businesses have been able to re-open their doors to in-person shopping, an increase in customer preference for online shopping and delivery has remained and is expected to last beyond the pandemic.¹⁴²

As a result of this growth of e-commerce, website accessibility for customers with disabilities has become a more prominent and prevalent issue. For example, Michael Taylor, a blind individual who uses a screen reader to navigate websites, described some of the significant barriers he encountered while online shopping for clothes.¹⁴³ He first noted that size charts rarely work correctly with screen readers.¹⁴⁴ If size charts were images or inaccessible PDFs, the screen reader could not detect or read the chart.¹⁴⁵ He also frequently encountered color-related accessibility issues.¹⁴⁶ For instance, the color selection circles used to display various color options were not compatible with screen readers because screen readers either cannot detect them or it simply announced "image" rather than "green."¹⁴⁷ To improve accessibility, Taylor recommended each color circle have corresponding text labels of the color.¹⁴⁸ Similarly, if a shirt has writing or a visual design on it, there should be a caption that provides the text or a description of the design and where it appears on the shirt.¹⁴⁹ Otherwise, the image of the clothing would be the only source of color and style information.¹⁵⁰

Similarly, many of these issues and more can be found on Target's website. An accessibility scan run by accessScan¹⁵¹ found that Target's

142. Lazar & Ferleger, *supra* note 6, at 85.

143. Michael Taylor, *3 common web accessibility errors on clothing sites*, USABLENET (Feb. 10, 2023, 10:05 AM), <https://blog.usablenet.com/3-common-web-accessibility-errors-on-clothing-sites-guest-post> [<https://perma.cc/F4QC-UVPR>].

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. Taylor, *supra* note 143.

150. *Id.*

151. accessScan is a feature of accessiBe, which is a company that is considered the market leader in website accessibility solutions and uses AI to simulate user-testing to produce a list of

website is non-compliant with the WCAG 2.1.¹⁵² The Compliance Audit tested forty-nine elements grouped into nine categories on the website and scored each element based on adherence to WCAG 2.1 level AA success criteria.¹⁵³ The categories that scored the lowest were graphics, forms, and readability.¹⁵⁴ Requirement 18 of the audit analyzed whether images had alternative text descriptions of the object and text embedded in the image.¹⁵⁵ Images of food or cosmetics that have text in the pictures, like ingredient lists or allergen warnings, need to provide that embedded text in the alternative text, otherwise a screen reader would not convey that information to the user.¹⁵⁶ Of the images selected for analysis, thirty-five failed the audit and only fifteen passed, which means thirty-five images did not have alternative text describing the good being sold.¹⁵⁷

Some forms (search fields) did not have submission buttons that were properly coded.¹⁵⁸ For example, if a button is an icon or a symbol, like a magnifying glass, people using screen readers may not understand the purpose or function of that button. Readability issues included font sizes that were too small and insufficient contrast between foreground and background colors.¹⁵⁹ Overall, there were many inaccessible features on Target.com that would prevent customers with disabilities from being able to fully enjoy and benefit from the goods offered by the company.¹⁶⁰

Another issue with the nexus requirement is that it may not apply to goods that are “online exclusive” and not sold in store.¹⁶¹ The nexus

accessibility issues and then offers suggestions to ensure a website is compliant with Title III, Section 508, WCAG 2.1, and other legislation. Danny Trichter, *accessiBe Review (2023): Leader in Web Accessibility*, ACCESSIBILITY CHECKER, (May 2023) <https://www.accessibilitychecker.org/guides/accessibe-review/> [<https://perma.cc/ZX3J-PQ3V>]. However, users with disabilities have criticized some of the solutions offered by accessiBe. *Overlay Fact Sheet*, <https://overlayfactsheet.com/> [<https://perma.cc/7W6L-JYDK>] (last visited July 24, 2023). Thus, this Note will use the accessibility issues raised by the accessScan but will not comment on or suggest the solutions offered by accessiBe.

152. ACCESSIBE, *supra* note 1, at 1. Currently, Target uses WCAG 2.0 Level AA as its accessibility standard. *Accessibility*, TARGET.COM, <https://www.target.com/c/accessibility-ways-to-shop/-/N-4ynq1> [<https://perma.cc/5VEV-5W9K>] (last visited July 28, 2023). Although Target.com is not required to adhere to WCAG 2.1, the Compliance Audit provides a useful analysis of the website based on current accessibility standards.

153. ACCESSIBE, *supra* note 1.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. ACCESSIBE, *supra* note 1. Of the elements analyzed, only 18 had sufficient contrast and 134 did not. *Id.*

160. *Id.*

161. Xiu, *supra* note 31, at 417; Astor-Pratt, *supra* note 4, at 2243 n.83.

approach used by the court in *Target* excluded goods that were sold online only because there was no connection between those goods and Target's stores.¹⁶² Additionally, it does not apply to online-only sales.¹⁶³ In *Haynes v. Dunkin' Donuts LLC*, the Eleventh Circuit noted that the goods and services offered by Dunkin' Donuts must be accessible, even if those goods and services are intangible.¹⁶⁴ In other words, if a good is on sale, then all customers should be able to benefit from that sale. But, if an online-only sale is offered on an inaccessible website, then it is not accessible to all customers and raises discrimination questions if customers with disabilities are forced to pay a higher price in person.¹⁶⁵ To align with the purposes and goals of the ADA, all websites should be accessible so that all customers, regardless of ability, can benefit from online-only sales and "online exclusives."

These are just a few examples to illustrate the difficulties people with disabilities have when shopping on inaccessible websites. The nexus approach does not adequately reflect the reality of current business operations and there are gaps in the coverage it provides when brick-and-mortar stores have online only sales. Thus, the nexus approach is now obsolete.

C. Proposed Amendment

The nexus requirement was already problematic before the COVID-19 pandemic. It has created a non-uniform application of the law across the United States that requires a private entity to analyze the differing legal frameworks to determine whether Title III applies to their website.¹⁶⁶ Additionally, companies that operate nationwide can be subject to different jurisdictional standards.¹⁶⁷ If it does apply, there are no official technical standards for the private entity to use.¹⁶⁸ Thus, a company could try to provide an accessible website, but may still be exposed to litigation because there are no clear standards or minimum requirements to follow.¹⁶⁹ Between 2017 and 2021, there

162. Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 954–56 (N.D. Cal. 2006).

163. Xiu, *supra* note 31, at 417.

164. Haynes v. Dunkin' Donuts LLC, 741 F. App'x 752, 754 (11th Cir. 2018).

165. *Id.*

166. See Lauren Stuy, *No Regulations and Inconsistent Standards: How Website Accessibility Lawsuits Under Title III Unduly Burden Private Businesses*, 69 CASE W. RES. L. REV. 1079, 1086–87, 1100 (2019).

167. *Compare* Cullen v. Netflix, 880 F. Supp. 2d 1017, 1024 (N.D. Cal. 2012) (holding that Netflix was not a place of public accommodation under Title III because it was an online only service), *with* National Ass'n of the Deaf v. Netflix, 869 F. Supp. 2d at 201–02 (holding that it was a place of public accommodation despite not having a physical location).

168. Clifford, *supra* note 11, at 11.

169. Stuy, *supra* note 166, at 1101–03.

was a 200% increase in lawsuits over website accessibility.¹⁷⁰ This slew of litigation is expected to continue¹⁷¹ unless there is a change.

Because the nexus requirement is now obsolete,¹⁷² the minority approach of the First and Seventh Circuits should be adopted so that Title III coverage extends to all private entities' websites, regardless of whether they have physical locations or not. This broader standard is supported by the purpose of the ADA and Congress's intent behind the statute.¹⁷³ It would also provide more protections for individuals with disabilities as the internet and online commerce continue to grow. Congress delegated rulemaking authority for the ADA and primary enforcement authority to the DOJ.¹⁷⁴ The DOJ should resume the rule-making that was withdrawn in 2017 that would have applied Title III standards to all private entities' websites.¹⁷⁵ Absent DOJ regulatory guidance, the Supreme Court could issue a decision that would create a binding precedent for all courts. Regardless of whether it is by the Supreme Court or the DOJ, a uniform approach that extends Title III coverage to all private entities' websites is necessary.

There also needs to be clear guidance on how accessibility should be achieved and the standards against which it will be measured. The WCAG and the revised 508 Standards provide two potential sources of guidance for accessibility standards.¹⁷⁶

The WCAG is an international standard developed by the Accessibility Guidelines Working Group (AG WG) that provides resources and measurable standards.¹⁷⁷ The WCAG 2.1, which is the current version of WCAG, provides several layers of guidance that work together to help address the needs of the widest possible range of internet users.¹⁷⁸ The first layer of guidance is the four principles of accessibility—perceivable, operable, understandable, and robust—which provide the necessary foundation for anyone to access and use websites.¹⁷⁹ The second layer is twelve guidelines that are organized

170. Clifford, *supra* note 11, at 6.

171. *Id.*

172. *See supra* Part III.B.

173. *See supra* Part III.A.

174. 42 U.S.C. §§ 12186(b), 12188(b).

175. *See supra* Part II.B and accompanying text.

176. Xiu, *supra* note 31, at 404.

177. Shawn Lawton Henry, *WCAG 2 Overview*, W3C, (Sept. 21, 2023) <https://www.w3.org/WAI/standards-guidelines/wcag/> [<https://perma.cc/367C-YPXP>] [hereinafter Henry, *WCAG 2 Overview*].

178. *Introduction to Understanding WCAG*, W3C, (June 20, 2023), <https://www.w3.org/WAI/WCAG21/Understanding/intro#understanding-the-four-principles-of-accessibility> [<https://perma.cc/NJ2H-SW2Y>].

179. *Id.*

under each of these principles.¹⁸⁰ Third, each guideline has testable success criteria that describe what each guideline must achieve to match different people's sensory, physical, and cognitive abilities.¹⁸¹ These criteria are measured against three levels of conformance: A, AA, AAA (with A being the lowest level and AAA being the highest level).¹⁸² The fourth and final level of guidance is sufficient and advisory techniques that are provided for each guideline and success criteria as options to satisfy these two categories.¹⁸³

Section 508 of the Rehabilitation Act of 1973 requires all electronic and information technology of the federal government, including government websites, software, and other applications, to be accessible.¹⁸⁴ In 2017, the Access Board updated its standards under Section 508 (508 Standards) by incorporating WCAG 2.0 by reference and requiring conformance to WCAG 2.0's Level A and AA Success Criteria and Conformance Requirements.¹⁸⁵ The revised 508 Standards were intended to address the accessibility challenges that newer technologies, like smartphones, posed for individuals with disabilities, such as a requirement that there is a way to stop, mute, or adjust the volume of audio that plays automatically, which can be heard in pop-up advertisements.¹⁸⁶ The revised 508 Standards are not binding on state and local governments, but these public entities are still required to ensure website accessibility.¹⁸⁷ Many states have passed legislation requiring website accessibility and some states have incorporated or referenced the 508 Standards and WCAG 2.0 in their laws.¹⁸⁸

The WCAG 2.1 would be the better standard for Title III private entities because it was developed by the WAI, which is an international

180. *Id.* While there are many usability guidelines that can help all users, the guidelines in the WCAG 2.1 only address problems specific to users with disabilities. *Id.* Some of these guidelines include time-based media (for audio and media), adaptable (for creating content that can be presented in different ways without losing information or structure), seizure and physical reactions (for not creating content in a way that is known to cause seizures or physical reactions), and input modalities (alternatives for users to operate functionality through inputs beyond a keyboard). *Id.*

181. *Web Content Accessibility Guidelines (WCAG) 2.1*, W3C (June 5, 2018), <https://www.w3.org/TR/WCAG21/#intro> [<https://perma.cc/E6RU-M76M>].

182. *Id.*

183. *Id.*

184. 29 U.S.C. § 794d.

185. 36 C.F.R. pt. 1194 app. A E205.4 (2018).

186. Information and Communication Technology (ICT) Standards and Guidelines, 82 Fed. Reg. 5790, 5790–91 (proposed Jan. 18, 2017) (to be codified at 36 C.F.R. pts. 1193, 1194); *Comparison Table of WCAG 2.0 to Original 508 Standards*, U.S. ACCESS BOARD E205.4, <https://www.access-board.gov/ict/wcag2ict.html> [<https://www.access-board.gov/ict/wcag2ict.html>] (last visited July 25, 2023).

187. ADA.gov, *supra* note 24.

188. *State Policy*, SECTION508.GOV, (Nov. 2022) <https://www.section508.gov/manage/laws-and-policies/state/> [<https://perma.cc/4BF4-3HYE>].

organization composed of industry, disability organizations, government, accessibility research organizations, and more who work together to develop web standards.¹⁸⁹ The WAI can be more responsive to changes in technology because it is a nongovernmental entity and the guidelines it creates are written by groups of people who are focused on real-world application. The WCAG 2.1 has three levels of conformance that gives businesses more flexibility in deciding how much money to invest in compliance.¹⁹⁰ Lastly, the WCAG 2.1's multiple layers of guidance are meant to address the needs of the widest possible range of internet users.¹⁹¹ This goal aligns with the goals and purpose of the ADA.

IV. IMPACT

Extending Title III coverage will benefit not only individuals with disabilities, but also individuals without disabilities, businesses and other private entities, and the courts. Millions of Americans would gain better access to private entities' websites.¹⁹² Private entities would have a clear technical standard to follow that would reduce uncertainties about their legal obligations and budgetary expenses, and it would expand their customer base.¹⁹³ Finally, the number of website accessibility lawsuits and concerns over serial plaintiffs would reduce.¹⁹⁴

A. Impact on Consumers

About 8.1 million Americans have some sort of vision impairment, including color blindness, 7.6 million are deaf or have serious difficulty hearing, and 19.9 million adults have motor impairments, like difficulty lifting or grasping that can impact their ability to use a mouse or keyboard.¹⁹⁵ Currently, two in five adults who are aged sixty-five years and older have a disability, and by the year 2060, the number of people who are sixty-five years or older is expected to double, so number of Americans with a disability is expected to grow.¹⁹⁶ Someone who does not currently have a disability may develop a vision, hearing, or mobility impairment as they age.

189. Shawn Lawton Henry, *About W3C WAI*, W3C, (Aug. 1, 2023) <https://www.w3.org/WAI/about/> [<https://perma.cc/FD4G-W9H3>] [hereinafter Henry, *About W3C WAI*]. The AG WG is a part of the World Wide Web Consortium (W3C) Web Accessibility Initiative (WAI). *Id.*

190. Henry, *WCAG 2 Overview*, *supra* note 177.

191. W3C, *supra* note 178.

192. *See infra* Part IV.A.

193. *See infra* Part IV.B.

194. *See infra* Part IV.C.

195. Cudd, *supra* note 5.

196. *Id.*

The internet has become a critical feature in many homes: 59.6% of people with disabilities live in a household with internet access and 72% of adults with disabilities own a smartphone.¹⁹⁷ For those who may face financial or other barriers to home internet access, libraries or other public resources are available. The COVID-19 pandemic highlighted the usage of the internet in everyday transactions, and it resulted in a substantial increase in the use of websites for essential services.¹⁹⁸ Congress intended that people with disabilities have equal access to the goods services, privileges, and advantages that are available to other members of the public.¹⁹⁹ Inaccessible websites, which prevent equal access, should therefore be considered an exclusionary practice that perpetuates discrimination based on disability.²⁰⁰

For example, in *Robles v. Domino's Pizza*, the visually impaired plaintiff was unable to use the company's website and app because they were incompatible with his screen reader.²⁰¹ As a result, on two separate occasions, he had to wait for over forty-five minutes to order a pizza over the phone.²⁰² Domino's contended that its phone line was an acceptable alternative for its website and app, but the court disagreed by stating that no person would find it an acceptable alternative to ordering from the website.²⁰³ When compared to the fact that a person without a vision disability would have been able to use the website or app to order pizza in significantly less time, this should be considered an exclusionary practice that perpetuated discrimination based on disability.

Website accessibility can also improve the experience of those without disabilities and allows content to be rendered across a broader range of platforms and devices.²⁰⁴ For example, closed captioning can be beneficial to people who use it to help understand information, people who watch videos in loud or quiet environments, and people who are learning the spoken language of the video.²⁰⁵ Thus, increased website accessibility has the potential to benefit all consumers.

197. *Id.*

198. *See supra* notes 140–42 and accompanying text.

199. *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994) (quoting S. REP. NO. 116, at 58 (1989)).

200. Clifford, *supra* note 11, at 13.

201. *Robles v. Domino's Pizza LLC*, No. CV 16-6599 JGB (Ex), 2021 WL 2945562, at *8 (C.D. Cal. June 23, 2021).

202. *Id.*

203. *Id.*

204. Lazar & Ferleger, *supra* note 6, at 66–67.

205. *Id.* at 67.

B. Impact on Private Entities

It is necessary to balance the interests of individuals with disabilities in receiving accessible online services with the interests of the businesses that will need to spend money and devote time to making necessary changes. There are legitimate concerns regarding the costs of implementing and maintaining website accessibility, but reliable data on the actual costs is scarce.²⁰⁶ For instance, an impact study in 2011 found that making an air travel website WCAG 2.0 compliant could range from \$31,000 for smaller websites to \$225,000 for larger websites,²⁰⁷ and continuing maintenance adds to that cost. Every time a business uploads a new photograph, link, or webpage, additional coding is required to remain compliant.²⁰⁸ Some businesses resort to retaining “digital accessibility consultants” to audit their website content and add new code, which can cost between \$4,800 to \$23,000 per site each year depending on the size of the site and other factors.²⁰⁹

Larger businesses may be able to absorb some of the cost of continued maintenance and are more likely to have technology departments that can audit and maintain the company’s website accessibility.²¹⁰ Whereas smaller businesses are likely to feel a greater financial impact and are more likely to hire outside consultants to maintain their compliance.²¹¹ To resolve this, the government could offer tax credits to smaller and medium-sized businesses to help offset some of these costs. Additionally, implementing website accessibility also expands the business’s customer base.²¹² By expanding the customer base and unlocking the billions of dollars in purchasing power held by Americans with disabilities, businesses have the potential to increase their profits to help offset the costs of accessibility maintenance.²¹³

Without an explicit accessibility standard from the DOJ, businesses face uncertainty when anticipating budgetary expenses because the compliance standards may change.²¹⁴ This, coupled with the fact that the WCAG is updated as technology and accessibility options change and advance, companies could be looking at costly changes even if they have a website that is compliant with current standards.²¹⁵

206. Stuy, *supra* note 166, at 1099.

207. *Id.*

208. *Id.* at 1100.

209. *Id.*

210. *Id.* at 1101.

211. Stuy, *supra* note 166, at 1101.

212. Clifford, *supra* note 11, at 12.

213. *Id.* at 12 nn.133–34.

214. *Id.* at 11.

215. Stuy, *supra* note 166, at 1099.

While the concerns regarding changes and updated standards are valid, the updated WCAG content published by the AG WG is “backwards compatible.”²¹⁶ This means that a website that meets the standards for WCAG 2.1 also meet the standards under WCAG 2.0.²¹⁷ The success criteria in WCAG 2.1 are incorporated verbatim in the WCAG 2.2 draft—one success criterion was removed because it is now considered obsolete—and nine new success criteria were added.²¹⁸ To ease the transition, the DOJ could provide a timeframe after a new WCAG version is published for businesses to implement the necessary changes before they could be subject to a Title III violation lawsuit. Additionally, updated versions of WCAG are infrequent. The first version, WCAG 2.0, was published in 2008 and the current version, WCAG 2.1, was published in 2018.²¹⁹

Businesses could also argue that they should be exempt from making their websites accessible, if the changes needed would fundamentally alter the nature of the goods and services, or if it would be an undue burden, such as significant difficulty or expense.²²⁰ However, the companies’ goods and services would not be fundamentally altered by changing the coding on their websites. While there would be increased costs and time in implementing and maintaining compliance, these downsides are greatly outweighed by the benefits of the accommodations, like increased revenue. An argument that businesses face an unfair burden of complying with unknown website accessibility standards could easily be countered if the DOJ provides a uniform standard and an achievable metric against which businesses could measure their accessibility success.

C. *Impact on the Courts*

In 2022 alone, plaintiffs filed 3,255 lawsuits alleging that a website was not accessible, which represented 37% of the Title III lawsuits filed that year.²²¹ As seen in the graph below, the number of website accessibility lawsuits has been continuously rising, sparking criticism and concern over serial plaintiffs.²²²

216. Henry, *WCAG 2 Overview*, *supra* note 177.

217. *Id.*

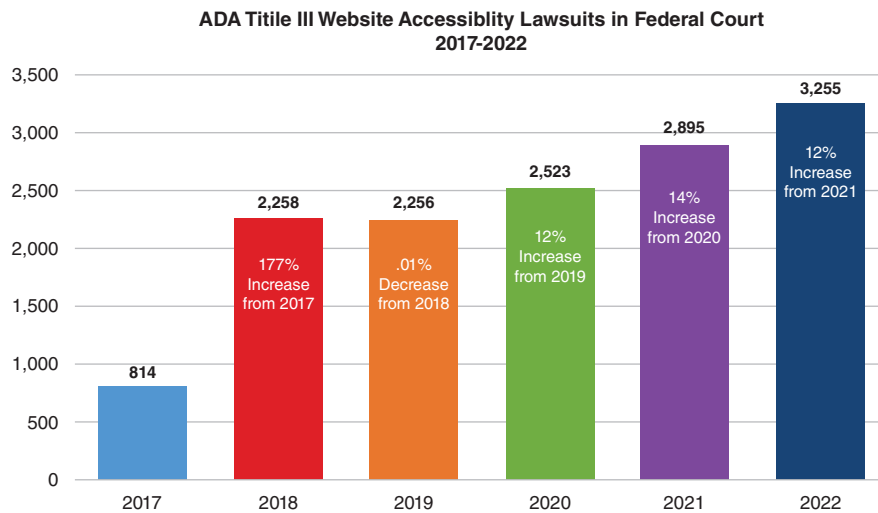
218. *Id.*

219. *Id.* The WCAG 2.2 Draft is scheduled to be finalized in 2023. *Id.*

220. 28 C.F.R. § 36.303(a).

221. Kristina M. Launey & Minh N. Vu, *Plaintiffs Set a New Record for Website Accessibility Lawsuit Filings in 2022*, ADA TITLE III NEWS & INSIGHTS (Jan. 23, 2022), <https://www.adatitleiii.com/2023/01/plaintiffs-set-a-new-record-for-website-accessibility-lawsuit-filings-in-2022/> [https://perma.cc/J99W-N7XS].

222. *Id.*; Clifford, *supra* note 11, at 11.



Serial plaintiffs search for inaccessible websites regardless of whether they have an actual intention of using the website.²²³ They are especially concerning to small and mid-sized businesses that may not be aware of the liability of an inaccessible website or that may lack the resources needed to correct the accessibility issues, pay for legal counsel, and potentially pay for court-issued fees.²²⁴ However, this concern should be mitigated by the fact that an individual must have a valid claim to advance their lawsuit.²²⁵ Some courts, particularly New York federal courts, have been dismissing website accessibility lawsuits for lack of standing, with one judge noting that the fact the plaintiff was a serial filer made his claims less plausible.²²⁶

Another concern results from an Eleventh Circuit decision in *Haynes v. Hooters of America* that potentially exposes businesses to continued liability while the business is in the process of website accessibility remediation.²²⁷ As a result of this decision, a business could be sued multiple times and have to defend itself against separate, yet substantively identical, lawsuits while it works to bring its website into compliance.²²⁸ However, the DOJ could promulgate a rule that would give businesses a grace period during which time an individual could

223. Clifford, *supra* note 11, at 11.

224. *Id.* at 11–12; Stuy, *supra* note 166, at 1102.

225. Clifford, *supra* note 11, at 12.

226. John W. Egan & Minh N. Vu, *Plaintiff-Friendly New York Courts Change Course in Three Recent Decisions in Website Accessibility Cases*, ADA TITLE III NEWS & INSIGHTS (June 12, 2023), <https://www.adatitleiii.com/> [<https://perma.cc/W6LT-NLWZ>].

227. Stuy, *supra* note 166, at 1101–02 (citing *Haynes v. Hooters of Am.*, 893 F.3d 781 (11th Cir. 2018)).

228. *Id.*

not bring a website accessibility lawsuit against the business while it was implementing changes consistent with new compliance standards.

Initially, there will likely be an increase in the number of lawsuits filed as there will be a greater number of private entities liable for inaccessible websites and private entities will need to incorporate changes to their websites based on the adopted accessibility standards. As above, the DOJ could provide a grace period after the new regulations are promulgated. Once the grace period ends, then any future lawsuits would be the result of the company's failure to comply with clear compliance standards. A uniform application of the law and clear compliance standards will help prevent future lawsuits by serial plaintiffs who can currently use the varying jurisdictional rules and standards to their advantage.²²⁹ The courts will benefit from reduced caseloads, preserved judicial resources, saved time, and decreased costs associated with these lawsuits.

V. CONCLUSION

The purpose of the ADA was to broaden the scope of protection for people with disabilities and to ensure their equality of opportunities and full participation.²³⁰ Congressional intent, as evidenced by the Committee Reports, was for the twelve categories of public accommodation to be construed liberally and to keep pace with rapidly changing technology.²³¹ Adopting the minority approach of the First and Seventh Circuits would effectuate Congress's intent by applying Title III to the websites of private entities to ensure that users with disabilities could fully and equally enjoy the websites' goods and services. COVID-19 demonstrated that the nexus requirement of the majority view is obsolete. The shift of business operations to online-only platforms arguably severed the connection between the online service and the physical store. The result was businesses were not legally required to have website accessibility in a large majority of circuits. Additionally, the three views of the circuit courts create unclear and confusing expectations for businesses.

To create a uniform standard, either the DOJ should amend or create new regulations, or the Supreme Court should issue a decision that would apply Title III to all websites of private entities and businesses. Beyond this, the DOJ or Access Board need to provide clear guidance on the technical standards and how accessibility success will

229. *Id.* at 1081.

230. 42 U.S.C. § 12101; Brief for the United States, *supra* note 13, at 5.

231. H.R. REP. NO. 101-485, pt. 2, at 100, 108.

be measured. This will benefit the courts as fewer website accessibility lawsuits will be filed as standards become clear and uniform, and it will benefit private entities who reduce the risk of liability while also expanding their customer bases.

Most importantly, the benefit to Americans with disabilities is immeasurable. Millions of Americans will benefit from website accessibility as they will be able to use websites for grocery ordering, prescription management, shopping, and more. The Access Board described the benefits to Americans with disabilities best when it stated that most of the significant benefits expected from increased website accessibility include greater social equality, human dignity, and fairness.²³²

Anna Schaldenbrand

232. Information and Communication Technology (ICT) Standards and Guidelines, 82 Fed. Reg. 5790, 5793 (proposed Jan. 18, 2017) (to be codified at 36 C.F.R. pts. 1193, 1194).

