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## Online Businesses Beware: ADA Lawsuits Demand Website Accessibility for Blind Plaintiffs

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# Online Businesses Beware: ADA Lawsuits Demand Website Accessibility for Blind Plaintiffs

*Ricardo Alvarado\**

## I. INTRODUCTION

Courts across the United States are grappling with a developing legal issue that can leave schools, hospitals, and businesses vulnerable to legal liability: under the Americans with Disabilities Act of 1990 (ADA), must an establishment's website be accessible to blind or visually impaired consumers? Title III of the ADA prohibits discrimination on the basis of disability in the full and equal enjoyment of public accommodations.<sup>1</sup> The issue involves whether courts should consider websites as places of public accommodation and apply this rule to them. The ADA, as it currently exists, makes no mention of the Internet.<sup>2</sup> For visually impaired consumers, screen reader technology assists them in navigating a website.<sup>3</sup> However, for it to work, a website owner must first intentionally design the site to be compatible with such technology.<sup>4</sup>

Currently, federal appellate courts are split on how to apply Title III of the ADA and whether it should apply to websites.<sup>5</sup> The unpredictable results have only been further complicated by a series of delays by the Department of Justice (DOJ) in providing guidance regarding the application of Title III of the ADA.<sup>6</sup> In the past year, plaintiffs filed at least 814 federal lawsuits regarding allegations of inaccessible websites, including a number of devel-

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1. The Americans with Disabilities Act, 42 U.S.C. § 12182(a) (2008).
2. Vivian Wang, *College Websites Must Accommodate Disabled Students, Lawsuits Say*, N.Y. TIMES (Oct. 11, 2017), <https://www.nytimes.com/2017/10/11/nyregion/college-websites-disabled.html>.
3. *See id.*
4. *See AFB Accessibility Resources*, AM. FOUND. FOR THE BLIND, <http://www.afb.org/info/programs-and-services/afb-consulting-services/afb-accessibility-resources/123> (last visited Feb. 5, 2019).
5. Chris Bruce, *Banks Join Legal Fight Over Website Access for Visually Impaired*, BLOOMBERG BNA (Nov. 8, 2017), <https://www.bna.com/banks-join-legal-n73014471896>.
6. Amanda Robert, *Attorneys: DOJ's Years-Long Delay On Regulations Hurting Companies Facing Disabilities Lawsuits Over Their Websites*, LEGAL NEWSLINE (Mar. 1, 2016, 10:47 AM), <https://legalnewsline.com/stories/510698224-attorneys-doj-s-years-long-delay-on-regulations-hurting-companies-facing-disabilities-lawsuits-over-their-websites>.

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oping class actions.<sup>7</sup> While the DOJ under the Obama administration supported the move toward website ADA compliance and was expected to develop rules, under the Trump administration, the DOJ has sent mixed messages regarding any proposed rule-making, leaving retailers and other businesses with any online presence to decipher the patchwork of decisions that has emerged in recent years.<sup>8</sup>

One particular case best represents an issue pitting accessibility advocates against pro-business groups that warn new ADA requirements will be far too burdensome.<sup>9</sup> *Gil v. Winn-Dixie Stores, Inc.* is the first case to go to trial and result in a ruling that the website of a brick-and-mortar business violated the ADA because it was inaccessible to visually impaired plaintiffs.<sup>10</sup> The defendant, a regional grocer in the southeastern United States, has appealed.<sup>11</sup> This case is particularly important, as pundits see it as a strong candidate for consideration by the U.S. Supreme Court.<sup>12</sup> As the singular case to actually proceed to a trial and result in a ruling against a business on ADA grounds, *Gil v. Winn-Dixie* is the only case of its kind with an evidentiary and procedural record.<sup>13</sup> The Supreme Court will likely want to settle the ongoing circuit split, and the Court tends to prefer cases with a well-developed record, such as *Gil v. Winn-Dixie*.<sup>14</sup> The outcome of this decision will likely embolden other prospective plaintiffs to file website accessibility cases against entities of all sizes, seeking to use the pressure of recent cases to force a favorable settlement.<sup>15</sup>

Further, experts indicate more of these cases are anticipated.<sup>16</sup> A 2017 study identified that 81 cases had been filed against an assortment of large

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7. Mihn N. Vu & Susan Ryan, *2017 Website Accessibility Lawsuit Recap: A Tough Year for Businesses*, SEYFARTH SHAW (Jan. 2, 2018), <https://www.adatitleiii.com/2018/01/2017-website-accessibility-lawsuit-recap-a-tough-year-for-businesses>.
8. *Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions*, U.S. DEP'T JUST. (Dec. 15, 2017), <https://www.adatitleiii.com/wp-content/uploads/sites/121/2017/12/ada-rule-withdrawal.pdf>.
9. Bruce, *supra* note 5.
10. *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1315, 1343 (S.D. Fla. 2017); Alexis Kramer, *Winn-Dixie Website Runs Afoul of Disability Law*, BLOOMBERG L. (June 15, 2017), <https://www.bna.com/winndixie-website-runs-n73014453606>.
11. Bruce, *supra* note 5.
12. Bruce, *supra* note 5.
13. *See* Bruce, *supra* note 5.
14. *See* Bruce, *supra* note 5.
15. Kramer, *supra* note 10.
16. *See* Kramer, *supra* note 10.

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companies ranging from The Cheesecake Factory to Costco Wholesale Corporation for the very same issue—failing to make their websites accessible to visually impaired consumers.<sup>17</sup> The issue has formed an alliance of businesses, ranging from convenience stores to hotels, filing amicus briefs on behalf of defendants facing ADA claims.<sup>18</sup> Business owners fear the *Gil v. Winn-Dixie* ruling makes clear that all of their services—including websites—must be accessible under the ADA.<sup>19</sup> Entities such as retail stores, hotels, and restaurants typically possess a significant web presence and can find themselves particularly vulnerable to website accessibility lawsuits. However, this problem extends beyond traditional businesses; entities covered under the ADA include a broad array of establishments, such as schools, libraries, day cares, and food banks.<sup>20</sup>

This Comment argues that the current state of the ADA and how it is applied to websites under Title III is untenable for those on both sides of the debate. Attorneys must be able to advise their clients in ensuring compliance with website accessibility laws and cannot wait for the promulgation of new regulations. More importantly, the application of the ADA as it exists results in inconsistencies and major gaps in protection for individuals with disabilities. In its current state, the ADA may end up harming more than helping. Part II of this comment will examine the background of the ADA, existing regulatory guidance on website accessibility, and any standards used to determine such accessibility. Part III will provide a survey of notable case law and provide a current overview of how courts interpret the ADA in regards to websites. Part IV will analyze the reasoning within the decision of *Gil v. Winn-Dixie*. Finally, Part V will address the competing social, legal, and economic considerations involved in this controversy and consider the viability of potential alternatives.

## II. BACKGROUND OF THE ADA

### A. Overview of the ADA

Understanding the current state of judicial interpretation regarding Title III and websites requires an overview of the statute's intended purpose and functions. The ADA was passed as an expansion of the Rehabilitation Act of 1973.<sup>21</sup> Congress enacted the ADA with the purpose of establishing “a clear and comprehensive Federal prohibition of discrimination on the basis of dis-

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17. Kramer, *supra* note 10.

18. See Bruce, *supra* note 5.

19. See Bruce, *supra* note 5.

20. 42 U.S.C.S. § 12181(7) (2018).

21. Compare 29 U.S.C.A. § 794 (West 2016), with 42 U.S.C. § 12182(a). (The Rehabilitation Act provides protection from disability discrimination in Federal programs, while the ADA expands this to include protection from disability discrimination in any public accommodation).

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bility in the areas of employment in the private sector, public accommodations, public services, transportation, and telecommunications.”<sup>22</sup> While the Rehabilitation Act placed emphasis on services to those with the most severe disabilities, the ADA was written with the much broader intent of preventing discrimination against *any* individuals with a recognized disability.<sup>23</sup>

Title III provides that “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.”<sup>24</sup> In essence, Title III prevents discrimination against disabled individuals by private entities that affect commerce and hold themselves out as places of public accommodation.<sup>25</sup> The language of the statute does not define the word “place,” so whether it is limited to a physical environment is hotly contested.<sup>26</sup> However, the term “public accommodation” is defined.<sup>27</sup> The statute lists which types of private entities affecting commerce qualify as Title III places of public accommodation in twelve enumerated categories that are summarized below:

- (1) *places of lodging*, such as an inn, hotel, or motel;
- (2) *establishments serving food or drink*, such as a restaurant or bar;
- (3) *place of exhibition or entertainment*, such as a movie theater, concert hall, or stadium;
- (4) *place of public gathering*, such as an auditorium, convention center, or lecture hall;
- (5) *sales or rental establishments*, like a bakery, clothing store, or shopping center;
- (6) *service establishments*, such as laundromats, banks, barber shops, and pharmacies;
- (7) *stations for specified public transportation*, terminals, and depots;
- (8) *places of public display or collection*, such as a museum, library, or gallery;

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22. H.R. REP. NO. 101-485, at 28 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 310.

23. The Act consists of multiple “Titles” which delineate the restriction of discrimination against individuals with disabilities in various categories. For example, Title I covers discrimination with regards to employment, Title II addresses public services, and Title III covers public accommodations and services operated by private entities. *See An Overview of the Americans with Disabilities Act*, ADA NAT’L NETWORK, <https://adata.org/factsheet/ADA-overview> (last updated 2017).

24. 42 U.S.C. § 12182(a).

25. *See id.* § 12181(7).

26. *See J.H. ex rel. Holman v. Just for Kids, Inc.*, 248 F. Supp. 3d 1210, 1215–17 (D. Utah 2017) (discussing and contrasting different circuit courts’ definitions of “place” under the ADA).

27. 42 U.S.C. § 12181(7).

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- (9) *places of recreation*, such as traditional parks, zoos, and amusement parks;
  - (10) *places of education* of all levels (elementary, secondary, undergraduate, or postgraduate);
  - (11) *social service center establishments*, such as a day cares, shelters, and food banks;
  - (12) *places of exercise or recreation*, like gyms, spas, bowling alleys, and golf courses.<sup>28</sup>

Guidance from the Department of Justice indicates the categories listed in Title III are an exhaustive list of categories, but the examples given within each category are not exhaustive.<sup>29</sup> The ADA further requires public accommodations “make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities.”<sup>30</sup> But modifications deemed reasonable can vary broadly between industries.<sup>31</sup> To this end, entities must “take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services . . .”<sup>32</sup> Failure to do so triggers a cause of action for an affected party that is intended to be protected by the statute.<sup>33</sup>

Under the ADA, a prevailing plaintiff is not entitled to punitive damages but can recover reasonable attorneys’ fees and costs.<sup>34</sup> Injunctive relief is available if the discrimination includes “a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities . . . where such removal is readily achievable.”<sup>35</sup> In other words, the ADA requires, without exception, that any policies or practices of a public accommodation be reasonably modified to provide access to disabled individuals unless doing so would fundamentally alter what is offered.<sup>36</sup> Enforcing compliance via injunctive relief would require an individualized inquiry

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28. *See id.*

29. *See ADA Title III Technical Assistance Manual*, U.S. DEP’T JUST., <https://www.ada.gov/taman3.html> (last visited Feb. 5, 2019).

30. 42 U.S.C. § 12182(b)(2)(A)(ii).

31. *ADA Title III Technical Assistance Manual*, *supra* note 29.

32. 42 U.S.C. § 12182(b)(2)(A)(iii).

33. *See id.* § 12188 (LEXIS through Pub. L. No. 115-243 (excluding Pub. L. No. 115-232)) (discussing enforcement provisions for disabled individuals who face discrimination).

34. *Id.* §§ 12188(b), 12205, 2000a–3(b).

35. *Id.* §§ 12188(a)(2), 12182(b)(2)(A)(iv).

36. *See id.* § 12182(b)(2)(A)(iii).

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to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances.<sup>37</sup>

## B. Department of Justice Guidance

The DOJ regularly issues guidance to various entities that may be liable under existing statutes, such as the ADA. While Section 12181(7) of the ADA lists the broad categories of unlawful discrimination under Title III, it does not define compliance or specific conduct.<sup>38</sup> For example, when it comes to specific standards for website compliance under Title III of the ADA, no details on how to comply with the law are provided. Title III instead leaves the DOJ to issue implementing regulations to establish accessibility standards and put covered entities on notice of their specific obligations under the law.<sup>39</sup> In 2010, the DOJ issued an Advanced Notice of Proposed Rulemaking, warning that it was "considering revising the regulations implementing Title III of the ADA in order to establish requirements for making the goods, services, facilities, privileges, accommodations, or advantages offered by public accommodations via the Internet, specifically at sites on the World Wide Web (Web) accessible to individuals with disabilities."<sup>40</sup> The advance notice indicated the DOJ's objective to clarify any "remaining uncertainty regarding the applicability of the ADA to Web sites of entities covered by Title III" and "make clear to entities covered by the ADA their obligations to make their Web sites accessible."<sup>41</sup>

While this announcement provided a welcome indication of the DOJ's acknowledgement of the problem and plan to issue clarifying rules, an advanced notice of proposed rulemaking is an early part of a long rulemaking process.<sup>42</sup> In the meantime, entities are forced to wait for the issuance of actual rules detailing how to comply with the law. On the other hand, the DOJ's advance notice expressed the view that companies did not necessarily need to make their websites accessible as long as they offered an alternative way for individuals with disabilities to access its good or services, such as a

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37. *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 688 (2001).

38. *See* 42 U.S.C § 12181(7).

39. *See id.* § 12186(b); *see also* 28 C.F.R. § 36.101 (2016) (describing purpose of DOJ's regulations).

40. 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 (proposed July 26, 2010).

41. *Id.*

42. *See* IRM § 32.1.1.2.1.

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24-hour phone line.<sup>43</sup> However, even this suggestion is not an officially prescribed rule that would ensure an entity was in compliance with the ADA.

When *Gil v. Winn-Dixie* was first filed, the DOJ filed a Statement of Interest supporting the plaintiff and argued that “Title III applies to discrimination in the goods and services “of” a place of public accommodation, rather than being limited to those goods and services provided “at” or “in” a place of public accommodation.”<sup>44</sup> At the time, Winn-Dixie objected to the DOJ’s involvement and moved to strike the Statement of Interest.<sup>45</sup> By this point, the DOJ had already begun increasing its investigations regarding website compliance with the ADA for school districts and education institutions.<sup>46</sup> Critics even charged that the DOJ’s prior activity was encouraging more lawsuits charging non-compliance with the ADA while businesses awaited further guidance from the DOJ.<sup>47</sup> Businesses left waiting on updated DOJ final regulations could be caught off guard by demand letters or lawsuits alleging their websites are not in compliance with the ADA. If the DOJ were to create new rules, the next step would be to issue a regular Notice of Proposed Rulemaking.<sup>48</sup> However, despite issuing the notice of proposed rulemaking and collecting public comments, the DOJ under the Obama administration never took the next step in enacting an official regulation addressing website accessibility.

In the waning months of the Obama administration, the DOJ indicated that no Notice of Advanced Rulemaking on ADA website accessibility would be published until 2018.<sup>49</sup> Then, under the Trump administration, the DOJ placed the original 2010 Advanced Notice of Proposed Rulemaking on its list of “inactive” regulations.<sup>50</sup> Placing a notice of proposed rulemaking on its “inactive” list signals the issue is not a priority for the current administra-

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43. 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 (proposed July 26, 2010).

44. Mihn N. Vu, *Florida Courts Rule ADA Covers Websites with Nexus to Physical Store*, SEYFARTH SHAW (Apr. 11, 2017), <https://www.adatitleiii.com/2017/04/florida-courts-rule-ada-covers-websites-with-nexus-to-physical-store/>.

45. *Id.*

46. See Andy Jones, *Department of Education Increases Investigations into Website Compliance with the ADA*, LEGAL NEWSLINE (May 25, 2016), <https://legalnewslines.com/stories/510738182-department-of-education-increases-investigations-into-website-compliance-with-ada>.

47. See Robert, *supra* note 6.

48. See *A Guide to the Rulemaking Process*, OFF. OF THE FED. REG., [https://www.federalregister.gov/uploads/2011/01/the\\_rulemaking\\_process.pdf](https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf) (last visited Feb. 5, 2019).

49. Robert, *supra* note 6.

50. *2017 Inactive Regulations*, REGINFOGOV, [https://www.reginfo.gov/public/jsp/Agenda/InactiveRINs\\_2017\\_Agenda\\_Update.pdf](https://www.reginfo.gov/public/jsp/Agenda/InactiveRINs_2017_Agenda_Update.pdf) (last visited Feb. 5, 2019).

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tion.<sup>51</sup> By December 2017, the DOJ announced it had withdrawn the proposed rulemaking entirely.<sup>52</sup> The DOJ stated it would evaluate “whether specific technical standards are necessary and appropriate to assist covered entities with complying with the ADA.”<sup>53</sup>

This withdrawal signals that the DOJ intends to take no action towards expanding the coverage of Title III, but it leaves retailers and other businesses with an online presence without guidance or standards while the number of website accessibility lawsuits continues to rise. While it is unsurprising that a new administration does not have an interest in carrying forward the plans and priorities of a previous administration of another political party, this announcement leaves any entities that may be liable under the ADA to fend for themselves. The only existing guidance for business is the patchwork of holdings issued by various courts across different jurisdictions, each with unique standards a defendant must meet to comply with the law.

### C. The WCAG 2.0

Currently, no standards have ever been proposed by the DOJ or Congress that prescribe any levels of accessibility for websites, but a popular standard for plaintiffs is the Web Content Accessibility Guidelines (WCAG) 2.0—a set of recommended international standards that outline how websites can be more accessible for people with disabilities and was established by a consortium of private organizations whose goal was to increase website accessibility.<sup>54</sup> This is the framework the district court recommended in *Winn-Dixie*, based on the testimony of an expert witness who tested Winn-Dixie’s website functionality.<sup>55</sup> The initial version of WCAG (WCAG 1.0) provided a reference for accessibility principles.<sup>56</sup> The current version, WCAG 2.0, was finalized in 2008 and adopted as an international organizations standard

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51. Jarret Cummings, *ADA Web Accessibility Regulatory Process Now “Inactive”*, EDUCAUSE REVIEW (July 27, 2017), <https://er.educause.edu/blogs/2017/7/ada-web-accessibility-regulatory-processes-now-inactive>.

52. *Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions*, U.S. DEP’T JUST., <https://www.datatitleiii.com/wp-content/uploads/sites/121/2017/12/ada-rule-withdrawal.pdf> (last visited Feb. 5, 2019).

53. *Id.* at 3.

54. *See About W3C*, W3C, <https://www.w3.org/Consortium/> (last visited Feb. 5, 2019); *see also ADA Website Accessibility and the New WCAG 2.1 Standards*, GRAYROBINSON, <http://www.gray-robinson.com/article/post/1754/ada-website-accessibility-and-the-new-wcag-21-standards> (last visited Feb. 5, 2019).

55. *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340, 1350 (S.D. Fla. 2017).

56. *Navigating WCAG 1.0 Guidelines and Techniques Documents*, W3C WEB ACCESSIBILITY INITIATIVE, <https://www.w3.org/WAI/intro/wcag10.php> (last visited Feb. 5, 2019).

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in 2012.<sup>57</sup> In an update of Section 508 of the Rehabilitation Act finalized in January 2017, the federal government’s Access Board “virtually adopted” the WCAG guidelines.<sup>58</sup> Section 508 of the Rehabilitation Act requires *federal agencies* to make their electronic information accessible to people with disabilities, so any guidance provided for compliance with the Rehabilitation Act does not carry much weight against ADA claims.<sup>59</sup>

The WCAG 2.0 is divided into three different levels of conformance: A, AA, and AAA.<sup>60</sup> Each of the three levels of “success criteria” indicate a different level of accessibility and design feasibility (with AAA being the most accessible, but least feasible).<sup>61</sup> However, even these conformance levels have been criticized as vague or subject to different interpretations, as seen in the DOJ’s notice of advanced rulemaking, where the DOJ stated the difference between the various conformance levels could cause confusion but never indicated a standard that would be ADA compliant.<sup>62</sup> Even the court that ruled in *Gil v. Winn-Dixie* did not indicate which level of success criteria would be sufficient to carry out the injunctive order and comply with Title III.<sup>63</sup>

### III. THE CONFUSING CASELAW OF WEBSITE ACCESSIBILITY CLAIMS

Conflicting interpretations, unclear guidance, and the unpredictable legal landscape has only encouraged further litigation. While the legislative record indicates Congress intended to revise the ADA in order to adapt to changing needs,<sup>64</sup> congressional inaction and rapid technological develop-

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57. *Gil*, 257 F. Supp. 3d at 1346.

58. *Id.*

59. See The Rehabilitation Act, 29 U.S.C.S § 794(d) (LEXIS through Pub. L. No. 115-243 (excluding Pub. L. No. 115-232)); see also M. Christine Fotopulos, *Civil Rights Across Borders: Extraterritorial Application of Information Technology Accessibility Requirements Under Section 508 of the Rehabilitation Act*, 36 PUB. CONT. L.J. 95, n. 7 (2006).

60. *Web Content Accessibility Guidelines (WCAG) 2.0*, W3C, <https://www.w3.org/TR/WCAG20/> (last visited Feb. 5, 2019).

61. *Id.*

62. 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. 434460, 43465 (proposed July 26, 2016) (seeking feedback regarding whether DOJ should adopt WCAG 2.0’s Level AA success criteria or should consider adopting another success criteria level).

63. See *Gil*, 257 F. Supp. 3d at 1350.

64. The legislative history of the ADA indicates that Congress “intends that the types of accommodation and services provided to individuals with disabilities, under . . . this bill, should keep pace with the rapidly changing technology of the times. This is a period of tremendous change and growth involving technol-

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ments<sup>65</sup> have left courts in the unenviable position of applying old law to new technologies. Because no further regulations or guidance have been issued, courts must continue to apply the language of the law as it exists, and the moving target of ADA website compliance continues to shift. When ADA website discrimination suits first began appearing in courts, judges looked to a more established area of the law and relied on Title III insurance cases for guidance.<sup>66</sup> Why? Insurance cases represented the closest available approximation of web discrimination cases because they dealt with similar legal issues.<sup>67</sup>

### A. Insurance Cases

Causes of action regarding both insurance and website discrimination under the ADA are derived from the same wording of Title III, which prohibits discrimination “in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.”<sup>68</sup> Because of their common statutory origin, insurance cases and website accessibility claims both require a determination on how the services a company offers could affect the definition of public accommodation under the statute.<sup>69</sup> These kinds of cases, in the insurance context, usually involve allegations of discriminatory employer-provided insurance policies.<sup>70</sup> Because the insurance policies were provided by an employer (and not purchased in an insurance office, which would qualify as a place of public accommodation), plaintiffs could not raise an ADA claim unless they successfully argued that the insurance policy *itself* qualified as a public accommodation under the statute.<sup>71</sup> At the time, insurance litigation regarding places of public accommodation were decided under one of two major

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ogy assistance and the Committee wishes to encourage this process.” H.R. REP. No. 101-485, at 108 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 391.

65. In 1997, only eighteen percent of all U.S. households had in-home Internet access, but by 2012, nearly seventy-five percent of U.S. households had Internet access. *Computer & Internet Access in the United States*, U.S. CENSUS BUREAU (Feb. 3, 2014), <https://www.census.gov/data/tables/2012/demo/computer-internet/computer-use-2012.html>.

66. Carly Schiff, *Cracking the Code: Implementing Internet Accessibility Through the Americans with Disabilities Act*, 37 CARDOZO L. REV. 2315, 2317 (2016).

67. *See id.* at 2323–24.

68. 42 U.S.C. § 12182(a); *see also* *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n, Inc.*, 37 F.3d 12, 18 (1st Cir. 1994); *Gil*, 257 F. Supp. 3d at 1348.

69. *See Carparts*, 37 F.3d at 18; *Gil*, 257 F. Supp. 3d at 1348.

70. *See, e.g.*, *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006 (6th Cir. 1997).

71. *See Carparts*, 37 F.3d at 19.

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controlling views; but even with only two dominant interpretations, circuit courts varied greatly in defining a public accommodation.<sup>72</sup>

The first influential case came from the First Circuit in *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Association of New England, Inc.*, where the plaintiff alleging discrimination was diagnosed with HIV prior to his insurance company's announcement that it would severely limit benefits for AIDS-related illnesses.<sup>73</sup> The court's interpretation of the plain meaning of the ADA proved influential, because it indicated that public accommodations were not limited to physical entities.<sup>74</sup> The court reasoned the inclusion of the term "services" in the ADA's definition of public accommodations signaled that not all public accommodations even need be tangible locations.<sup>75</sup> Further, the court determined an ambiguous construction of public accommodations supported public policy and provided the solution Congress intended in ending discrimination against people with disabilities.<sup>76</sup> While the First Circuit only initially indicated that a place of public accommodation need not be a solely physical structure,<sup>77</sup> the Seventh Circuit later extended the reasoning, concluding even the operator of a website would be restricted from discriminating against people with disabilities in accessing a physical or electronic space.<sup>78</sup>

On the other hand, the Sixth Circuit vehemently disagreed with the First Circuit's reasoning when confronted with the same question in *Parker v. Metropolitan Life*.<sup>79</sup> The case involved a plaintiff suffering from a mental disorder who alleged a violation of the ADA because her employer-offered insurance plan presented drastically reduced benefits for mental disorders in comparison to benefits for physical disabilities.<sup>80</sup> However, the Sixth Circuit firmly held a public accommodation required a physical place.<sup>81</sup> Additionally, the court ruled that, because the public did not have access to the same insurance policy, there was no "nexus" between the benefits of the plan constituting an alleged ADA violation and a place of public accommodation.<sup>82</sup> In essence, the insurance policy did not violate the ADA because, in the view of

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72. Schiff, *supra* note 66.

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

74. *See id.* at 20.

75. *Id.* at 19.

76. *Id.*

77. *Id.* at 20.

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

79. *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1006 (6th Cir. 1997).

80. *See id.*

81. *See id.*

82. *Id.* at 1011.

the court, it had no connection to any of the enumerated places of public accommodation.

The court's reasoning was based on its own interpretation of the plain meaning in the ADA using another statutory canon of construction—*noscitur a sociis*—which defines the meaning of vague language in a text by relying on the meanings of its immediately adjacent terms.<sup>83</sup> The Sixth Circuit also looked to the Department of Justice's treatment of wholesalers under Title III, which classified wholesalers' offered services into two categories: (1) those available to the general public; and (2) those only available to other businesses (which would be exempt from the public accommodation requirement).<sup>84</sup> In spite of the majority's holding in *Parker*, Chief Judge Martin's dissent specifically called to attention that technology could affect the definition of a public accommodation and predicted that limiting Title III to only physical places would undermine its protections as technology continued to expand the way consumers purchase goods or services.<sup>85</sup>

Following the Sixth Circuit's example in *Parker*, the Ninth Circuit employed similar reasoning in *Weyer v. Twentieth Century Fox Film Corp.* and ruled that an entity must be a physical facility to qualify as a place of public accommodation.<sup>86</sup> The Ninth Circuit's adoption of the *Parker* holding later set the stage for the foundational split in case law that exists today regarding website discrimination claims under the ADA. Applying the legal reasoning of these Title III insurance cases, federal district courts have arrived at inconsistent holdings on ADA website accessibility claims.

## B. ADA Website Accessibility Caselaw

One of the earliest influential cases regarding website ADA compliance claims was decided by the Eleventh Circuit in *Rendon v. Valleycrest Productions Ltd.*<sup>87</sup> Rendon provided an interesting set of facts, as individuals with disabilities brought an ADA Title III claim against the producers of the television gameshow "Who Wants to Be a Millionaire."<sup>88</sup> The plaintiffs alleged the telephone screening process the show's producers used to select potential contestants (which required rapid button-dialing in response to an audio question) discriminated against individuals with hearing or mobility disabili-

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83. *Noscitur a sociis*, BLACK'S LAW DICTIONARY (10th ed. 2014).

84. *Parker*, 121 F.3d at 1011–12.

85. *Id.* at 1019–20 (Martin, J., dissenting). "The same technological advances that have offered disabled individuals unprecedented freedom may now operate to deprive them of rights that Title III would otherwise guarantee." *Id.* at 1020.

86. *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114–15 (9th Cir. 2000) (citing *Parker*, 121 F.3d at 1006).

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

88. *Id.* at 1279.

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ties.<sup>89</sup> In this case, the court reasoned the “show [took] place at a public accommodation (a studio)” which fell under the ADA and agreed with the plaintiffs that the process used to select contestants tended to screen out individuals with disabilities.<sup>90</sup> But the court first looked to the Ninth and Sixth Circuits’ adoption of *Parker* and established the need for a “nexus” between the alleged Title III violation and a place of public accommodation.<sup>91</sup> In ruling for the plaintiffs, the court concluded the alleged violation had a sufficient “nexus” to the physical location of the game show because the screening process served as the sole means obtaining access to the studio where the game show was filmed.<sup>92</sup>

Another court relied on the precedent set in *Rendon* to reach a different result when it considered *Access Now v. Southwest Airlines*, in which a plaintiff sued the first major airline to establish a presence on the Internet.<sup>93</sup> While Southwest intended for its virtual ticket counter website to operate as a convenient feature, the site was largely inaccessible to individuals using screen reader technology, and a visually impaired plaintiff sued under Title III.<sup>94</sup> The court applied *Rendon*’s “nexus” theory, but concluded that no nexus existed between the website and a physical place.<sup>95</sup> Because the court found Southwest’s website could not be tied to a specific location and did not consider websites to be physical places of public accommodation, it ruled in favor of the airline.<sup>96</sup> Even though the court acknowledged the website was inaccessible to individuals with visual disabilities, it noted the incompatible website did not inhibit such individuals’ ability to access an actual place of public accommodation (such as a game show studio or, in this case, Southwest’s physical ticket counters).<sup>97</sup> Notably, the court sagely warned against expanding the ADA’s reach to include non-physical spaces because it would “create new rights without well-defined standards.”<sup>98</sup>

If previous cases can be seen as attempting to limit the expansion of Title III, *National Federation of the Blind v. Target* changed course and sought to include most websites under its purview.<sup>99</sup> In this case, the Califor-

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89. *Id.* at 1280.

90. *Id.* at 1283.

91. *Id.* at 1284 n.8.

92. *Id.* at 1283.

93. *Access Now v. Southwest Airlines*, 227 F. Supp. 2d 1312 (S.D. Fla. 2002).

94. *See id.* at 1316.

95. *Id.* at 1321.

96. *See id.* at 1320.

97. *See id.*

98. *Id.* at 1318.

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

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nia branch of the National Federation of the Blind led a multi-plaintiff lawsuit against Target Corporation, claiming that its website was effectively inaccessible to visually disabled consumers and violated the ADA.<sup>100</sup> The website, Target.com, offered an inventory of goods for purchase similar to inventory sold in-store and provided additional information such as coupons, store hours and locations, and store pickup options.<sup>101</sup>

While defendants sought to invoke nexus theory arguments, the court rejected the foundational assertion that a public accommodation must be a physical place and reasoned that even a website could face liability under Title III of the ADA as a “service” provided by a place of public accommodation.<sup>102</sup> The court reinforced its reasoning with a plain language interpretation of Title III, noting it prohibits discrimination in the provision of the goods and services “of,” as opposed to “in,” a public accommodation.<sup>103</sup> In other words, the court made clear discrimination under the ADA could occur anywhere, even away from a place of public accommodation. However, the court attempted to limit the effects of its holding by only recognizing Title III website claims based on information or services affecting the enjoyment of goods from Target brick-and-mortar locations.<sup>104</sup>

More recently, other courts have been reluctant to include websites with physical locations under Title III claims. In *Young v. Facebook*, the plaintiff alleged Facebook did not accommodate people with mental disorders when it had terminated her accounts due to repeated violations of Facebook’s Statement of Rights and Responsibility.<sup>105</sup> The court was bound by Ninth Circuit precedent and held that only a physical place can be a place of public accommodation.<sup>106</sup> The court distinguished Facebook’s websites from an actual physical location (which could classify as a place of public accommodation), since the information and services it provided existed solely on the Internet.<sup>107</sup> Despite the fact the plaintiff traveled to Facebook’s physical headquarters in Santa Clara, the court noted that the services provided to the public via Facebook’s website would not normally be available at its headquarters; thus, even the “nexus” test in *National Federation of the Blind* would fail to establish liability under the ADA.<sup>108</sup>

Unsurprisingly, courts continue to differ in interpreting exactly what type of entities fall under Title III and whether websites should be held to the

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100. *See id.* at 949.

101. *Id.*

102. *Id.* at 952.

103. *Id.* at 953.

104. *Id.* at 956.

105. *See Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1114 (N.D. Cal. 2011).

106. *Id.* at 1115.

107. *Id.*

108. *See id.*

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same compliance standards as physical locations. As a result, several different approaches to Title III have formed among U.S. Circuit Courts.

### C. Current Judicial Interpretations of ADA Website Liability

Mirroring the split results of the aforementioned cases, two opposing interpretations rose to prominence in determining website accessibility suits. One strictly construes places of public accommodation to be physical entities, while the second school of thought consists of a wider array of interpretations reading the language of Title III more broadly. Following a strict interpretation of the enumerated places of public accommodations listed in Title III of the ADA, the Third and Sixth Circuits have declined to apply Title III to non-physical locations such as websites.<sup>109</sup> However, of the courts that *have* extended Title III to websites, there tend to be two general divisions: (1) one group of courts employs a liberal construction of Title III that captures the intent of Congress in enacting ADA; and (2) the other group relies upon the nexus theory approach.

For example, the First and Seventh Circuits' approaches broadly construe the language of Title III to "to effectuate its purpose of providing a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."<sup>110</sup> In other words, these courts take a more liberal interpretation of Title III in order to better comply with the intended purpose of the Americans with Disabilities Act.<sup>111</sup> This approach tends to consider *any* services or goods offered to the public by a private entity, not just those offered at a physical location falling into a Section 12181(7) category.<sup>112</sup> The end goal is to ensure goods and services offered to the public on any platform (like websites) are accessible to all, within the spirit of the law. Using this analysis, several courts have found even purely online businesses with no connection to any physical place as a "public accommodation" listed in Section 12181(7) under Title III.<sup>113</sup>

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109. *See Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612–14 (3d Cir. 1998) (“[W]e do not find . . . the terms in 42 U.S.C. § 12181(7) to refer to non-physical access or even to be ambiguous . . . .”); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010–13 (6th Cir. 1997) (explaining that “a public accommodation is a physical place”); *Stoutenborough v. Nat’l Football League, Inc.*, 59 F.3d 580, 583 (6th Cir. 1995) (determining that places of public accommodation are limited to physical “facilities”).

110. *Nat’l Fed’n of the Blind v. Scribd, Inc.*, 97 F. Supp. 3d 565, 573 (D. Vt. 2015).

111. *See id.*

112. *See id.*

113. *See Nat’l Ass’n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 200 (D. Mass. 2012) (“[E]xcluding businesses that sell services through the Internet from the ADA would ‘run afoul of the purposes of the ADA’”) (quoting *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n, Inc.*, 37 F.3d 12, 20 (1st Cir. 1994)).

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The more tempered approach favored by other courts, including the Ninth and Eleventh Circuits, focuses on the “nexus” theory—whether the alleged non-compliant place or process has a sufficient nexus to a physical space that *is* a public accommodation.<sup>114</sup> Simply stated, the goods and services provided by a public accommodation must have a sufficient connection or “nexus” to a physical place in order to be liable under the ADA.<sup>115</sup> Therefore, a business’ website violates Title III when it impedes the “full and equal enjoyment” of the goods and services offered at that business’ physical establishment to people with disabilities.<sup>116</sup> Conversely, if there is no effect on a disabled person’s access to goods or services at physical location, no ADA violation exists under this view.<sup>117</sup>

#### D. The Netflix Problem

The inconsistent approaches to websites under Title III of the ADA has led to conflicting results across different jurisdictions. *Cullen v. Netflix* and *National Association of the Deaf v. Netflix* serve as the best example of the problem as two cases involving the Internet streaming service in two different jurisdictions that reached opposing results in the same year.<sup>118</sup> In both cases, plaintiffs argued the streaming site failed to fully subtitle content in its library and therefore denied equal access to its service to people with hearing

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114. *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000) (interpreting Title III “suggest[s] that some connection between the good or service complained of and an actual physical place is required”); *see Rendon v. Valleycrest Prods.*, 294 F.3d 1279, 1284 (11th Cir. 2002) (identifying a nexus between remote technological eligibility process and access to “the privilege of competing in a contest held in a concrete space”).

115. *See, e.g., Earll v. Ebay, Inc.*, 599 Fed. App’x 695, 696 (9th Cir. 2015).

116. *See Nat’l Fed’n of the Blind v. Target, Corp.*, 452 F. Supp. 2d 946, 955–56 (N.D. Cal. 2006). (granting standing to plaintiffs that “alleged the inaccessibility of Target.com denie[d] the blind the ability to enjoy the services of Target stores”).

117. *Jancik v. Redbox Automated Retail, LLC*, No. SACV-13-1387-DOC (RNBx), 2014 WL 1920751, at \*9 (C.D. Cal. May 14, 2014) (holding a website was not place of public accommodation because there was not a sufficient nexus between its website and physical kiosks); *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1115 (N.D. Cal. 2011) (“Facebook operates only in cyberspace, and is thus not a place of public accommodation. . . . Although Facebook’s physical headquarters obviously is a physical space, it is not a place where the online services are offered to the public”); *Ouellette v. Viacom*, No. CV 10-133-M-DWM-JCL, 2011 WL 1882780, at \*4–5 (D. Mont. Mar. 31, 2011) (holding online theater websites were not physical places and not sufficiently connected to any physical structure).

118. *Cullen v. Netflix*, 880 F. Supp. 2d 1017 (N.D. Cal. 2012); *Nat’l Ass’n of the Deaf*, 869 F. Supp. 2d at 196.

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disabilities.<sup>119</sup> Under the more aggressive liberal construction approach, the U.S. District Court of Massachusetts was bound by the First Circuit precedent set in *Carparts* and ruled that Netflix's website was a place of public accommodation under Title III.<sup>120</sup> However, in the U.S. District Court for the Northern District of California, bound by Ninth Circuit precedent set in *Weyer*, the court applied the "nexus" approach.<sup>121</sup> The court held that Netflix's streaming website was *not* a place of public accommodation under Title III because it was only available via the Internet, not a physical location, so no nexus existed.<sup>122</sup> A series of recent decisions in the past year has only complicated these unpredictable results.

### E. Other Cases

In 2017 alone, businesses with an online presence faced a surge of demand letters and lawsuits regarding the inaccessibility of their websites to the visually impaired in violation of Title III of the ADA:

- In *Andres Gomez v. Bang & Olufsen America, Inc.* in February 2017, the U.S. District Court for the Southern District of Florida granted the defendant's motion to dismiss and relied on precedent to conclude that websites are wholly unconnected to any physical location and generally not subject to the ADA.<sup>123</sup> The court held "the ADA does not require places of public accommodations to create full-service websites for disabled persons . . . [but] if a retailer chooses to have a website, [it] cannot impede a disabled person's full use and enjoyment of the brick-and-mortar store."<sup>124</sup>
- In *Robles v. Domino's Pizza, LLC* in March 2017, the U.S. District Court for the Northern District of California deferred to the DOJ's authority when it ruled in favor of Domino's.<sup>125</sup> The plaintiff alleged that the Domino's website violated the ADA because it failed to meet WCAG 2.0 AA guidelines.<sup>126</sup> The court dismissed the case for two reasons: (1) the plaintiff failed to identify an ADA violation, especially in light of the fact that the Domino's website included a

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119. *Nat'l Ass'n of the Deaf*, 869 F. Supp. 2d at 199; *Cullen*, 880 F. Supp. 2d at 1021.

120. *Nat'l Ass'n of the Deaf*, 869 F. Supp. 2d at 200.

121. *Cullen*, 880 F. Supp. 2d at 1023.

122. *Id.*

123. *Gomez v. Bang & Olufsen Am., Inc.*, No. 16-CV-23801, 2017 WL 1957182, at \*4 (S.D. Fla. Feb. 2, 2017).

124. *Id.* at \*1.

125. *Robles v. Domino's Pizza, LLC*, No. CV-16-06599-SJO-SPX, 2017 WL 1330216, at \*8 (C.D. Cal. Mar. 20, 2017).

126. *Id.*

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banner readable by screen reader software that directed blind users to a 1-800 number where they could receive assistance from an operator in navigating the website; and (2) finding the website in violation of the ADA would violate Domino's due process rights because the DOJ had yet to promulgate new regulations on website accessibility.<sup>127</sup>

- In *Gorecki v. Hobby Lobby Stores, Inc.*, concluded in June 2017, the U.S. District Court for the Central District of California denied Hobby Lobby's motion to dismiss and went a step further in holding the retailer's website constituted a "public accommodation" under the ADA.<sup>128</sup> In justifying its holding, the court noted the website allowed consumers to accomplish a wide variety of activities, such as purchasing products, searching store locations, viewing discounts, obtaining coupons, and purchasing gift cards.<sup>129</sup> Finally, the court relied on other existing regulations issued by the DOJ requiring public accommodations "communicate effectively" with customers with disabilities through the use of auxiliary aids and services.<sup>130</sup>
- In October 2017, one of the first cases involving the application of the ADA to mobile apps emerged.<sup>131</sup> In *Reed v. CVS Pharmacy, Inc.*, the U.S. District Court for the Central District of California rejected CVS's motion to dismiss the suit and its argument that the court could not make a determination because there are no legally binding standards for website and mobile accessibility.<sup>132</sup> The court explained the lawsuit simply asked the court to make the same accessibility determination it would regularly make regarding the accessibility of physical locations.<sup>133</sup> This ruling will likely pave the way for further suits and settlements regarding mobile apps.
- In November 2017, a New Hampshire federal court ruled the ADA applied to a business' website in *Access Now, Inc. v. Blue Apron, LLC*.<sup>134</sup> The court denied the online food delivery company's motion to dismiss and held that Blue Apron's website was a place of public

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127. *Id.* at \*5.

128. *Gorecki v. Hobby Lobby Stores, Inc.*, No. CV 17-1131-JFW(SKX), 2017 WL 2957736, at \*5 (C.D. Cal. June 15, 2017).

129. *Id.* at \*1.

130. *Id.* at \*3.

131. *See Reed v. CVS Pharmacy, Inc.*, No. CV 17-3877-MWF (SKX), 2017 WL 4457508, at \*1 (C.D. Cal. Oct. 3, 2017).

132. *Id.* at \*4.

133. *Id.* at \*6.

134. *Access Now, Inc. v. Blue Apron, LLC*, No. 17-CV-116-JL, 2017 WL 5186354, at \*3 (D.N.H. Nov. 8, 2017).

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accommodation, in spite of the fact Blue Apron operates exclusively online and has no traditional physical locations for customers to visit.<sup>135</sup>

This brief list does not include the vast majority of cases that were settled out of court. Among the most notable, McDonald's, Kmart, Grubhub, and home supply company Empire Today recently settled cases alleging their websites or smartphone applications were not accessible to visually impaired customers.<sup>136</sup> Settlement is often preferred by defendants for several reasons. First, it keeps the determination out of the hands of a judge, which could lead to potentially unpredictable results; a court could determine standards arbitrarily or base their reasoning on misused expert testimony. Settlement also allows defendants to offer solutions that work best for its business, as opposed to following whatever remedial steps a judge orders, which can vary wildly. While ADA claims are only remedial and can only provide compensation for a plaintiff's legal fees, settlements often remain confidential, so the true "cost" of settling is difficult to gauge.<sup>137</sup>

Further, and most importantly, in June 2017, the U.S. District Court for the Southern District of Florida issued its opinion on *Gil v. Winn-Dixie Stores, Inc.*<sup>138</sup> The district court ruled in favor of Gil, holding that the grocery chain denied full and equal access to goods and services of a place of public accommodation.<sup>139</sup> The court ordered Winn-Dixie to make its website accessible to customers who rely on special software to use websites.<sup>140</sup> At the time, the company's Vice President of Corporate and Consumer Affairs announced that Winn-Dixie planned to appeal the judgement, stating that while the company is "sensitive to the needs of the visually impaired . . . the legal position regarding website standards are unclear and [it] believe[s] improvement can be achieved through customer dialogue, rather than through the courts."<sup>141</sup>

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135. *Id.*

136. Samantha Bomkamp, *McDonald's, Kmart, Others Settle Suits Over Website Access for the Blind*, CHI. TRIB. (Nov. 6, 2017), <http://www.chicagotribune.com/business/ct-biz-blind-website-settlements-20171107-story.html>; Wang, *supra* note 2.

137. *Id.*

138. *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340 (S.D. Fla. 2017).

139. *Id.* at 1349.

140. *Id.* at 1351.

141. Kramer, *supra* note 10.

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#### IV. ANALYSIS OF *GIL V. WINN-DIXIE, INC.*

The dispute in *Gil v. Winn-Dixie* centered on the ADA lawsuit by Juan Carlos Gil, a legally blind customer of Winn-Dixie Stores Inc.<sup>142</sup> Following a bench trial, the court ruled Winn-Dixie's website violated the ADA.<sup>143</sup> This case and the resulting verdict are notable for several reasons. As previously mentioned, *Gil* is the first case of its kind to go to trial and result in a ruling against a physical business for violating Title III of the ADA by having an inaccessible website.<sup>144</sup> The limited damages available under the ADA and relatively limited attorneys' fees resulting from these cases usually destine them to be settled early-on in litigation. In contrast to other cases that were either settled or decided upon pre-trial motions, this case proceeded to trial on a fact-intensive analysis of the website's inaccessibility with common screen reader software and was fielded by expert testimony.<sup>145</sup> Because of the trial and expert witness testimony, the court even ordered Winn-Dixie to comply with the very WCAG 2.0 guidelines the plaintiff suggested.<sup>146</sup>

As a district court decision, this ruling is not binding on other federal courts, but it does lay groundwork for other courts to replicate if an ADA website compliance case were to proceed to trial. This decision is also significant because any ruling in favor of a plaintiff can serve to embolden further plaintiffs to bring more ADA website accessibility lawsuits. Winn-Dixie appealed to the U.S. Court of Appeals for the Eleventh Circuit and filed its opening brief in October of 2017.<sup>147</sup> Finding themselves in danger of facing liability under the ADA for their website compliance, multiple trade groups across a dozen industries argued that the current caselaw has created "significant confusion" about the ADA and what is required to comply.<sup>148</sup> Unfortunately, the facts of *Gil v. Winn-Dixie* do not help to shed more light on those requirements.

##### A. Facts

Plaintiff Gil brought the action under Title III of the ADA, alleging the defendant's website was inaccessible to the visually impaired.<sup>149</sup> The suit sought declaratory and injunctive relief, as well as attorneys' fees and costs.<sup>150</sup> The parties did not dispute that Gil had a qualified disability and that

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142. *Gil*, 257 F. Supp. 3d at 1340.

143. *Id.* at 1349.

144. *Id.* at 1350.

145. *Id.* at 1346.

146. *Id.* at 1351.

147. Bruce, *supra* note 5.

148. Bruce, *supra* note 5.

149. *Gil*, 257 F. Supp. 3d at 1340.

150. *Id.*

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Winn-Dixie's physical grocery stores and pharmacies were considered public accommodations under Title III.<sup>151</sup> Plaintiff Gil, who is legally blind and has cerebral palsy, is able to use a computer but cannot see the screen.<sup>152</sup> He uses access technology software with a screen reader which automatically tells Gil what is on the website.<sup>153</sup>

Gil alleged he had shopped at Winn-Dixie's stores and pharmacies for years and had a member rewards card.<sup>154</sup> When Gil discovered the ability to access coupons and refill prescriptions online, Gil found that some 90% of the website did not work with his reading software.<sup>155</sup> The complaint offered over 500 other sites Gil used that were accessible, including other grocery store chains, such as Publix and Walgreens.<sup>156</sup> In order to receive remedy under the ADA, Gil noted he was "100% certain" he would return to Winn-Dixie stores once the website is accessible.<sup>157</sup>

In its response, Winn-Dixie admitted it was in the process of creating an ADA policy for its site, but that it had faced many obstacles.<sup>158</sup> First, Winn-Dixie claimed six different third parties, including Google and American Express, were needed to coordinate in modifying the interface of its own Winn-Dixie site to be ADA-compliant.<sup>159</sup> Second, Winn-Dixie claimed there were multiple screen readers and browser formats that needed to be accommodated, which caused complications. However, Gil's expert provided the most influential testimony for the court. The expert tested the website and suggested that the WCAG addressed all of the primary issues or problems found on the Winn-Dixie website.<sup>160</sup> He estimated it would cost much less than the \$250,000 the company reserved to fix the site (\$37,000 or less).<sup>161</sup>

For the district court, the most important facts regarding Winn-Dixie's website accessibility revolved around its pharmacy and coupons.<sup>162</sup> Winn-Dixie's website allowed customers to refill prescriptions online without ordering at the pharmacy, but the website was incompatible with screen-readers.<sup>163</sup> Gil alleged he did not wish to go into the pharmacy because he would

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151. *Id.*

152. *Id.* at 1343.

153. *Id.*

154. *Id.*

155. *Gil*, 257 F. Supp. 3d at 1344.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 1345.

160. *Id.*

161. *Gil*, 257 F. Supp. 3d at 1347.

162. *Id.* at 1349.

163. *Id.* at 1344.

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have to verbally inform the pharmacist what he needed and felt uncomfortable because he could not know if other people are nearby, listening.<sup>164</sup> Gil alleged he was filing to protect his privacy under HIPPA (Health Insurance Portability and Accountability Act of 1996—a data privacy law on the safeguarding of medical information) so that he did not have to verbally announce what medications he required at the pharmacy.<sup>165</sup>

As for the coupons, Gil's only way of reading coupons without website access would be to have a friend or store employee read the printed advertisements at the store.<sup>166</sup> An important distinction to draw is that Winn-Dixie does not conduct any sales directly from its website. However, the website does allow customers to access digital coupons which “link” to the customer's Winn-Dixie card, so it applies the discount upon purchase.<sup>167</sup> The only way to have a digital coupon link to a customer's reward card is through the Winn-Dixie website.<sup>168</sup>

## B. Holding & Rationale

In its analysis, the court acknowledged the existing split between courts on whether the ADA limits places of public accommodation to only physical spaces.<sup>169</sup> The court also acknowledged that the Eleventh Circuit had not addressed whether websites are public accommodations under the ADA.<sup>170</sup> Instead, the next best thing was the Eleventh Circuit's decision in *Rendon*, which ruled that the plain language of Title III of the ADA covers both physical barriers that prevent a disabled person from accessing a public accommodation as well as “intangible barriers, such as eligibility requirements and screening rules or discriminatory policies and procedures that restrict a disabled person's ability to enjoy the defendant entity's goods, services and privileges.”<sup>171</sup> Under the belief that intangible barriers could be covered under Title III, the district court relied on cases applying the “nexus” approach. Those courts concluded that while places of public accommodation must be physical spaces, the goods and services *provided by* a public accommodation can be covered under the ADA if they have a sufficient “nexus” to a physical place.<sup>172</sup>

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164. *Id.*

165. *Id.*

166. *Id.*

167. *Gil*, 257 F. Supp. 3d at 1345.

168. *Id.*

169. *Id.* at 1348.

170. *Id.*

171. *Id.* (quoting *Rendon v. Valleycrest Prods.*, 294 F.3d 1279, 1284 n.8 (11th Cir. 2002)).

172. *See Earll v. Ebay, Inc.*, 599 Fed. App'x 695, 696 (9th Cir. 2015) (the term “place of public accommodation” requires a connection between the good or

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Upon this foundation, the court developed its own legal reasoning based on the “nexus” test and considered how heavily “integrated” a website was into physical locations themselves. The Court recognized that where a website was “heavily integrated with brick-and-mortar stores and operates as a gateway to the physical store locations,” courts have found it to be a service of a public accommodation and therefore covered by the ADA.<sup>173</sup> Under this logic, the court reasoned the services offered on Winn-Dixie’s website (such as the online pharmacy system, digital coupons, and the ability to find store locations) are “undoubtedly services, privileges, advantages, and accommodations offered by Winn-Dixie’s physical store locations.”<sup>174</sup> The court found these accommodations especially important for visually impaired individuals because “it is difficult, if not impossible, for such individuals to use paper coupons found in newspapers or in the grocery stores, to locate the physical stores by other means, and to physically go to a pharmacy location in order to fill prescriptions.”<sup>175</sup>

The court concluded that Winn-Dixie’s website was inaccessible to visually impaired individuals who must use screen reader software, and therefore, Winn-Dixie had violated the ADA because the inaccessibility of its website “denied Gil the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations that Winn-Dixie offers to its sighted customers.”<sup>176</sup> However, the court noted it need not decide whether Winn-Dixie’s website is a public accommodation itself, because the factual findings demonstrated the website was “heavily integrated” with Winn-Dixie’s physical store locations and “operates as a gateway” to the physical store locations.<sup>177</sup>

The court found injunctive relief appropriate because Winn-Dixie presented no evidence it would be unduly burdensome to make its website accessible to visually impaired individuals.<sup>178</sup> The court concluded the cost of the upgrade did not matter even though the business had \$250,000 budgeted, because that amount “pales in comparison” to the \$2 million Winn-Dixie spent creating the website and the subsequent \$7 million overhaul to accommodate the rewards program in 2016.<sup>179</sup> The court also held it was feasible

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service alleged and a physical place); *see also Rendon*, 294 F.3d at 1284 n.8 (noting that some courts require a nexus between the challenged service and the public accommodation).

173. Nat’l Fed’n of the Blind v. Target, Corp., 452 F. Supp. 2d 946, 953–55 (N.D. Cal. 2006).

174. *Gil*, 257 F. Supp. 3d at 1349.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 1350.

179. *Id.* at 1347.

for Winn-Dixie to repair the site.<sup>180</sup> Further, the court explained its view that third parties are not an insurmountable obstacle, as they either already must comply to meet the same ADA requirement or Winn-Dixie has a “legal obligation” to require them to do so if they are part of site.<sup>181</sup>

The court ordered Winn-Dixie to conform its website with the WCAG 2.0 criteria and allow visually impaired consumers to enjoy full and equal enjoyment of the services, facilities, privileges, advantages, and accommodations provided.<sup>182</sup> It is important to note the district court did not go as far as it could have; the ruling did not declare the website a public accommodation in itself, instead only holding it was heavily integrated enough into the full enjoyment of a public accommodation’s goods and services.<sup>183</sup> However, that technicality can make this ruling more likely to be upheld, because the holding is not as significant of a departure on the application of Title III as other courts that simply classified websites as places of public accommodation. Winn-Dixie has appealed and filed its opening brief in October 2017.<sup>184</sup> Gil submitted the appellee’s brief late December 2017.<sup>185</sup> Oral arguments have been tentatively scheduled for May 2018.<sup>186</sup>

## V. COMPETING CONSIDERATIONS & ALTERNATIVE SOLUTIONS

### A. Analysis of Competing Interests

#### 1. Economic Impact of ADA Claims and the Fear of Litigation

In the view of businesses, plaintiffs have been virtually unchecked in raising web accessibility claims. Companies across the country fear receiving demand letters from plaintiffs’ firms and disability rights advocacy groups alleging the company is violating Title III of the ADA. The litigation in *Gil v. Winn-Dixie* is an example of the concern. While he was depicted as a loyal Winn-Dixie customer with few shopping alternatives, Gil has filed suit against many other companies and has been winning and settling cases in large volumes.<sup>187</sup> Even the district courts’ written version of the facts cast Gil in an unusually warm light, listing his volunteer activities, education, and

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180. *Gil*, 257 F. Supp. 3d at 1347.

181. *Id.*

182. *Id.* at 1350.

183. *Id.* at 1348.

184. Brief for Petitioner, *Gil v. Winn-Dixie Stores, Inc.* 257 F. Supp. 3d 1340 (2017) (No. 17-13467).

185. *Id.*

186. *Id.*

187. Gwen Filosa, *Blind Man Settles ADA Lawsuit with Hawks Cay*, FLA. KEYS NEWS (Dec. 27, 2017), <http://www.flkeysnews.com/news/local/article191740014.html>.

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participation in Para-Olympic events.<sup>188</sup> Another notable achievement is that Gil has filed nearly seventy lawsuits alleging that various companies' websites violate the ADA.<sup>189</sup> Winn-Dixie was the third such lawsuit he filed.<sup>190</sup> It is probable this prolific plaintiff activity is what triggered the DOJ's somewhat unexpected commentary in his case. An independent account showed that, as of October 2017, Gil's attorney had filed forty-three percent of the 244 federal website accessibility cases filed so far that year.<sup>191</sup> Sean Gorecki, the plaintiff that obtained a settlement in the McDonald's case, is also a plaintiff in dozens of similar lawsuits against companies including Chili's parent Brinker International, Quizno's, Arby's, T.G.I Friday's, Red Lobster, Sizzler, Supercuts, Bath & Body Works, and Build-a-Bear Workshop.<sup>192</sup>

In addition to the frequency of litigation, the cost of adjusting a website to meet guidelines that do not exist presents another challenge for potential defendants. As demonstrated in *Gil*, the lack of any standards defining compliance means disagreement arises even when parties measure the approximate cost of retrofitting an existing website to be accessible.<sup>193</sup> Target, for example, had to pay approximately \$10 million in damages and legal fees to settle a class action lawsuit with the National Federation of the Blind in addition to its agreement to make its website accessible to customers with disabilities.<sup>194</sup> It is important to note that private entities must make their websites compatible with assistive technologies of various kinds, not just those for consumers with visual impairments. Making a website accessible to assistive technology also requires very technical knowledge that seemingly exists beyond the traditional skillset of employees who are typically responsible for running a website. For example, the Vice President of Information Technology at Winn-Dixie was regarded as having the most knowledge on website

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188. *Gil*, 257 F. Supp. 3d at 1344.

189. John O'Brien, *First-of-Its-Kind Trial Goes Plaintiff's Way; Winn-Dixie Must Update Website for the Blind*, FORBES (June 13, 2017), <https://www.forbes.com/sites/legalnewslines/2017/06/13/first-of-its-kind-trial-goes-plaintiffs-way-winn-dixie-must-update-website-for-the-blind>.

190. *Id.*

191. Kristina M. Launey, *A Cautionary Tale: DOJ Intervenes in Another Web Accessibility Lawsuit*, SEYFARTH SHAW (Dec. 13, 2016), <https://www.adatitleiii.com/2016/12/a-cautionary-tale-doj-intervenes-in-another-web-accessibility-lawsuit>.

192. Bomkamp, *supra* note 136.

193. *Gil*, 257 F. Supp. 3d at 1346.

194. Jonathon Hensley, *The High Cost of Digital Discrimination: Why Companies Should Care About Web Accessibility*, GUARDIAN (Dec. 31, 2016), <https://www.theguardian.com/sustainable-business/2015/dec/31/digital-discrimination-netflix-disney-target-web-accessibility-doj>.

digital applications, yet even he had little experience or awareness of the depth of the work required to make Winn-Dixie's website accessible.<sup>195</sup>

Due to both the cost of modifying a website to better comply with assistive-reading technology and the uncertainty as to whether any steps taken would satisfy a court's interpretation of the law, private entities may be less inclined to adopt technology that would help improve their services or operations if it could trigger an unforeseen ADA claim. The advent and expansion of mobile applications as an alternative to traditional websites has only expanded this uncertainty. Mobile applications or mobile-only services are slowly becoming part of the types of entities in the crosshairs of web accessibility suits.<sup>196</sup> The ADA's application to web content will only continue to expand as services become more and more web-based.

## 2. The Social Impact of an ADA "Discrimination" Claim

The direct economic risks of an ADA website suit can be roughly estimated, but less direct effects can take their toll on private entities subject to Title III. First, by the language of the law, website accessibility lawsuits must allege that "discrimination" under the ADA occurred in some manner.<sup>197</sup> While the devastating impact of social stigmatization to people with disabilities must always be at the forefront,<sup>198</sup> policymakers must also acknowledge the indirect impacts on local commerce. Companies that fail to design accessibility into their web-based consumer platforms are exposed to a palpable risk of reduced revenues, lost customers, and a damaged reputation.<sup>199</sup>

Businesses found guilty of "discriminating" against people with disabilities face an uphill battle to redeem their public image. More than ever, consumers actively make their purchasing decisions based on a business' stance or actions regarding prominent social issues.<sup>200</sup> The impact of this problem extends beyond traditional businesses and affects other "private" entities, including schools and colleges.<sup>201</sup> For example, if consumers actively make purchasing decisions based on the social impact of traditional profit-oriented

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195. *See Gil*, 257 F. Supp. 3d at 1344.

196. Brian Solomon, *Shopping Apps Are Now the Fastest Growing Thing in Mobile*, FORBES (Jan. 6, 2015), <http://www.forbes.com/sites/briansolomon/2015/01/06/shopping-apps-are-now-the-fastest-growing-thing-in-mobile>.

197. 42 U.S.C. § 12182(a) (2008).

198. Samuel R. Bagenstos, *Subordination, Stigma, and "Disability"*, 86 VA. L. REV. 397, 437 (2000).

199. Hensley, *supra* note 194.

200. *See generally* Jena McGregor, *Why "Buycotts" Could Overtake Boycotts Among Consumer Activists*, WASH. POST (Feb. 28, 2018), <https://www.washingtonpost.com/news/on-leadership/wp/2018/02/28/why-buycotts-could-overtake-boycotts-among-consumer-activists>.

201. Wang, *supra* note 2.

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businesses, then prospective students are likely to avoid schools alleged to have discriminated against people with disabilities.

### 3. Rationale for the ADA

The ADA was signed into law in 1990 because Congress concluded that individuals with disabilities commonly faced discrimination in modern society.<sup>202</sup> Congress found people with disabilities wound up leading socially and economically disadvantaged lives, so it sought to extend civil rights protections seen in the Civil Rights Act of 1964 and the Rehabilitation Act of 1973. While the Rehabilitation Act of 1973 prevented discrimination by public entities such as government agencies, it did not restrict discrimination from privately owned places of public accommodation, such as schools, restaurants, or hospitals. Even when originally designed, the architects of the ADA acknowledged that law's scope must extend beyond tangible barriers; congressional hearings demonstrated that Congress sought to ensure people with disabilities feel welcome and address their fears about participating safely in places of public accommodation.<sup>203</sup>

However, common accessibility issues often arise for people with disabilities when the Internet is involved. These issues can vary among individuals with disabilities depending on their impairment; issues regarding website compatibility can render a website completely inaccessible to many kinds of people with disabilities, not just those with visual impairments. While individuals with visual disabilities can rely on assistive technology to read website content, websites must still possess underlying code instructing the device on how to describe graphic content and navigate the page. Thus, if a site owner takes no affirmative steps to make their website compatible, a webpage is likely to become indecipherable to an individual relying on an assistive technology. The rapid adoption of online content by both consumers and businesses only increases the potential for accessibility hurdles. To rectify these issues and establish their rights, individuals with disabilities began to bring new lawsuits in court that specifically targeted websites as places of public accommodation.<sup>204</sup>

The nature of the ADA is that of a remedial statute; it is not meant to provide large monetary damages to harmed plaintiffs, only reasonable legal fees and a court order requiring an entity to remedy the issue.<sup>205</sup> However, the confidential nature of most settlements does little to reveal any additional costs required to settle an ADA accessibility claim out of court.

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202. See 29 U.S.C.A. § 794; H.R. Rep. No. 101-485, pt. 4, at 28 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 310.

203. H.R. REP. NO. 101-485, pt. 4 at 28.

204. See, e.g., *Gomez v. Gen. Nutrition Corp.*, 323 F. Supp. 3d 1368, 1378 (S.D. Fla. 2018); *Walker v. Sam's Oyster House, LLC*, No. 18-193, 2018 WL 4466076, at \*4 (E.D. Pa. 2018).

205. 42 U.S.C. §§ 12188(a), 12205, 2000a-3(b).

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## B. Alternatives & Solutions

As a result of the ongoing split in ADA interpretations, judicial agreement will likely only be fostered if the Supreme Court decides to hear a case on the matter. Otherwise, the judicial split will continue to exist. This underscores why cases such as *Gil v. Winn-Dixie* are so important—because they offer eligible cases for the Supreme Court to review and attempt to settle the matter. Nonetheless, this issue has been developing for years with no sign that the Court plans to address it soon. In reviewing *Gil* on appeal, the Eleventh Circuit will likely follow its own precedent set in *Rendon*, which adopted the use of the nexus test for ADA claims.<sup>206</sup> Additionally, the Ninth Circuit is reviewing a district court's dismissal of a website accessibility suit against pizza giant Domino's.<sup>207</sup> If the court upholds the dismissal as anticipated, it may result in a large reduction of website accessibility claims in federal courts bound by Ninth Circuit.<sup>208</sup> Even if the number of such claims decrease in the Ninth Circuit, there is no reason to believe the ongoing surge of website accessibility lawsuits will slow down in other jurisdictions.<sup>209</sup>

### 1. DOJ Issuing Regulations or Guidance

While the DOJ had maintained a posture indicating support for expanding Title III to include websites, the most recent news has represented an about-face.<sup>210</sup> Though the DOJ left the door open for taking further action if necessary, it made no commitments and has not provided any further timelines. Unfortunately, DOJ guidance would likely provide the most effective remedy, because it would fill in the gaps of the ADA and offer clearer guidelines for compliance. Even if the DOJ intended to address the problem, any action would not generate immediate results. Though the DOJ could immediately issue commentary on the proper application of Title III, courts would only look to it as a guideline, not as steadfast regulation. The DOJ could begin anew the rule making process to issue regulations, but that process is time-intensive and any lasting regulations could take years. From issuing an advance notice of proposed rulemaking in 2010, it took the DOJ six years just to announce it would postpone any rulemaking to 2018, before the current administration reversed course and announced no new rules would be

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206. *Rendon v. Valleycrest Prods.*, 294 F.3d 1279, 1284 (11th Cir. 2002).

207. Vu & Ryan, *supra* note 7.

208. Vu & Ryan, *supra* note 7.

209. Vu & Ryan, *supra* note 7.

210. *Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions*, *supra* note 8.

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issued.<sup>211</sup> Thus, the likelihood of intervention by the DOJ is low and progress could be years away.

## 2. Congressional Revision of the ADA

While the Internet existed in 1990, it was nowhere near as prevalent as it is today.<sup>212</sup> At the time, Congress did not address the effects of the ADA on the Internet, and even the statute's definition of public accommodation does not specifically refer to the Internet. Congress was successful in revising the ADA in 2008, when Congress amended the law to better define protected disabilities.<sup>213</sup> Congress took this action specifically because it determined courts were misinterpreting the ADA and defining the meaning of a disability far too narrowly.<sup>214</sup> Congress even called attention to specific cases in which it felt the courts strayed too far from the ADA.<sup>215</sup> However, none of the 2008 ADA amendments made any mention of web content, leaving the judiciary with the task of interpreting the existing law. The current state of political dysfunction does not indicate an optimistic likelihood that Congress can successfully pass amendments to the ADA on any topic, let alone on website accessibility.

In addition, any local- or state-level regulation will not help resolve this federal law issue. The ADA does not preempt any other law, whether federal, state, or local, as long as the other law grants protections equal to or greater than those provided by the ADA.<sup>216</sup> However, setting up clear guidelines (that by definition must be as stringent as the ADA) is a difficult task for lawmakers. Due to the vague nature of this law—that does not mention the Internet but is applied to websites—it is unclear as to what an equivalent level of local regulation would be. Additionally, even if local or state legislatures take up the issue and provide *greater* protections than those granted in the ADA, the results may only serve to upset private entities within that jurisdiction. Any company in a local or state jurisdiction that enacts its own website compliance laws with greater protections will find themselves forced

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211. *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of Public Accommodations*, 75 Fed. Reg. 43460 (proposed July 26, 2010); Robert, *supra* note 6.

212. *Web Content Accessibility Guidelines (WCAG) 2.0*, *supra* note 60.

213. Congress intended for the term “disability” under the ADA to be interpreted similarly to how it was interpreted under the Rehabilitation Act of 1973. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

214. *Id.*

215. *Id.*

216. *Policy Brief Series: Righting the Americans with Disabilities Act*, NAT'L COUNCIL ON DISABILITY (Oct. 21, 2003), <https://ncd.gov/publications/2003/Oct212003>.

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to adhere to a local law (with higher standards than the ADA) which does not guarantee any protection from federal ADA claims.<sup>217</sup>

### 3. Self-Adhering to Accessibility Standards

As more and more private entities begin to expand their services through web or mobile-based technologies that are accessible from any place with internet access, they expose themselves to potential ADA liability. Because an ADA suit could be brought in various federal jurisdictions (even simultaneously and often with differing interpretations of the law), private entities must operate as if their websites are places of public accommodation. Otherwise, the risk of liability could be too great. The best way to prevent a website accessibility lawsuit or increase the chances of its dismissal is to take affirmative steps in making one's own website compatible with accessibility technology.

In the absence of any codified standards, self-adhering to the WCAG 2.0 may be the best way to demonstrate that a website is accessible. The WCAG 2.0 provides the most reliable standards for website accessibility conformance because it is the most prominent set of accessibility standards and has been embraced by courts, such as in *Gil v. Winn-Dixie*.<sup>218</sup> In addition, the DOJ has acknowledged the WCAG 2.0 as a benchmark and even used it in website accessibility proceedings.<sup>219</sup> By conforming to the WCAG 2.0, website operators can avoid liability by preventing compatibility issues from ever arising for customers. Further, showing conformance to WCAG 2.0 can help an entity under Title III demonstrate it has made its website as accessible as necessary under the ADA.

Beyond the prevention of litigation, embracing website accessibility reform is in the best interest of businesses. It improves the customer experience for a legally-protected segment of the population and prevents negative publicity due to accessibility barriers. A website accessible to more people inherently increases the pool of potential customers able to interact with the site, thus increasing potential exposure or revenue. One recent decision from late 2017 suggested an accessible website "banner" providing a staffed telephone number to address accessibility issues could be a means of compliance in lieu of a fully accessible website.<sup>220</sup> The court reasoned that if a defendant can show telephonic access provides equal access, no violation of the ADA oc-

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217. *See id.*

218. 257 F. Supp. 3d 1340, 1343 (S.D. Fla. 2017).

219. *Justice Department Settles with McLennan County, Texas, Regarding Accessibility of County Services Under the Americans With Disabilities Act*, DEP'T JUST. (Nov. 17, 2015), <https://www.justice.gov/opa/pr/justice-department-settles-mclennan-county-texas-regarding-accessibility-county-services>.

220. *See Gorecki v. Dave & Buster's*, No. 17-cv-1138 PSG (AGRx), 2017 WL 6371367, at \*7 (C.D. Cal. Oct. 10, 2017).

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curred.<sup>221</sup> Of course, as discussed in Part III, compliance in one jurisdiction does not guarantee compliance in others.

## VI. CONCLUSION

The ADA, as it exists, does not serve the interests of parties on either side. Current interpretation of the vague language of the ADA leaves inconsistent and unreliable protections for individuals with disabilities. Congress intended for the ADA “to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.”<sup>222</sup> Unfortunately, little is consistent or clear regarding the opposing outcomes in the *Netflix* cases, for example.<sup>223</sup> The precise scenario noted in the dissent of *Parker*<sup>224</sup> has slowly become reality: as establishments continue to integrate their services online, the protections offered by Title III of the ADA continue to be diluted. Even legal compromises such as the nexus test do not help because they still require a court to establish a somewhat dubious connection between an alleged discrimination claim and a physical place of public accommodation.<sup>225</sup>

If the unpredictable state of ADA website law leaves business vulnerable, then those intended to be protected by the law suffer just as much, because it would essentially require a legal background just to determine the obscure extent of one’s own rights in a particular jurisdiction. Advocates may argue that the ADA *is* working as intended, because it is getting results for plaintiffs that experience discrimination, albeit in an incongruous manner. This argument claims that the ADA is working as intended in deterring entities from maintaining inaccessible websites because the net effect achieves some level of change by causing business to make their websites accessible. However, causing businesses to modify their services and be accessible to individuals with disabilities out of fear of litigation is an alarmingly inefficient process delivering, at best, inconsistent results. Just as the court in *Access Now* warned, the judicial expansion of the ADA’s reach to include non-physical spaces “create[s] new rights without well-defined standards.”<sup>226</sup>

Entities that could fall under Title III are left with no instructions on how to demonstrate they comply with the ADA. Simply put, these entities

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221. *Id.*

222. 42 U.S.C. § 12101(2) (2009).

223. *See generally* Nat’l Ass’n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 196 (D. Mass. 2012); Cullen v. Netflix, 880 F. Supp. 2d 1017, 1017 (N.D. Cal. 2012).

224. *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1019 (6th Cir. 1997).

225. *See* Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n, Inc., 37 F.3d 12, 19–20 (1st Cir. 1994).

226. *Access Now v. Southwest Airlines*, 227 F. Supp. 2d 1312, 1318 (S.D. Fla. 2002).

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cannot follow rules that do not exist. While the DOJ has abandoned the cause to salvage the situation and fails to provide leadership on the issue,<sup>227</sup> courts continue to conjure their own brands of justice in applying the ADA. While the DOJ is not likely to push the previous administration's pro-website accessibility agenda, its inaction will not stop more lawsuits. Though an amendment to the ADA could curb excessive lawsuits, an amendment is highly unlikely.<sup>228</sup> Congress has made significant revisions only once in the twenty-eight years since the law was enacted. Surprisingly, the ADA still does not mention the Internet. As the court in *Domino's* ruled, finding a private entity's website liable for discrimination would violate its due process rights because the DOJ has not yet promulgated new regulations on website accessibility.<sup>229</sup> Thus, the best risk mitigation effort for any potential Title III entities is still to make their websites accessible as soon as possible.

The fact remains that the current state of the ADA does not adequately serve both those that the statute is enforced upon and those it was intended to protect. Even companies wishing to fully comply with the law have no certain way to do so, because the lack of any regulations leaves the creation of accessibility standards to a district court judge. The net effect leads businesses nowhere in addressing the problem without lawsuits and leaves plaintiffs hoping that they sued in the right jurisdiction.

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227. *Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions*, *supra* note 52; *2017 Inactive Regulations*, *supra* note 50.

228. *Vu & Ryan*, *supra* note 7.

229. *Robles v. Domino's Pizza, LLC*, No. CV-16-06599-SJO-SPX, 2017 WL 1330216, at \*2 (C.D. Cal. Mar. 20, 2017).