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Clicks, Bricks, and Politics: Website Accessibility Under Title II and Title III of the Americans with Disabilities Act

Elliza Guta*

I. INTRODUCTION

The Internet's role in modern society is constantly expanding. While only a few thousand websites were in existence in the early 1990s, there are almost two billion active websites today.[1] Every major business, news source, health care provider, and government entity has an online presence and the nation's reliance on the Internet is growing. The role of the Internet in Americans' daily lives is not a new phenomenon, but in the wake of the COVID-19 pandemic, the use of the Internet and online technology has dramatically increased. Whether it's grocery shopping, zoom-school, or checking local infection rates, the pandemic has only further cemented the role of websites and online media platforms in our lives.[2]

Despite the increasing importance of the Internet, many websites remain inaccessible to over sixty million disabled individuals living in America today.[3] While the advent of new assistive technologies makes it

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1. *Total Number of Websites*, INTERNET LIVE STATS, https://www.internetlivestats.com/total-number-of-websites/ (last visited Jan. 5, 2022).

2. *See* Randy Pavlicko, *The Future of the Americans with Disabilities Act: Website Accessibility Litigation After Covid-19*, 69 CLEV. ST. L. REV. 953, 954 (2021).

3. One in four individuals in America has a disability. *Disability Impacts All of Us,* CDC, https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-

possible for disabled individuals to access the Internet and use computers in ways that were previously impossible, the "digital divide" persists as businesses continually fail to create and modify websites to work with assistive technologies.[4] The large-scale transition from brick-and-mortar services to "click-and-mortar" services illustrates that the problem of website accessibility is not disappearing anytime soon.[5] In response to this growing problem, the disabled community has filed countless lawsuits against both government and private entities under the Americans with Disabilities Act (ADA).[6]

Although the ADA was created to remedy the pervasive problem of discrimination against disabled individuals, the ADA's application to websites remains unclear. The majority of website accessibility claims have been filed against private entities under Title III of the ADA.[7] For over twenty years, courts have debated whether websites are places of public accommodation subject to Title III's accessibility requirements.[8] Recently, there has been an influx of claims brought against public

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all.html#:~:text=61%20million%20adults%20in%20the,is%20highest%20in%20the%20South (last visited Jan. 5, 2022). After surveying the top one million websites, WebAIM, a non-profit website accessibility evaluator, concluded that 97.4% of websites remain inaccessible to individuals with disabilities. *The WebAIM Million: An Annual Accessibility Analysis of the Top 1,000,000 Home Pages*, WEBAIM, https://webaim.org/projects/million/ (last visited Jan. 5, 2022). Of the seventy-two most frequently used government websites, 30% had inaccessible homepages. Natalie Alms, *Many Federal Website Don't Meet Accessibility Requirements, Study Finds,* THE BUSINESS OF FEDERAL TECHNOLOGY (Jun. 6, 2021), https://fcw.com/articles/2021/06/06/federal-websites-accessibility-study.aspx?utm_medium=email&_hsmi=132720989&_hsenc=p2ANqtz-9uTYbgrELPJaN0dSNvmRg6IvGV1YFccfWktEsk9MdcY6u3R27xM7Q2JFTgAlpBs6SKUjo9mzQIuGEPQKkkgA7SR7rtQQ&utm_content=132720989&utm_source=hs_email.

4. Arjeta Albani, *Equality in the Age of the Internet: Websites Under Title III of the Americans with Disabilities Act*, 13 J. BUS. & TECH. L. 97 (2017).

5. Alexandra Twin, *Click and Mortar*, INVESTOPEDIA, https://www.investopedia.com/terms/c/click_and_mortar.asp (last visited Jan. 5, 2022); *See also* Christopher Mullen, *Places of Public Accommodation: Americans with Disabilities and the Battle for Internet Accessibility*, 11 DREXEL L. REV. 745 (2019).

6. *See*, *e.g.*, Ernesto Claeyssen, *Buy It on the 'Gram: The Need to Extend the Americans with Disabilities Act to the E-Commerce World*, 72 RUTGERS U.L. REV. 1517, 1523 (2021); Ashley Cheff, *The Website Accommodations Test: Applying the Americans with Disabilities Act to Websites*, 26 WM. & MARY J. RACE, GENDER & SOC. JUST. 261 (2020).

7. In 2018, over 10,000 claims of website inaccessibility under Title III of the ADA were filed. Minh Vu et al., *Website Accessibility Cases Push ADA Lawsuits to New High*, TLNT (Feb. 21, 2019), https://www.tlnt.com/website-accessibility-cases-push-ada-lawsuits-to-new-high/.

8. *See* Nancy J. King, *Website Access for Customers with Disabilities: Can We Get There from Here?*, UCLA J.L. & TECH. 6 (2003).

entities under Title II.[9] While the courts are divided on the application of Title III to claims against private entities,[10] courts largely agree Title II applies to the websites of public entities.[11] Nevertheless, courts continually struggle with the appropriate standards to determine whether a government entity's website is accessible.[12] The lack of clear and consistent standards illustrates that the solution to the problem of website inaccessibility is not further judicial intervention. Instead, the best way to address the digital divide is to amend the text of the statute and promulgate regulations to provide comprehensive standards applicable specifically to website accessibility claims.

This Comment analyzes website accessibility claims under both Titles II and III of the ADA. Part two of this Comment outlines key terms in website accessibility caselaw to familiarize readers with the technological barriers faced by disabled individuals and current attempts by non-profit organizations to create comprehensive standards that remedy these barriers. Part three of this Comment provides an overview of the history and purpose of the ADA, with an emphasis on the two emerging perspectives on how the text should be interpreted. Part four delves into the application of the ADA to website accessibility claims. Part five provides an overview of Title II caselaw and part six gives an in-depth analysis of the circuit split in Title III caselaw. Part seven discusses the implications of website accessibility caselaw on businesses and individuals with disabilities, highlighting the insufficiencies of the current piecemeal litigation approach to securing rights. Lastly, part eight evaluates three potential remedies to the problem of website inaccessibility: (1) continued judicial interpretation, (2) promulgating regulations, and (3) amending the text of the statute.

II. THE DIGITAL DIVIDE

A. Defining Website Accessibility

The World Wide Web Consortium[13] defines "website accessibility" as the ability to perceive, understand, navigate, interact, and contribute to

9. Elizabeth Bowersox, *Municipalities and Universities New Targets in ADA Website Accessibility Lawsuits*, JDSUPRA (Mar. 1, 2019), https://www.jdsupra.com/legalnews/municipalities-and-universities-new-65775/.

10. *See infra* Part VI.

11. *See infra* Part V.

12. *See infra* Part V.

13. The World Wide Web Consortium (WSC) is an international non-profit organization that creates standards to foster website accessibility. *About W3C*, W3C WEB

the web.[14] In the context of anti-discrimination litigation, the term "website accessibility" describes a broad-based movement to remove intangible barriers to online platforms, so individuals with disabilities can access the online content available to non-disabled individuals.[15] Common examples of these barriers include: lack of closed captioning on videos and audio content, insufficient color contrasting, and the inability to magnify text.[16] For example, an individual who is legally blind or has low vision may rely on screen readers to access online content. Screen readers are software programs that translate online text into audio content or braille to help visually impaired individuals "read" the online text and navigate the webpage.[17] Websites that lack headings, contain links with vague descriptors, such as "click here," or lack alternative text to describe images displayed on the page, make it increasingly difficult for individuals to navigate the webpage using screen reader software.[18] The website accessibility movement focuses on removing these barriers. Most website accessibility claims address accessibility issues faced by individuals with vision-, hearing-, and mobility-impairments.[19]

B. Applicable Standards

The ADA is silent on the appropriate standards web developers should follow when creating online content. The ADA does not mention

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ACCESSIBILITY INITIATIVE (WAI), https://www.w3.org/Consortium/ (last visited Jan. 5, 2022).

14. *Introduction to Web Accessibility*, W3C WAI, https://www.w3.org/WAI/fundamentals/accessibility-intro/#what (last visited Jan. 5, 2022).

15. Jessica Navarro, *The 10 Most Common Accessibility Issues*, SITEIMPROVE (Jul. 6, 2021), https://siteimprove.com/en-us/blog/common-accessibility-issues/.

16. *Id.*; *The Most Common Web Accessibility Issues to Avoid*, BUREAU OF INTERNET ACCESSIBILITY (Nov. 3, 2017).

https://www.boia.org/blog/the-most-common-web-accessibility-issues-to-avoid.

17. *Screen Readers*, AMERICAN FOUNDATION FOR THE BLIND, https://www.afb.org/blindness-and-low-vision/using-technology/assistive-technology-products/screen-readers (last visited Jan. 5, 2022).

18. *Make Your Webpages Accessible*, AMHERST COLLEGE, https://www.amherst.edu/help/web-tips/make_accessible (last visited Jan. 5, 2022).

19. *See* Gavin Appleby et. al., *The Wave of Website and Other ADA Accessibility Claims–What You Should Know*, INSIGHT (Feb. 22, 2016), https://www.littler.com/files/2016_2_the_wave_of_website_and_other_ada_accessibility_claims.pdf; *See also* Ryan C. Brunner, *Websites As Facilities Under ADA Title III*, DUKE L. & TECH. REV. 171, 191 n.170 (2017); Laura Wolk, *Equal Access in Cyberspace: On Bridging the Digital Divide in Public Accommodations Coverage Through Amendment to the Americans with Disabilities Act*, 91 NOTRE DAME L. REV. 447, 475 (2015).

the Internet or websites. And the Department of Justice (Department)—the agency responsible for promulgating regulations under Titles II and III of the ADA—has also not published regulations on website accessibility.[20] However, the Department has informally endorsed, and courts have occasionally adopted the Web Content Accessibility Guidelines (WCAG) as the appropriate standard for website accessibility.[21] The WCAG are guidelines developed by the World Wide Web Consortium (W3C), to help web developers, businesses, and public entities create websites that are easily navigable for individuals with disabilities.[22] Although no standard can perfectly outline the necessary components of website accessibility,[23] the WCAG standards are detailed, comprehensive, and generally regarded as the gold standard for assessing whether a website provides equal access to individuals with disabilities.[24] Nevertheless, while some courts have referred to the standards as a potential equitable remedy for violations of the ADA's accessibility requirements, not all courts have endorsed WCAG's adoption.[25] As a result, there are currently no nationwide standards for businesses and public entities to reference with confidence that conformity to those standards will ensure compliance with the law.

III. HISTORY AND PURPOSE OF THE ADA

The ADA is a sweeping statute, enacted to remedy the widespread discrimination faced by disabled Americans.[26] A uniquely bipartisan bill, the ADA passed the House and the Senate by a wide margin.[27]

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20. 42 U.S.C. § 12186(b) (2021).

21. 28 C.F.R. pt. 36, app. 1, 196 (2010).

22. The first set of guidelines, WCAG 2.0, were published in December 2008. WCAG 2.0 was superseded by WCAG 2.1 in June 2018 and W3C has announced plans to publish updated guidelines in 2022. *Web Content Accessibility Guidelines (WCAG) Overview*, W3C WAI, https://www.w3.org/WAI/standards-guidelines/wcag/#versions (last visited Jan. 5, 2022).

23. Some disability advocates argue that website accessibility standards will always be incomplete due to the fast-paced, every-changing nature of the Internet. Jonathan Hassell, *The Future of WCAG – Maximising Its Strengths Not Its Weaknesses*, HASSELL INCLUSION (Jan. 7, 2013), https://www.hassellinclusion.com/blog/wcag-future.

24. *See*, *e.g.*, Brunner, *supra* note 19, at 192; Mullen, *supra* note 5, at 767.

25. *Compare* Robles v. Domino's Pizza, LLC, 913 F.3d 898, 907 (9th Cir. 2019), *with* Carroll v. FedFinancial Fed. Credit Union, 324 F. Supp. 3d 658, 667 (E.D. Va. 2018).

26. 42 U.S.C. § 12101(b)(2) (2008); PGA Tour, Inc. v. Martin, 532 U.S. 661, 674 (2001).

27. The House approved the bill with a vote of 377 to 28 and the Senate passed it by a margin of 91 to 6. *Righting the Americans with Disabilities Act*, NATIONAL COUNCIL ON DISABILITY (Dec. 1, 2004), https://ncd.gov/publications/2004/dec12004.

When signing the Act, President George H.W. Bush referred to it as the "first comprehensive declaration of equality for people with disabilities," and "a powerful expansion of protections," and "basic civil rights."[28] With these purposes in mind, Congress addressed three primary areas of discrimination, each reflected in a separate chapter of the ADA: Title I prohibits discrimination in private employment; Title II prohibits discrimination by public entities (i.e., state and local governments); and Title III prohibits discrimination in places of public accommodation (i.e., private businesses that offer commercial services to the public).[29] Each chapter begins with a general anti-discrimination provision,[30] and then lays out separate prohibitions against discrimination in a host of more targeted areas including physical access, eligibility requirements, and participation in activities.[31]

The ADA's main strengths are its "comprehensive character,"[32] and its "clear, strong, consistent, enforceable standards."[33] While these characteristics are often complementary, courts reach opposite conclusions regarding the application of the ADA to websites depending on whether they prioritize the law's comprehensive character or its clear, consistent standards.

On the one hand, the statute includes broad language and catch-all provisions to eliminate discrimination in a wide range of activities—illustrating the ADA's comprehensive character.[34] Recognizing that Congress could not foresee every form and manifestation of discrimination, the statute was written to adapt to changing circumstances. As one Congressman put it, "the Committee intends that the types of accommodation and services provided to individuals with disabilities, under all of the titles of [the ADA], should keep pace with the rapidly changing technology of the times."[35] The comprehensive

28. President George H.W. Bush, Remarks on Signing of the Americans with Disabilities Act of 1990, 2 Pub. Papers 1068 (Jul. 26, 1990).

29. *PGA Tour*, 532 U.S. at 675.

30. 42 U.S.C. §§ 12112(a), 12132, 12182(b) (2008).

31. 42 U.S.C. §§ 12112(b)–12117(b), 12133–12165, 12182–12189 (2008).

32. *The Americans with Disabilities Act of 1989: Hearings on S. 933 before the S. Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong. 197 (1989) (statement of Attorney General Dick Thornburgh).

33. 42 U.S.C. § 12101(b)(2) (2008).

34. For example, the inclusion of the phrase "or other establishment" after each example of places of public accommodation is argued by some as evidence that Congress intended for the statute to expand beyond the listed examples. *E.g.*, 42 U.S.C. § 12181(7) (2008); *see also* Albani, *supra* note 4, at 101.

35. H.R. REP. NO. 101-485 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 391.

nature of the statute suggests that evolving technologies, such as websites, should be included within the statute's mandate.[36]

On the other hand, the statute provides great detail on the specific entities covered, the actions necessary to satisfy the anti-discrimination provisions, and the consequences for non-compliance—illustrating the ADA's emphasis on specific standards.[37] As one court put it, "[w]here Congress has created specifically enumerated rights and expressed the intent of setting forth 'clear, strong, consistent, enforceable standards,' courts must follow the law as written and wait for Congress to adopt or revise legislatively-defined standards that apply to those rights."[38] Consequently, the Act's detail and specificity suggest that the disparity between the Act's lack of website accessibility standards and the Act's purpose of eliminating discrimination should be remedied by Congress and not the judiciary.[39] Arguments over whether courts should interpret the broad language of the ADA to include standards governing website accessibility or wait for Congress to amend the statute dominate discussions of website accessibility claims.[40]

IV. DETANGLING THE WEB: THE APPLICATION OF THE ADA TO WEBSITES

Judicial interpretations of Title II and III of the ADA differ dramatically in their application to website accessibility claims, notwithstanding the striking similarities in the statutory and regulatory language.[41] Title II, which applies to state and local governments, provides that individuals with disabilities shall not "be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity."[42] Similarly, Title III, which applies to private businesses that offer services to the public, states that individuals with disabilities shall not "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

36. *See* Albani, *supra* note 4, at 101–02.

37. For example, the inclusion of separate and specific standards in the provisions on places of public accommodation is argued by some as evidence of Congressional intent to limit covered activity to the entities and activities described on the face of the statute. *E.g.*, 42 U.S.C. § 12182; *see also* Wolk, *supra* note 19, at 471.

38. Access Now, Inc. v. Sw. Airlines, Co., 227 F. Supp. 2d 1312, 1318 (S.D. Fla. 2002) (quoting 42 U.S.C. § 12101(b)(2)).

39. Wolk, *supra* note 19, at 472.

40. Claeyssen, *supra* note 6, at 1534; Wolk, *supra* note 19, at 472.

41. *Compare* Meyer v. Walthall, 528 F. Supp. 3d 928, 958–59 (S.D. Ind. 2021), *with* Gil v. Winn-Dixie Stores, Inc., 993 F.3d 1266, 1274–77 (11th Cir. 2021), *opinion vacated on reh'g*, 17-13467-CC, 2021 WL 6129128 (11th Cir. Dec. 28, 2021).

42. 42 U.S.C. § 12132 (2008).

place of public accommodation."[43] The statutory language of both titles prohibits discrimination in a host of public and private activities and services. Additionally, the regulations under Titles II and III, promulgated under the Department's rulemaking authority,[44] require public entities and places of public accommodation to provide "auxiliary aids" to ensure that communication with disabled individuals is as "effective" as communication with nondisabled individuals.[45] Under both titles, auxiliary aids include "accessible electronic and information technology," such as "screen reader software," and "closed caption decoders."[46]

Despite the similarities in the statutory and regulatory language, courts have reached contrasting conclusions on the application of the ADA to website accessibility claims based on whether the claim is brought under Title II or III. Courts interpreting the "services" of a public entity under Title II recognize that websites fall within this broad statutory language.[47] Thus, public entities are required to provide auxiliary aids—such as programming compatible with screen reader software or closed captioning on videos—to ensure that the public entity's service is accessible to individuals with disabilities.[48] Courts interpreting the "services" of a place of public accommodation under Title III, however, are divided on whether Congress intended to include websites and thus whether the auxiliary aid regulations mandate the operation of accessible websites.[49] Consequently, the key difference between the two provisions, resulting in differing outcomes in website accessibility claims, is the interpretation of the term "services" as applied to public and private entities.

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43. 42 U.S.C. § 12182(a) (2008).

44. 42 U.S.C. § 12186(b) (2008); *see* Bragdon v. Abbott, 524 U.S. 624, 646 (1998) (holding that DOJ's administrative guidance on ADA compliance is entitled to deference). The Equal Employment Opportunity Commission has rule-making authority under Title I of the ADA. 42 U.S.C. § 12116 (2008).

45. 28 C.F.R. § 35.160(b)(1) (2010) ("A public entity shall furnish appropriate auxiliary aids and services where necessary to afford qualified individuals with disabilities . . . an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity."); 28 C.F.R. § 36.303(c)(1) (2010) ("A public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities.").

46. Title II of the Americans with Disabilities Act, 28 C.F.R. § 35.104 (2010); Title III of the Americans with Disabilities Act, 28 C.F.R. § 36.303(b) (2010).

47. *E.g.*, *Meyer*, 528 F. Supp. 3d at 958–59.

48. *Id.* at 959.

49. *E.g.*, *Gil*, 993 F.3d at 1277; *See, e.g.*, *Robles*, 913 F.3d at 904.

V. TITLE II

Courts have consistently applied Title II to websites operated by public entities based on a uniform interpretation of the phrase "services, programs, or activities."[50] Multiple circuit courts—namely, the Second, Sixth, Seventh, Eighth, and Ninth Circuits—have expressly held the plain language of the statute, in conjunction with the ADA's expansive purpose, supports a broad application of the Title II accessibility requirements.[51] The Second Circuit, for instance, characterized the phrase "services, programs, or activities" as a "catch-all" provision that should be interpreted broadly to avoid "hair-splitting arguments" by public entities attempting to avoid the requirements of Title II.[52]

The broad scope of "services, programs, or activities" in Title II's prohibition against discrimination indicates that websites are naturally included within Title II's mandate. The Department has long interpreted "services, programs, or activities" to cover websites operated by state and local governments, even though the ADA does not explicitly reference the Internet.[53] The Department emphasized that public entities choosing to provide services online or communicate information through the Internet "must ensure that individuals with disabilities have equal access to such services or information."[54] Moreover, almost every federal court addressing this issue concluded that government websites related to public programs are covered under

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50. *See e.g.*, *Meyer*, 528 F. Supp. 3d at 959; Martin v. Metropolitan Atlanta Rapid Transit Authority, 225 F. Supp. 2d 1362, 1377 (N.D. Ga. 2002); Reininger v. Oklahoma, 292 F. Supp. 3d 1254, 1264–64 (W.D. Okla. 2017); Innes v. Board of Regents of University System of Maryland, 29 F. Supp. 3d 566, 580–81 (D. Md. 2014); Eason v. N.Y. State Bd. of Elections, No. 16-cv-4292 (KBF), 2017 U.S. Dist. LEXIS 209249, at *12–13 (S.D.N.Y. Dec. 20, 2017); Hindel v. Husted, No. 2:15-cv-3061, 2017 U.S. Dist. LEXIS 13820, at *13 (S.D. Ohio Feb. 1, 2017); Payan v. L.A. Cmty. Coll. Dist., Nos. 19-56111, 19-56146, 2021 U.S. App. LEXIS 25324 (9th Cir. Aug. 24, 2021).

51. *See, e.g.*, Innovative Health Sys., Inc. v. City of White Plains, 117 F.3d 37, 44–47 (2d Cir. 1997); Johnson v. City of Saline, 151 F.3d 564, 569–70 (6th Cir. 1998); Ashby v. Warrick Cnty. Sch. Corp., 908 F.3d 225, 231 (7th Cir. 2018); Bahl v. Cty. of Ramsey, 695 F.3d 778 (8th Cir. 2012); Barden v. City of Sacramento, 292 F.3d 1073, 1076–77 (9th Cir. 2002).

52. *Innovative Health*, 117 F.3d at 45; *see also Johnson*, 151 F.3d at 570 ("[T]he word 'activities,' on its face, suggests great breadth and offers little basis to exclude any actions of a public entity.").

53. 28 C.F.R. pt. 35, app. A, 1, 178 (2021).

54. *Id.*; *see also Accessibility of State and Local Government Websites to People with Disabilities*, U.S. DEP'T OF JUST. (2003), https://www.ada.gov/websites2.htm.

Title II.[55] For example, the United States District Court for the Southern District of Indiana, in *Meyer v. Walthall*,[56] explained that "[t]here is no articulable reason why" state government websites "that provide information about and applications for vital government benefits programs . . . would fall outside the broad category of government activities encompassed by 'services, programs, or activities.'"[57]

While courts agree that Title II applies to websites operated by public entities, courts have struggled to determine whether a website complies with Title II's accessibility requirements.[58] For example, in *Meyer*, the court was unable to determine at the summary judgment phase whether the defendant's website was accessible.[59] The plaintiffs argued that the defendants' website, which was incompatible with screen reading software, violated Title II because it did not comply with WCAG standards.[60] The district court agreed that Title II applied to the defendants' website and that the inability to use screen reader software meant that the website was inaccessible.[61] However, the court went on to state that while "primary consideration must be given to the plaintiff's requested accommodation," (i.e., the WCAG standards), the accommodation "need not be perfect or the one most strongly preferred, by the plaintiff" to comply with Title II.[62] Because there are multiple methods to ensure website accessibility, the court held that the defendants' refusal to conform its website to WCAG did not mean that

55. *Eason*, 2017 U.S. Dist. LEXIS 209249, at *4–5 (state election website); *Hindel*, 2017 U.S. Dist. LEXIS 13820, at *13 (state election website); *Martin*, 225 F. Supp. 2d at 1377 (state transportation website); *Meyer*, 528 F. Supp. 3d at 959 (state family and social services website); *Payan*, 2021 U.S. App. LEXIS 25324, at *11 (community college website); *Reininger*, 292 F. Supp. 3d at 1264 (state legislature website). Specifically, every federal court except a district court in Florida has concluded that a website is a service, program, or activity. Gil v. Broward Cty., Fla., No. 18-60282-CIV-DIMITROULEAS, 2018 U.S. Dist. LEXIS 225828, at *6 (S.D. Fla. May 7, 2018). Citing to Title III caselaw, the court in *Gil*, dismissed the plaintiff's Title II claim for failure to allege a nexus to a physical space. *Id.* A later district court case criticized *Gil* for incorrectly "lumping together all ADA cases involving alleged website violations" and applying Title III caselaw to a Title II claim. Price v. City of Ocala, Florida, 375 F. Supp. 3d 1264, 1272 (M.D. Fla. 2019).

56. 528 F. Supp. 3d 928 (S.D. Ind. 2021).

57. *Id.* at 958–59.

58. *E.g.*, *id.* at 961–62; *Payan*, 2021 U.S. App. LEXIS 25324, at *11–12.

59. 528 F. Supp. 3d at 959.

60. *Id.* at 961.

61. *Id.*

62. *Id.* at 960.

the defendants violated Title II, and denied summary judgment for both parties.[63]

Without clear statutory or regulatory guidance, the conclusion that accessibility can be achieved in multiple ways has resulted in inconsistent application of the WCAG standards. Some courts use WCAG as the benchmark for liability, while others insist that WCAG is not applicable because it has not been formally adopted by the Department.[64] The lack of clarity on the appropriate benchmark for accessibility means that these claims are often litigated and taken to trial, an expensive and time-consuming process.[65] This case-by-case analysis conflicts with the uniformity and consistency outlined in the ADA's purpose statement.[66]

Judicial confusion on the standards to adjudicate website accessibility claims under Title II illustrates that a key issue in the website accessibility caselaw is not only whether the ADA applies to websites, but also, what standards should be used to assess accessibility.

VI. TITLE III: THE "PLACE" WHERE IT ALL WENT WRONG

Courts have inconsistently applied Title III to websites operated by places of public accommodation. Two circuit splits have emerged as a result. Originally, circuits were divided as to whether Title III is limited to physical spaces. The First, Second, and Seventh Circuits all concluded that places of public accommodation are not limited to physical spaces.[67] Under this interpretation, a website is a place of public accommodation and any services offered on the website are subject to Title III's accessibility requirements.[68] The Sixth, Ninth, and Eleventh Circuits, however, concluded that places of public accommodation are limited to actual, physical spaces.[69] To challenge the

63. *Id.* at 962.

64. *Compare Hindel*, 2017 U.S. Dist. LEXIS 13820, at *12–13, *with Meyer*, 528 F. Supp. 3d at 962.

65. *See, e.g.*, Payan, 2021 U.S. App. LEXIS 25324, at *12.

66. 42 U.S.C. § 12101(b)(2).

67. Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc., 37 F.3d 12, 19 (1st Cir. 1994); Markett v. Five Guys Enters. LLC, No. 17-cv-788 (KBF), 2017 U.S. Dist. LEXIS 115212, at *4–5 (S.D.N.Y. Jul. 21, 2017)*;* Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999).

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

69. Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1115 (9th Cir. 2000); Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1010–11 (6th Cir. 1997); *Gil*, 993 F.3d at 1277.

accessibility of a website, plaintiffs would need to allege a "connection" between the website and a physical store.[70]

Among the courts requiring a connection to a physical location, a new circuit split is emerging—whether the services of a place of public accommodation incorporates websites or is limited to the services offered at physical brick-and-mortar stores. Using the "nexus" standard, the Sixth and Ninth Circuits have concluded that websites can be a service of a place of public accommodation.[71] However, the Eleventh Circuit adopted a narrower interpretation under its "intangible barrier" standard.[72] Because public accommodations are limited to physical places, websites are subject to regulation under Title III only if they create an intangible barrier to the accessibility of the goods and services of the physical store.[73] Thus, a new division among courts has arisen: whether Title III is limited to the tangible goods and services available at the physical location of the place of public accommodation or whether Title III encompasses intangible services such as websites.[74]

A. Physical Places vs. Digital Spaces: The argument that public accommodations are not limited to physical places.

The First, Second, and Seventh Circuits have all held that places of public accommodation are not limited to actual, physical places.[75] The initial cases analyzing whether Title III is limited to physical spaces occurred in the context of insurance policies.[76] Focusing on the broad purposes of the statute and legislative history, these circuits concluded that insurance contracts could be subject to Title III's anti-discrimination provisions because Title III was not limited to physical structures.[77] These opinions laid the foundation for future courts to extend the protections of Title III to web-only businesses.[78] Because websites are places of public accommodation, any of the

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

71. *Id.*; *Robles*, 913 F.3d at 905.

72. *Gil*, 993 F.3d at 1278.

73. *Id.*

74. *E.g.*, *Gil*, 993 F.3d at 1280–81, 1293–95 (compare majority and dissent analysis of a place of public accommodation's goods and services).

75. *Carparts*, 37 F.3d at 19; *Markett*, 2017 U.S. Dist. LEXIS 115212, at *4–5; *Doe*, 179 F.3d at 559.

76. Wolk, *supra* note 19, at 450.

77. Josephine Meyer, *Accessible Websites and Mobile Applications Under the ADA: The Lack of Legal Guidelines and What This Means for Businesses and Their Customers*, 44 SEATTLE U.L. REV. SUPRA 14, 16, 18–19 (2020).

78. Cheff, *supra* note 6, at 266–67.

amenities offered by a businesses on its website is a service of a place of public accommodation.

The First Circuit was the first to address whether places of public accommodation are limited to physical structures.[79] In *Carparts Distribution Center v. Automotive Wholesaler Association of New England*,[80] the First Circuit held that an insurance policy could be subject to Title III's anti-discrimination provisions because places of public accommodation were not limited to physical structures.[81] The court highlighted the list of public accommodations in the definitional section of the ADA, which included "a 'travel service,' a 'shoe repair service,' an 'office of an accountant, or lawyer,' an 'insurance office,' a 'professional office of a healthcare provider,' and 'other service establishment[s].'"[82] Reasoning that many of these service establishments conduct their business without a physical location, the court stated that "[i]t would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not."[83] Notably, the court cited to the lack of Department regulations mentioning "physical boundaries or physical entry" as further support for the conclusion that Title III was not limited to physical spaces.[84] By focusing on the broad, remedial purpose of the ADA, applicable legislative history, and the "illustrative" list of example public accommodations, the court concluded that Title III was not limited to physical structures.[85]

District courts in the First Circuit have extended *Carparts* to mean that web-only businesses are places of public accommodation under Title III.[86] In *National Association of the Deaf v. Netflix*,[87] the United

79. *Carparts*, 37 F.3d at 19.

80. 37 F.3d 12 (1st Cir. 1994).

81. *Id.* at 19.

82. *Id.* (quoting 42 U.S.C. § 12181(7)(F) (2008)).

83. *Id.*

84. *Id.* at 20. Interestingly, the Department has issued regulatory guidance referencing physical structures in its definition of place of public accommodation. Specifically, the Department defines a place of public accommodation as "a facility operated by a private entity whose operations affect commerce and fall within at least one of the following categories." 28 C.F.R. § 36.104 (2010). Facility is further defined as "all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located." *Id.* This definition exclusively references physical structures.

85. *Carparts*, 37 F.3d at 19–20.

86. *E.g.*, *Netflix*, 869 F. Supp. 2d at 200–202; Access Now, Inc. v. Blue Apron, LLC, No. 17-CV-116-JL, 2017 U.S. Dist. LEXIS 185112, at *9–10 (D.N.H. Nov. 8, 2017).

States District Court for the District of Massachusetts held that the web-only streaming service, Netflix, was a place of public accommodation.[88] The court provided three reasons for its conclusion.[89] First, legislative history indicated that Congress intended the statute to evolve with changing technology.[90] Second, legislative history indicated that the examples included in the definition of public accommodations were illustrative, not exhaustive.[91] Thus, Congress's failure to list the Internet or websites as an example place of public accommodation was not dispositive.[92] Third, the ADA "covers the services 'of' a public accommodation, not services 'at' or 'in' a public accommodation."[93] Consequently, although Netflix provided services for use in the home, which is not a place of public accommodation, the website was still a service "of" a place of public accommodation subject to Title III's accessibility requirements.[94]

Similarly, the Second Circuit in *Pallozzi v. Allstate Life Insurance Company*,[95] held that public accommodations are not limited to physical locations in the context of a life insurance policy dispute.[96] Citing *Carparts*, the court stated that Title III was "meant to guarantee [the disabled] more than mere physical access."[97] And, just as the district court in *Netflix* noted, the Second Circuit in *Pallozzi* highlighted that Title III is not limited to services provided "at" or "in" a place of public accommodation.[98] Even though an insurance contract is not used on the premises of the insurance agency, the contract was still a service of a place of public accommodation.[99]

Emphasizing that Title III is not limited by physical spaces, the *Pallozzi* decision, like *Carparts*, set the stage for future challenges to

87. 869 F. Supp. 2d 196 (D. Mass. 2012).

88. *Id.* at 201–02.

89. *Id.*

90. *Id.* at 200–01.

91. *Id.* at 201.

92. *Id.*

93. *Id.*

94. *Id.*

95. 198 F.3d 28 (2d Cir. 1999), *opinion amended on denial of reh'g*, 204 F.3d 392 (2d Cir. 2000).

96. *Id.* at 32–33.

97. *Id.* at 32.

98. *Id.* at 33.

99. *Id.*

web-only businesses.[100] The district court in *Andrews v. Blick Art Materials*,[101] for example, interpreted the court's decision in *Pallozzi* to mean that "the sale of goods and services to the public, rather than how and where that sale is executed" is "crucial" when determining Title III's applicability.[102] In other words, whether the defendant sells goods and services through an online retail website or a physical brick-and-mortar store, the determining factor is the sale of goods to the public, not the physical location of that sale.[103] As a result, a website can itself be a place of public accommodation.[104]

Lastly, the Seventh Circuit in *Doe v. Mutual of Omaha Insurance Company*,[105] held that places of public accommodation are not limited to physical spaces.[106] Addressing yet another insurance contract claim, the court in *Doe* concluded that the "core meaning" of Title III is that the "store, hotel, restaurant, dentist's office, travel agency, theater, Web site, or other facility (*whether in physical space or in electronic space*) that is open to the public cannot exclude disabled persons from entering the facility," or "from using the facility in the same way that the nondisabled do."[107] Citing *Doe*, district courts in the Seventh Circuit have held that the ADA applies to web-only businesses, such as Uber.[108]

Under the First, Second, and Seventh Circuits interpretation of the ADA, Title III regulates websites operated by places of public accommodation with physical locations *and* businesses that sell

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100. *See, e.g.*, National Federation of the Blind v. Scribd Inc., 97 F. Supp. 3d 565, 571, 575–76 (D. Vt. 2015); Andrews v. Blick Art Materials, LLC, 268 F. Supp. 3d 381, 391, 398 (E.D.N.Y. 2017).

101. 268 F. Supp. 3d at 381.

102. *Id.* at 392.

103. *Id.*

104.*Id.* at 398; *see also* Dominguez v. N.Y. Equestrian Ctr., Ltd., No. 18-cv-9799 (AJN), 2020 U.S. Dist. LEXIS 179258, at *5 (S.D.N.Y. Sep. 28, 2020); Wu v. Jensen-Lewis Co., 345 F. Supp. 3d 438, 443 (S.D.N.Y. 2018).

105. 179 F.3d 557 (7th Cir. 1999).

106. *Id.* at 559.

107. *Id.* at 559 (citing *Carparts*, 37 F.3d at 19) (emphasis added). This interpretation was reiterated in another Seventh Circuit case on insurance contracts when the court gave the analogy that the ADA prohibits a furniture store from refusing to sell furniture to a disabled person whether the exchange occurs in person or over the Internet. Morgan v. Joint Admin. Bd., Ret. Plan of Pillsbury Co., and Am. Fed'n of Grain Millers, 268 F.3d 456, 459 (7th Cir. 2001).

108. Access Living of Metro. Chicago v. Uber Techs., Inc., 351 F. Supp. 3d 1141, 1155–56 (N.D. Ill. 2018), *aff'd,* 958 F.3d 604 (7th Cir. 2020); *see also* Wright v. Experiment, No. 1:19-cv-01423-SEB-TAB, 2021 U.S. Dist. LEXIS 13214, at *11-12 (S.D. Ind. Jan. 22, 2021).

products or services exclusively online.[109] Relying on the broad remedial purpose of the statute and legislative history, these circuits have concluded that Title III is not limited to physical locations.[110] Although the circuit courts have yet to definitively hold that websites are subject to Title III, the opinions addressing insurance contracts have established a broad framework for interpreting the text of the statute.[111] District courts applying this caselaw have extended the protections of the ADA to a wide range of online business activity.[112]

B. Physical Places vs. Digital Spaces: The argument that public accommodations are limited to physical places.

While the First, Second, and Seventh Circuits have all held that a connection to a physical location is not necessary to bring at Title III claim,[113] the Sixth, Ninth, and Eleventh Circuits have arrived at the opposite conclusion.[114] Relying on canons of statutory construction and the applicable Department regulations, the Sixth and Ninth Circuits have held the plain language of Title III requires a nexus to a physical location.[115] Courts analyzing website accessibility claims under the nexus requirement conclude websites are one of the services offered by brick-and-mortar places of public accommodation.[116] Brick-and-mortar places of public accommodation are required to provide auxiliary aids to ensure that their services are accessible to individuals with disabilities; thus, physical stores must operate accessible websites.[117] The Eleventh Circuit, however, has rejected the nexus standard and the interpretation of services that incorporates websites.[118] Rather the intangible barrier standard adopted by the Eleventh Circuit focuses on whether the website creates an impediment to the accessibility of the services offered at the physical store.[119] The differing interpretation of

109. *Carparts*, 37 F.3d at 19; *Markett,* 2017 U.S. Dist. LEXIS 115212, at *4–5; *Doe*, 179 F.3d at 559.

110. *See supra* note 75.

111. *See supra* Part VI, Section A.

112. *See e.g.*, Nat'l Ass'n of the Deaf v. Harvard Univ., 377 F. Supp. 3d 49, 60–61 (D. Mass. 2019).

113. *See supra* Part VI, Section A.

114. *Weyer*, 198 F.3d at 1115; *Parker*, 121 F.3d at 1010–11; *Gil*, 993 F.3d at 1277.

115. Richard E. Moberly, *The Americans with Disabilities Act in Cyberspace: Applying the "Nexus" Approach to Private Internet Websites*, 55 MERCER L. REV. 963, 975 (2004).

116. *See, e.g.*, Nat'l Fed'n of the Blind v. Target, 452 F. Supp. 2d 946, 953 (N.D. Cal. 2006).

117. *Robles*, 913 F.3d at 904–05.

118. *Gil*, 993 F.3d at 1278.

119. *Id.*

services under the nexus and intangible barrier standards has further muddied the waters of what is required to allege a website accessibility claim under Title III.

1. The Nexus Standard

While the Sixth and Ninth Circuits have declined to extend the protections of Title III to web-only businesses, they have granted relief when a plaintiff alleges a nexus between a brick-and-mortar store and a website. Like the cases previously discussed, the issue of whether a place of public accommodation must be an actual, physical location first arose in the context of insurance policies.[120] In *Parker v. Metropolitan Life Insurance Company*,[121] an individual sued their employer and the insurance carrier for providing more comprehensive coverage of physical disabilities than mental-health related disabilities.[122] The Sixth Circuit explicitly rejected the reasoning of the First Circuit in *Carparts*, and asserted that the term public accommodation referred to a physical, tangible place.[123]

Focusing on the plain meaning of the text, the Sixth Circuit argued the court in *Carparts* gave the statute "unintended breadth" by not applying the statutory canon *noscitur a sociis*.[124] Under the doctrine of *noscitur a sociis*, an ambiguous term is interpreted by reference to surrounding terms.[125] The *Parker* court concluded that the "clear connotation" of the words listed in the definition of public accommodation was an association to a physical place.[126] Rather than the word "travel service," or "shoe repair service" referencing businesses that conduct their affairs by phone or mail, the *Parker* court reasoned "that Congress simply had no better term than 'service' to describe an office where travel agents provide travel services and a place where shoes are repaired."[127] A proper application of *noscitur a sociis* resolved any ambiguity in the text foreclosing the need to reference legislative history.[128] As a result, the benefits plan (provided by the employer rather than directly from the insurance company) was not subject to Title III because the plan did not have a "nexus" or connection to

120. *Weyer*, 198 F.3d at 1115; *Parker*, 121 F.3d at 1010.
121. 121 F.3d 1006 (6th Cir. 1997).
122. *Id.* at 1008.
123. *Id.* at 1014.
124. *Id.* (quoting Kurinsky v. United States, 33 F.3d 594, 597 (6th Cir. 1994)).
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 1014 n.10.

policies offered by insurance companies' physical locations.[129] The court did not conclude, however, that a plaintiff must "physically enter" a place of public accommodation to bring a Title III claim and explicitly left open whether a plaintiff could challenge the accessibility of a good or service provided by a public accommodation "by some other means."[130] District courts would later define "some other means" to include websites.[131]

District courts within the Sixth Circuit have concluded websites operated by brick-and-mortar stores are subject to Title III's accessibility requirements.[132] After analyzing *Parker* and other circuit court opinions, the United States District Court for the Northern District of Ohio in *Castillo v. Jo-Ann Stores*,[133] concluded that the plaintiff's claim challenging the accessibility of Jo-Ann craft store's website was cognizable under Title III.[134] For example, the plaintiff alleged the inaccessible features of the website prevented her from accessing the store locator feature, which impeded her ability to shop at physical stores.[135] Because the plaintiff alleged the website prevented her from accessing the physical Jo-Ann craft stores, the court concluded that a sufficient nexus existed between the physical place of public accommodation and service (i.e., the website) provided by the public accommodation.[136] Although a website is not itself a place of public accommodation, the court in *Castillo* recognized that a website is still subject to regulation under Title III because it is one of the services offered by a physical place of public accommodation.[137]

The Ninth Circuit adopted the nexus standard in *Weyer v. Twentieth Century Fox Film*.[138] Like the Sixth Circuit, the Ninth Circuit cited the principle of *noscitur a sociis* to justify the conclusion that places of public accommodation are limited to physical locations.[139] The court briefly highlighted that there must be "some connection between the good or service complained of and an actual, physical place";[140] however,

129. *Id.* at 1011.

130. *Id.* at 1011 n.3.

131. 286 F. Supp. 3d 870, 876 (N.D. Ohio 2018).

132. *See id.* at 881; Brintley v. Aeroquip Credit Union, 321 F. Supp. 3d 785, 792–93 (E.D. Mich. 2018), *rev'd on other grounds*, 936 F.3d 489 (6th Cir. 2019).

133. *Castillo*, 286 F. Supp. 3d at 870.

134. *Id.* at 876.

135. *Id.* at 880–81.

136. *Id.* at 881.

137. *Id.*

138. 198 F.3d 1104 (9th Cir. 2000).

139. *Id.* at 1114.

140. *Id.*

it was not until the court's decision in *Robles v. Domino's Pizza*,[141] that the specifics of the nexus standard were outlined.

In *Robles*, a blind individual argued Domino's online website and mobile app violated Title III because they were incompatible with screen reading software.[142] Domino's is a place of public accommodation because it operates physical restaurants throughout the nation.[143] Therefore, Domino's is required 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*."[144] The Department defines auxiliary aids and services to include "accessible electronic and information technology."[145] As a result, Domino's must provide electronic software that makes its website and mobile app compatible with screen reader technology as a part of its obligation to offer auxiliary aids and services.[146] The court emphasized that the website and app are primarily used to locate nearby stores and order pizzas for delivery or pick-up.[147] Because the inaccessibility of the website and app impeded the plaintiff's access to physical stores, the Ninth Circuit concluded that the nexus requirement was satisfied.[148] Although individuals do not primarily access the app and website on the premises of Domino's physical stores, the court clarified that the statute "applies to the services *of* a place of public accommodation, not services *in* a place of public accommodation."[149] Consequently, the Ninth Circuit requires brick-and-mortar public accommodations to operate accessible websites that facilitate access to their physical buildings.[150]

However, the holding in *Robles* is limited by the factual circumstances presented in the case. The plaintiff alleged the website facilitated access to the goods and services of the physical store and did

141. 913 F.3d 898 (9th Cir.), *cert. denied,* 140 S. Ct. 122 (2019).

142. *Id.* at 902.

143. *See* 42 U.S.C. § 12181(7)(b) (2008) ("The following private entities are considered public accommodations for purposes of this title . . . a restaurant, bar, or other establishment serving food or drink.").

144. *Robles*, 913 F.3d at 905 (citing 42 U.S.C. § 12182(b)(2)(A)(iii) (2008)) (emphasis added).

145. *Id.* (citing 28 C.F.R. § 36.303(b)(2) (2010)).

146. *Robles*, 913 F.3d at 905.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 905–06.

not argue that the website itself was a service.[151] Thus the court expressly left open the question of whether "the ADA covers the websites or apps of a physical place of public accommodation where their inaccessibility does not impede access to the goods and services of a physical location."[152]

District courts within the Ninth Circuit have concluded that websites are themselves a service of a place of public accommodation. For example, in *National Federation of the Blind v. Target*,[153] the United States District Court for the Northern District of California held a plaintiff successfully stated a claim under Title III by alleging that the inaccessible features of Target.com prevented the plaintiff from enjoying the goods and services of the physical store.[154] The court clarified that while website accessibility challenges must be connected to a physical store, Title III protects more than physical access.[155] Specifically, the court stated:

> The case law does not support defendant's attempt to draw a false dichotomy between those services which impede physical access to a public accommodation and those merely offered by the facility. Such an interpretation would effectively limit the scope of Title III to the provision of ramps, elevators and other aids that operate to remove physical barriers to entry. Although the Ninth Circuit has determined that a place of public accommodation is a physical space, the court finds unconvincing defendant's attempt to bootstrap the definition of accessibility to this determination, effectively reading out of the ADA the broader provisions enacted by Congress.[156]

Websites connected to brick-and-mortar stores must comply with Title III's accessibility requirements as a service of a place of public accommodation, even though the service is typically utilized outside of the place of public accommodation.[157] Thus, arguments that Title III only prohibits discrimination in the enjoyment of goods and services on the premises of physical places of public accommodation do not comport with the broad scope of the nexus test.[158]

Citing the doctrine of *noscitur a sociis*, the Sixth and Ninth Circuit have concluded that places of public accommodation must have a physical location.[159] While challenges to web-only businesses have failed

151. *Id.* at 905.
152. *Id.* at 905 n.6.
153. 452 F. Supp. 2d 946 (N.D. Cal. 2006).
154. *Id.* at 956.
155. *Id.* at 955.
156. *Id.*
157. *Id.*
158. *Id.*
159. *Weyer*, 198 F.3d at 1114; *Parker*, 121 F.3d at 1014.

in these circuits,[160] websites with a connection or nexus to a physical location must comply with Title III's accessibility requirements.[161] District courts within the Sixth and Ninth Circuit recognize that a website is itself a service of a place of public accommodation.[162] Thus, if a plaintiff demonstrates that the business operating the website has physical locations, then the website is subject to regulation as a service of those brick-and-mortar businesses.[163]

2. The Intangible Barrier Standard

Not only are circuits divided on the application of Title III to web-only businesses, but circuits that agree Title III is limited to physical spaces disagree on how courts should analyze the connection between the website and the brick-and-mortar location.[164] The development of the intangible barrier standard by the Eleventh Circuit as an alternative to the nexus standard is a recent response to criticism that the application of Title III to digital spaces gives the statute an expansive interpretation not aligned with the text's plain meaning.[165] While the nexus standard recognizes that websites can themselves be a service of a physical place of public accommodation,[166] the intangible barrier standard defines service narrowly to include only the amenities offered at the physical location of the place of public accommodation.[167] These differing interpretations have resulted in different outcomes despite factually similar cases.

In *Gil v. Winn-Dixie*,[168] the plaintiff, a blind man, challenged the accessibility of Winn-Dixie's website.[169] Gil alleged that digital coupon and online prescription re-fill features were incompatible with screen

160. *See, e.g.*, Earll v. EBay, Inc., 599 F. App'x 695, 696 (9th Cir. 2015).

161. *See supra* Part VI, Section B.1.

162. *See supra* Part VI, Section B.1.

163. *See, e.g.*, *Castillo*, 286 F. Supp. 3d at 876; *Robles*, 913 F.3d at 904–05.

164. *Compare Robles*, 913 F.3d at 904–06, *with Gil*, 993 F.3d at 1274–84.

165. *Gil*, 993 F.3d at 1281–82.

166. *See, e.g.*, *Target*, 452 F. Supp. 2d at 955.

167. *Gil*, 993 F.3d at 1281.

168. 993 F.3d 1266 (11th Cir. 2021), *opinion vacated on reh'g*, 17-13467-CC, 2021 WL 6129128 (11th Cir. Dec. 28, 2021). The Eleventh Circuit recently issued an order vacating its earlier opinion establishing the intangible barrier standard. Gil v. Winn-Dixie Stores, Inc., No. 17-13467-CC, 2021 U.S. App. LEXIS 38489 (11th Cir. Dec. 28, 2021). While the earlier opinion no longer holds the force of law, the Eleventh Circuit has not issued a second opinion supplanting its prior reasoning. As a result, the court's discussion of the intangible barrier standard still provides insight into how a Title III website accessibility case may be decided in the future.

169. *Gil*, 993 F.3d at 1270.

reader software.[170] Gil's inability to use the website meant that he had to rely on store employees or friends to convey his confidential medical information to re-fill his prescriptions or help him clip coupons.[171] As a result, Gil argued he was unable to fully and equally enjoy the "services, facilities, privileges, advantages and accommodations," provided by Winn-Dixie through winndixie.com.[172] Citing to the nexus standard, the district court concluded that the website was "'heavily integrated' with Winn-Dixie's physical stores—so much so that it 'operates as a gateway to the physical store locations.'"[173] According to the district court, the inaccessible features of the website violated Title III.[174] The Eleventh Circuit disagreed for two reasons.[175]

First, the Eleventh Circuit majority clarified that public accommodations are limited to actual, physical spaces.[176] After restating the definition of public accommodation in § 12181(7), the court concluded that the text is "unambiguous and clear."[177] Because all of the examples listed in the statute "are tangible, physical places," websites are not places of public accommodation under Title III.[178] The court was unpersuaded by Gil's reference to the statute's legislative history or statements by the Department that supported the inclusion of websites within the meaning of public accommodation.[179] Although the Winn-Dixie website was not a place of public accommodation, the court recognized that the website could still be subject to Title III's accessibility requirements if it created an intangible barrier to the physical store.[180]

Second, the majority held that challenges to websites associated with brick-and-mortar stores must satisfy the intangible barrier standard

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170. *Id.* Winn-Dixie estimated that the cost of updating their website to make it compatible with screen reading technology would be approximately $250,000. *Id.* at 1273 n.6. Ironically, Forbes estimates Winn-Dixie's net worth at $9.6 Billion and the litigation costs of a civil suit from pleading to appeal can easily exceed $200,000. *Southeastern Grocer*, FORBES (Nov. 23, 2020), https://www.forbes.com/companies/southeastern-grocer/?sh=5077d515757d.

171. *Gil*, 993 F.3d at 1272.

172. *Id.* at 1271.

173. *Id.* at 1273 (quoting *Gil*, 257 F. Supp. 3d at 1349).

174. *Gil*, 993 F.3d at 1273.

175. *Id.* at 1275.

176. *Id.* at 1277.

177. *Id.* at 1276.

178. *Id.* at 1277. The dissent did not dispute this portion of the majority's opinion. *Id.* at 1277 n.14.

179. *Id.* at 1276 n.11–12.

180. *Id.* at 1278.

rather than the nexus standard adopted by the Third, Sixth, and Ninth Circuits.[181] The intangible barrier standard comes from a prior Eleventh Circuit decision, *Rendon v. Valleycrest Productions*.[182] In *Rendon*, the plaintiffs, hearing- and mobility-impaired individuals, sued the production company of "Who Wants To Be A Millionaire."[183] The show selected contestants using an automated hotline. Individuals would call the hotline number and answer a series of questions using the keypad. The plaintiffs argued the system discriminated against the disabled because individuals with hearing-impairments could not hear the questions and individuals with mobility-impairments could not answer the questions quickly enough using the keypad. As a result, these individuals would not be selected to participate on the show.[184] The defendant contended the hotline could not "serve as the basis for a Title III claim because it is not itself a public accommodation or a physical barrier to entry erected at a public accommodation."[185] The Eleventh Circuit concluded the hotline was subject to Title III because the statute covers both "tangible barriers," such as "physical and architectural barriers,"[186] and "intangible barriers, such as eligibility requirements and screening rules or discriminatory policies and procedures that restrict a disabled person's ability to enjoy the defendant entity's goods, services and privileges."[187]

The Eleventh Circuit applied the *Rendon* standard in *Gil* and concluded that the website did not create an intangible barrier to Gil's ability to access and enjoy the goods and services of Winn-Dixie's physical stores.[188] The court distinguished the intangible barrier present in *Rendon* from the Winn-Dixie website, arguing that the phone system in *Rendon* was the "sole access point" to the physical game show.[189] Gil, however, was not prevented from accessing the prescription counter or coupon books at the physical stores.[190] As a result, the website did not prevent Gil from shopping at the physical store and no intangible barrier was present.[191]

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181. *Id.* at 1281.
182. 294 F.3d 1279 (11th Cir. 2002).
183. *Id.* at 1280.
184. *Id.* at 1280–81.
185. *Id.* at 1283.
186. *Id.* (citing 42 U.S.C. § 12182(b)(2)(A)(iv)).
187. *Rendon*, 294 F.3d at 1283 (citing 42 U.S.C. § 12182(b)(2)(A)(i)–(ii)).
188. *Gil*, 993 F.3d at 1280.
189. *Id.* at 1279.
190. *Id.*
191. *Id.*

The majority's conclusion that Gil was not denied equal access to the goods and services offered at the Winn-Dixie store highlights the key difference between the nexus and intangible barrier standard—the interpretation of service. Under the nexus standard, a website is a service of a physical place of public accommodation.[192] Thus, the online prescription refill and coupon selection features located on Winn-Dixie's website must be accessible because they are part of the range of services Winn-Dixie offers that just happen to be online. Under the intangible barrier standard, however, a website is not a service of a physical place of public accommodation.[193] The majority asserted the only services at issue were the prescription re-fill and coupon selection services available at the physical Winn-Dixie stores.[194] Because Gil had access to those services in the store, making the online version of those services compatible with screen reader technology was not necessary.[195]

Despite the similarities between the alleged accessibility issues in *Robles* and *Gil*, the courts reached different conclusions. Both the plaintiffs in *Gil* and *Robles* challenged website features that facilitated access to goods and services in the store. The plaintiff in *Robles* wanted to access the Domino's pizza website and app to order food and beverages, a service available at the physical Domino's restaurant;[196] the plaintiff in *Gil* wanted access to Winn-Dixie's website to clip coupons and pick up prescriptions, services available at the physical Winn-Dixie stores.[197] While the Ninth Circuit in *Robles* allowed the plaintiff's claim to proceed based on the nexus standard,[198] the majority in *Gil* held that the plaintiff's claim failed to satisfy the connection requirement through the intangible barrier standard.[199] These different outcomes exemplify a major problem within the Title III caselaw: inconsistent application of Title III's anti-discrimination provisions.

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192. *Target*, 452 F. Supp. 2d at 955.

193. *Gil*, 993 F.3d at 1281.

194. *Id.* at 1279.

195. *Id.* at 1280–81. The dissent contested this conclusion arguing that even if the *website* itself was not a service, the *in-store* prescription re-fill and coupon services were inferior for disabled customers because they lacked the convenience and privacy available to website users. Thus, the dissent concluded that even if the statutory text was only limited to services provided on-site at the physical store location, Gil was not able to enjoy fully and equally those services. *Id.* at 1295–96 (Pryor, J., dissenting).

196. *Robles*, 913 F.3d at 905.

197. *Gil*, 993 F.3d at 1280–81.

198. *Robles*, 913 F.3d at 904–05.

199. *Gil*, 993 F.3d at 1283–84.

VII. THE PROBLEM

Courts have wrestled with the difficult question of whether websites are subject to regulation under the ADA for over twenty years, resulting in two circuit splits and three approaches to website accessibility claims under Title III. The First, Second, and Seventh Circuits have taken an unrestricted approach to website accessibility: allowing claims against web-only businesses to proceed under Title III.[200] The Sixth and Ninth Circuit have taken a moderate approach: limiting Title III's application to brick-and-mortar businesses but allowing website accessibility claims to proceed if the plaintiff can demonstrate a nexus between the website and the physical businesses.[201] Lastly, the Eleventh Circuit has taken a restrictive approach to website accessibility claims: limiting Title III's application to brick-and-mortar businesses but allowing website accessibility claims to proceed if the plaintiff can demonstrate that the website creates an intangible barrier to accessing the goods and services of the physical store.[202] Each of these approaches has resulted in vastly different case outcomes despite factually similar circumstances.

Inconsistent application of Title III's anti-discrimination provisions has created confusion among lower courts and private businesses trying to cobble together a consistent standard from the morass of diverging opinions.[203] Like cases should be treated alike,[204] but as the comparison of the decisions in *Gil* and *Robles* illustrates, the application of Title III to similar factual circumstances does not result in the same outcome.[205] The lack of uniformity in Title III caselaw is problematic for two reasons: (1) the lack of coherent and consistent standards burdens businesses because they are uncertain of their legal obligations, and (2) the piecemeal litigation approach only addresses website accessibility issues among a subset of disabled individuals.[206]

The lack of clear standards governing website accessibility claims burdens businesses as they attempt to discern the appropriate

200. *See supra* Part VI, Section A.

201. *See supra* Part VI, Section B.1.

202. *See supra* Part VI, Section B.2.

203. Deeva V. Shah, *Web Accessibility for Impaired Users: Applying Physical Solutions to Digital Problems*, 38 HASTINGS COMM. & ENT. L.J. 215, 227 (2016).

204. *See, e.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1623 (2018).

205. *See supra* text accompanying notes 196–199.

206. *See* Wolk, *supra* note 19, at 472–477; Meyer, *supra* note 77, at 29; Patrick Maroney, *The Wrong Tool for the Right Job: Are Commercial Websites Places of Public Accommodation under the Americans with Disabilities Act of 1990*, 2 VAND. J. ENT. L. & PRAC. 191, 202 (2000).

standards for compliance and prevents them from actively addressing website accessibility issues.[207] Like the accessibility of physical facilities, website accessibility differs depending on the disability.[208] Accessibility is not a one-size-fits-all approach and as technology changes, so will accessibility standards. As the Supreme Court recently stated, "[t]he forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow."[209] Take the *Robles* case as an example. Domino's argued that imposing WCAG 2.0 as the standard for assessing liability under Title III violated its due process rights because the Department had not formally adopted the standards.[210] Although the Ninth Circuit ultimately concluded that requiring Domino's to comply with WCAG 2.0 as a potential remedy for a violation of Title III did not violate due process, time and money were wasted litigating the issue.[211] Furthermore, while compliance with WCAG 2.0 would improve the accessibility of the defendant's website, the standards are not static. In fact, W3C updated its standards in 2018 (i.e., WCAG 2.1) and has plans to publish another version in 2022 (i.e., WCAG 2.2).[212] Any court order or settlement agreement enforcing WCAG 2.0 would thus leave out the updated accessibility requirements included in WCAG 2.1 and 2.2. As a result, Domino's website and mobile application would once again be inaccessible despite prior enforcement actions challenging accessibility.[213] Relying on courts or settlement agreements to set accessibility standards on a case-by-case approach does not give defendants adequate notice of their legal

207. Wolk, *supra* note 19, at 473–74.

208. While individuals with vision- and upper-mobility-impairments may require programming that ensures the website content is compatible with screen reader technology, individuals who are deaf and hard of hearing may require closed captioning for videos and other audio content. Meyer, *supra* note 77, at 23–25.

209. Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (2017) (Kennedy, J.).

210. *Robles*, 913 F.3d at 907.

211. *Id.* at 909.

212. W3C, *supra* note 22.

213. For example, WCAG 2.0 does not address accessibility for individuals with cognitive impairments. W3C, *Making Content Usable for People with Cognitive and Learning Disabilities* (Apr. 2021), https://www.w3.org/TR/2021/NOTE-coga-usable-20210429/. Consequently, compliance with WCAG 2.0 does not guarantee equal access to online content for a large portion of the disabled population. As accessibility issues arise and technology changes, accessibility standards must be updated.

obligations or provide the flexibility necessary to ensure website accessibility evolves with changing technology.[214]

The absence of clear rules also means that businesses are reacting to website accessibility challenges rather than actively seeking to comply with the statute's anti-discrimination requirements. Attempting to retrofit websites with accessibility features after the software and programing framework is already established is much like retrofitting buildings with ramps and guardrails after the foundation is laid and the walls are in place—expensive and time-consuming.[215] Furthermore, launching an inaccessible product and then later altering it to comply with accessibility requirements "is still a glaring form of inequality since people with disabilities are excluded during the time gap between inaccessibility and accessibility."[216] Requiring businesses to design their websites with assistive technologies in mind up front, rather than after the fact, would be more cost effective and ensure equal access to all relevant website features.[217] Nevertheless, the current legal landscape surrounding website accessibility leaves businesses uncertain on their obligations under the law and unable to proactively take steps to ensure equal access to online forums without incurring significant costs.

The lack of clear standards governing website accessibility claims inhibits the consistent and comprehensive protection of rights across disabilities and jurisdictions.[218] The current patchwork approach to securing rights through litigation has resulted in some improvements to website accessibility.[219] But this progress is not enjoyed by all disabled

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214. *See Blue Apron*, 2017 U.S. Dist. LEXIS 185112, at *25 ("Uniform regulation in this area would, of course, be preferable to the case-by-case approach required by its absence.").

215. Brian Wentz et al., *Retrofitting Accessibility: The Legal Inequality of After-the-Fact Online Access for Persons with Disabilities in the United States*, FIRST MONDAY (Nov. 7, 2011), https://firstmonday.org/article/view/3666/3077.

216. *Id.*

217. *Id.* Wentz explains that retrofitting online websites with accessibility features after the fact increases cost and often fails to address all accessibility issues:

> To illustrate the challenges and potential costs that retrofitting for accessibility can produce, retrofitting a simple Tic-Tac-Toe computer game for accessibility resulted in the lines of code growing from 192 to 1,412. This type of retrofit would tend to be time-consuming and costly, compared to a project started with universal access in mind. . . . If the application were designed with accessibility in mind, the design could have more easily addressed this with fewer statements of code.

Id.

218. Wolk, *supra* note 19, at 474.

219. *See, e.g.*, *Markett*, 2017 U.S. Dist. LEXIS 115212, at *6 (requiring that Five Guys make its website accessible).

individuals.[220] Disabled individuals in New York enjoy much broader protection of rights than disabled individuals in Georgia.[221] Allowing circuits to apply the protections of Title III differently in similar circumstances runs afoul of the purpose of the ADA to provide national, consistent, and clear standards for accessibility.[222] Additionally, relying on litigation to enforce website accessibility standards gives substantial discretion to the Department to enforce its interpretation of the ADA, which further adds to the inconsistency. For example, the Department previously took the position that Title III applies to web-only businesses.[223] However, the Department has altered its position, concluding that Title III applies only to websites associated with brick-and-mortar businesses.[224] Thus, while the Department currently endorses the view that Title III applies to websites—but notably not all websites—there is nothing preventing the Department from further changing its position. The rights of disabled individuals should not fluctuate with changes in administrations. In the absence of clear statutory language requiring the Attorney General to guarantee equal access to websites and other online platforms, the Department can evade its prosecutorial duty by simply declaring that Title III does not apply to intangible spaces.[225]

Lastly, litigation has focused on remedying accessibility issues faced by a subset of the disabled population. The majority of website accessibility claims have focused on accessibility issues related to vision and hearing impairments, ignoring the rights of other disabled individuals.[226] For example, in *Netflix*, the plaintiffs alleged that Netflix's "watch instantly" page was inaccessible because it lacked closed captioning.[227] Following the district court's decision applying Title III's anti-discrimination provisions to web-only businesses, such as

220. *See, e.g., Gil*, 993 F.3d at 1270 (denying plaintiffs request that Winn-Dixie alter its website to provide accessible content).

221. *Compare Andrews*, 268 F. Supp. 3d at 398, *with Gil*, 993 F.3d at 1270.

222. *See* 42 U.S.C. § 12101(b)(2).

223. Statement of Interest of the United States of America in Opposition to Defendant's Motion for Judgment on the Pleadings, Nat'l Ass'n of the Deaf v. Netflix, Inc., No. 3:11-cv-30168, at *6 (D. Mass. May 15, 2012), https://www.ada.gov/briefs/netflix_SOI.pdf.

224. Statement of Interest of the United States of America, Gil v. Winn-Dixie Stores, Inc., No. 16-CV-23020-RN, at *5 (S.D. Fla. Dec. 12, 2016), https://www.ada.gov/briefs/winn_dixie_soi.pdf.

225. Wolk, *supra* note 19, at 473.

226. *See* Brunner, *supra* note 19, at 190 n.170; Wolk, *supra* note 19, at 475–76.

227. 869 F. Supp. 2d at 199.

streaming services, Netflix entered into a settlement agreement.[228] The agreement required Netflix to update its website to provide closed captioning and train its employees on issues related to closed captioning, but made no mention of education or website alterations for other accessibility issues.[229] Furthermore, the agreement is limited to the specific business subject to the enforcement action. Although the settlement agreement with Netflix was a step in the right direction, it did not remedy accessibility issues faced by individuals with other types of disabilities or ensure equal access to content on other streaming services.

The ADA was designed to guarantee individuals with disabilities equal access to a host of private and public activities, services, and facilities.[230] But the current approach to website accessibility only targets a subset of websites and addresses accessibility issues among a subset of disabilities.[231] This piecemeal litigation landscape, which has resulted in divergent approaches to evaluating website accessibility across circuits, is not adequately protecting the rights of disabled Americans. Scholars and jurists recognize that website accessibility caselaw is a mess and a host of different solutions have been proposed to remedy the pervasive problems in the current approaches to website accessibility claims.[232] Overall these proposed solutions fall into three general categories: adopting a broad interpretation of statutory text, promulgating regulations, or amending the text of the ADA.

VIII. PROPOSED SOLUTIONS

Scholars have proposed three remedies to the problem of website inaccessibility. First, some scholars argue that courts should adopt an

228. Consent Decree, Nat'l Ass'n of the Deaf v. Netflix, Inc., No. 11-30168-MAP, at § 3(b) (D. Mass. Oct. 10, 2012).

229. *Id.* For example, cognitive disabilities have been largely left out of website accessibility claims. W3C is in the process of updating its standards to include accessibility criteria targeted at addressing cognitive disabilities, illustrating the need to provide accessible technologies for these individuals. *Supra* note 208.

230. 42 U.S.C. § 12101(b)(2).

231. *See supra* text accompanying notes 207–229.

232. *See, e.g.*, Moberly, *supra* note 115, at 1004 (arguing that circuits should all adopt the nexus approach); Meyer, *supra* note 77, at 29 (arguing that the text of the ADA should be amended); Claeyssen, *supra* note 6, at 1542–44 (arguing that courts should interpret Title III to regulate web-only businesses); Nikki D. Kessling, *Why the Target "Nexus Test" Leaves Disabled Americans Disconnected: A Better Approach to Determine Whether Private Commercial Websites Are "Places of Public Accommodation*,*"* 45 HOUS. L. REV. 991, 1024 (2008) (arguing for a "commerce and character" based approach to evaluating websites under the ADA).

expansive interpretation of the current text of the ADA to incorporate all websites within the purview of its anti-discrimination provisions.[233] Second, other scholars argue that that the Department should issue regulatory guidance that clarifies the ADA's application to websites and sets out comprehensive standards to determine whether a website is accessible.[234] Third, additional scholars argue that the text of the ADA should be amended to incorporate provisions specifically regulating websites.[235] The best method to achieve the original goals of the ADA, within the context of the current technological era, is a hybrid approach, where Congress amends the text of the statute to clarify its application to websites and requires the Department to promulgate regulations on website accessibility within a specific timeframe.

A. Judicial Intervention

For years, advocates have attempted to persuade courts that Title III regulates websites, resulting in two circuit splits and divergent opinions on how the ADA applies to websites. Continuing down this path will only lead to further confusion for two reasons. First, the only way to resolve the two circuit splits through the judicial branch is for the Supreme Court to take up a case and declare a universal interpretation of the text. Even though the issue has been percolating in the lower courts for over twenty years, the Supreme Court has refused to step into the fray. And the Supreme Court's decision to deny cert in the *Robles* case further illustrates that the Court is in no rush to resolve the debate on the applicability of Title III to website accessibility claims.[236] Waiting for the Supreme Court to step in and provide clarity on this issue is, as Hillary Duff once said, "like waiting for rain in this drought. Useless and disappointing."[237] As the Court continues to weigh the pros and cons of stepping into the chaos of website accessibility, online content remains inaccessible, and businesses are no closer to understanding their obligations under the law.

Second, even if the Supreme Court did establish a universal interpretation of the text, it would not remedy the problem of insufficient standards defining accessibility. The confusion surrounding

233. *See, e.g.*, Shani Else, *Courts Must Welcome the Reality of the Modern World: Cyberspace Is A Place Under Title III of the Americans with Disabilities Act*, 65 WASH. & LEE L. REV. 1121, 1155 (2008).

234. *See, e.g.*, Albani, *supra* note 4, at 111.

235. *See, e.g.*, Wolk, *supra* note 19, at 472.

236. *Domino's Pizza, LLC v. Robles*, 140 S. Ct. 122 (2019) (denying Domino's petition for writ of certiorari).

237. A Cinderella Story (Warner Bros. Pictures 2004).

the standards applicable to website accessibility claims under Title II illustrates that the solution to the circuit split in Title III claims is not further judicial interpretation. Although the issue is relatively new, courts are in agreement that Title II includes websites within its mandate.[238] Nevertheless, confusion abounds on the specific standards and guidelines public entities must follow to comply with Title II's accessibility requirements.[239] In the absence of clear legal definitions on accessibility in the digital context, courts consistently require that claims proceed to trial in order to resolve disputes as to the exact meaning of accessibility.[240] Judicial confusion on the standards to adjudicate website accessibility claims under Title II illustrates that even if courts were to agree that Title III applies to websites that would not resolve the underlying problem—the lack of clear standards applicable to websites. Creating standards to determine whether a website has complied with Title III's accessibility requirements is a job for the legislative or executive branch. Like the physical accessibility standards outlined in the statute, Congress needs to clarify the application of the ADA to websites and delegate authority to the Department to set specific accessibility standards applicable to websites and emerging technologies.

B. Promulgating Regulations or Amending the Text of the Statute

Some scholars assert that promulgating regulations or amending the text of the statute could remedy the current chaos of website accessibility caselaw. However, while regulations or an amendment to the text would improve website accessibility, each avenue alone is insufficient to remedy the entire problem. Relying only on the Department's regulatory authority would not guarantee the application of the ADA to web-only businesses and only amending the text of the statute would not allow for the flexibility necessary to set accessibility standards that evolve with emerging technologies.

The current circuit split over the application of Title III to intangible spaces means that Department regulations related to web-only businesses could be ignored as contrary to the plain meaning of the text. The Supreme Court's decision in *Chevron v. National Resource Defense Council*,[241] held that regulations promulgated under statutory authority are afforded increased deference.[242] However, courts are not

238. *See supra* note 52.
239. *See supra* Part V.
240. *See supra* Part V.
241. 467 U.S. 837 (1984).
242. *Id.* at 844.

required to defer to the agency interpretation if such an interpretation is "manifestly contrary" to the plain meaning of the statute.[243] Congress delegated authority to the Department to promulgate regulations; thus these regulations are given heightened deference.[244] Nevertheless, courts have already interpreted the plain meaning of Title III to exclude web-only businesses.[245] This conclusion could be used by courts to ignore Department regulations requiring web-only businesses to comply with accessibility standards, as manifestly contrary to the plain meaning of the text of Title III.[246]

The Third, Sixth, Ninth, and Eleventh Circuits have all concluded that Title III only applies to physical, tangible spaces based on the plain meaning of the text.[247] For example, in *Gil*, the Eleventh Circuit explicitly stated that the text was "unambiguous and clear," that Title III applied only to tangible spaces and not websites alone, excluding web-only businesses from the ADA's obligations.[248] Regulations requiring web-only businesses to conform to Title III's accessibility requirements would conflict with these circuits' interpretation of the plain, unambiguous meaning of the text. Applying Title III's anti-discrimination requirements to web-only businesses is necessary to ensure disabled individuals can meaningfully participate in online spaces. However, the current circuit split over the application of Title III to intangible spaces means that Department regulations could be invalidated as contrary to the plain meaning of the text.[249] Regulations on their own are thus insufficient to ensure the accessibility of all websites, regardless of the website's connection to a physical space.

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243. *Id.*

244. 42 U.S.C. § 12186(b) (2008).

245. *E.g.*, *Gil*, 993 F.3d at 1276.

246. Ford v. Schering-Plough Corp., 145 F.3d 601, 613 (3d Cir. 1998); *Parker*, 121 F.3d at 1012 n.5.

247. *Weyer*, 198 F.3d at 1114; *Parker*, 121 F.3d at 1011 n.3; *Ford*, 145 F.3d at 613; *Gil*, 993 F.3d at 1277.

248. *Gil*, 993 F.3d at 1277.

249. Additionally, the Supreme Court's ruling in *National Cable & Telecommunications Association v. Brand X Internet Services*, held that if a court concludes a statute is "unambiguous" then the court's interpretation "trumps an agency construction otherwise entitled to *Chevron* deference." 545 U.S. 967, 982 (2005). In circuits where the court has held that the statute is clear, the agency regulation adopting a contrary approach would not even be entitled to *Chevron* deference. *Id*. Thus, in the Eleventh Circuit, where the court has unequivocally held that Title III does not apply to web-only businesses based on the "unambiguous" interpretation of the statute, contrary regulations from the Department would not be analyzed under *Chevron*. *Gil*, 993 F.3d at 1277.

Similarly, amending the text of the statute would clarify the application of Title III to websites but would not solve the problem of specific standards on website accessibility. As demonstrated by the Title II caselaw, courts need clear, consistent guidelines to analyze whether an entity's website is accessible under the ADA.[250] While Congress could adopt specific accessibility standards, such as the Web Content Accessibility Guidelines (WCAG), delegating rulemaking authority to the Department on the issue of website accessibility would be preferable for two reasons.

First, the Department possesses the specialized knowledge and expertise to create the appropriate standards on website accessibility. Working to make digital spaces accessible requires expert knowledge and skill. Getting Congress up to speed on the particulars of website accessibility would be a time-consuming and repetitive process when the attorneys at the Department already possess the requisite knowledge to promulgate appropriate standards.

Second, regulations set by the Department would provide greater flexibility as technology changes. Websites and other digital spaces are constantly changing. W3C has updated its accessibility standards three times within the last thirteen years, illustrating the rapidly changing environment of digital accessibility.[251] The notice and rulemaking process was designed to be flexible and enable executive agencies to adjust regulations and guidance as technology changes. While Congress could codify specific standards, the legislative process is cumbersome and difficult. As technology changes and the standards become outdated, disabled individuals would suffer as new content becomes once again inaccessible. While Congress cannot easily respond to quick technological developments, the regulation process is poised to adapt to changing circumstances. Thus, delegating authority to the Department to promulgate regulations as new technologies emerge would ensure that disabled individuals are never relegated to second-class digital citizens.

C. Hybrid Approach: Amending the Text of the Statute and Promulgating Regulations

The best method to bridge the digital divide is a hybrid approach combining textual amendments and delegating rulemaking authority. Congress should amend the text of the ADA to clarify its application to digital spaces, such as websites, mobile applications, and other online

250. *See supra* text accompanying notes 58–66.

251. W3C, *supra* note 22.

platforms. By unambiguously including digital spaces within the definition of place of public accommodation, courts and the Department would not have the leeway to ignore the application of the ADA to websites and other emerging technologies. Additionally, Congress should require that the Department promulgate regulations laying out specific accessibility standards for digital spaces within a specific timeframe. The creation of comprehensive standards for evaluating website accessibility would ensure that businesses understand their obligations under the law and disabled Americans have equal access to the Internet.

IX. CONCLUSION

The importance of the Internet in the daily lives of Americans cannot be overstated. However, a large portion of the population remains cut off from the important resources that private businesses and public entities offer online. Disability advocates have sought to use the current text of the ADA to remedy the problem of website inaccessibility through the federal court system. While this approach has increased the accessibility of many websites, it is insufficient. Judicial confusion on the application of the ADA to intangible spaces and the appropriate standards to apply to evaluate accessibility illustrate that continued judicial interpretation of the current ADA text will not provide the clear, cohesive, and comprehensive standards necessary to remedy the widespread problem of website inaccessibility. Rather the best solution to is to amend the text of the statute to clarify its application to digital spaces and promulgate regulations outlining specific accessibility standards. This approach would ensure that disabled individuals can fully enjoy the privileges and advantages of an increasingly digitalized society.