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## NOTES

# INACCESSIBLE WEBSITES ARE DISCRIMINATING AGAINST THE BLIND: WHY COURTS, WEBSITES, AND THE BLIND ARE LOOKING TO THE DEPARTMENT OF JUSTICE FOR GUIDANCE

ELIZABETH SHEERIN<sup>†</sup>

### INTRODUCTION

In 2015, a legally blind man went online to a store's website and attempted to use its prescription refill service.<sup>1</sup> He frequently used the Internet with the help of Job Access With Speech ("JAWS").<sup>2</sup> JAWS is an industry-standard screen-reading technology meant to assist individuals with disabilities using screen navigation.<sup>3</sup> When the man heard about the online refill service, he was excited to take advantage of something he would be able to do independently.<sup>4</sup> He often found employees were annoyed when he would ask for help in the store and he wanted to protect his privacy rather than announce all of his prescriptions.<sup>5</sup> Unfortunately, the website was not compatible with JAWS and the man was unable to use this service.<sup>6</sup> Meanwhile, a person without disabilities could access the website and take advantage of the online refill service.

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<sup>1</sup> *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340, 1343–44 (S.D. Fla. 2017).

<sup>2</sup> *Id.* at 1343. Job Access With Speech ("JAWS") is a popular screen reader program for individuals. "JAWS provides speech and Braille output for the most popular computer applications on your PC." *Blindness Solutions: JAWS*, FREEDOM SCIENTIFIC, <http://www.freedomscientific.com/Products/Blindness/JAWS> (last visited Sept. 16, 2018).

<sup>3</sup> *Winn-Dixie*, 257 F. Supp. 3d at 1343. The plaintiff in *Winn-Dixie* tried to use multiple software programs, Internet browsers, and types of computers to access the Winn-Dixie website successfully. *Id.* The software programs attempted included NVDA, VoiceOver, and Narrator. *Id.*

<sup>4</sup> *Id.* at 1344.

<sup>5</sup> *Id.* Only ten percent of the website was accessible when using the software. *Id.* The plaintiff has been on between five hundred and six hundred other websites that are accessible with JAWS. *Id.*

<sup>6</sup> *Id.*

The Americans with Disabilities Act (the "ADA") was enacted by Congress and signed by George H.W. Bush in 1990.<sup>7</sup> The ADA was intended to eliminate discrimination against individuals with disabilities by providing clear and enforceable standards for employers, government agencies, and places of public accommodation.<sup>8</sup>

Specifically, Title III of the ADA states: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."<sup>9</sup> The statute enumerates twelve types of entities that are places of public accommodation and includes examples in each category.<sup>10</sup> The list of examples under each enumerated entity is not exclusive.<sup>11</sup> Unfortunately, the Internet was not heavily relied on when Title III was enacted and, therefore, was not explicitly enumerated as a place of public accommodation.<sup>12</sup>

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<sup>7</sup> Pub. L. No. 101-335, 104 Stat. 327 (1990) (codified as amended in scattered §§ 42 and 47 U.S.C.); *see also* Presidential Statement on Signing the Americans with Disabilities Act of 1990, 26 WEEKLY. COMP. PRES. DOC. 1165 (July 30, 1990).

<sup>8</sup> *See* 42 U.S.C. § 12182 (2012).

<sup>9</sup> *Id.* § 12182(a).

<sup>10</sup> *Id.* § 12181(7). The listed entities are:

(A) an inn, hotel, motel, or other place of lodging . . . ; (B) a restaurant, bar, or other establishment serving food or drink; (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment; (D) an auditorium, convention center, lecture hall, or other place of public gathering; (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment; (F) a laundromat, dry-cleaner, bank, barber shop . . . or other service establishment; (G) a terminal, depot, or other station used for specified public transportation; (H) a museum, library, gallery, or other place of public display or collection; (I) a park, zoo, amusement park, or other place of recreation; (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education; (K) a day care center, senior citizen center; homeless shelter, food bank, adoption agency, or other social service center establishment; and (L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

*Id.*

<sup>11</sup> H.R. REP. NO. 101-485, pt. 2, at 100 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 383; *see also* Trevor Crowley, Comment, *Wheelchair Ramps in Cyberspace: Bringing the Americans with Disabilities Act into the 21st Century*, 2013 BYU L. REV. 651, 656 n.23 (2013).

<sup>12</sup> *See History of the Web*, WORLD WIDE WEB FOUNDATION, <http://webfoundation.org/about/vision/history-of-the-web/> (last visited Sept. 16, 2018). The Internet was not publicly accessible until 1991; one year after Title III was enacted. *Id.* Today, Americans use the Internet daily, often spending hours

No specific provision in Title III applies directly to Internet sites, and circuit courts are split as to whether the Internet should be considered a place of public accommodation and therefore subject to the ADA.<sup>13</sup> This split became apparent in 2012, when the First and Ninth Circuits disagreed as to whether the video streaming service, Netflix, should be subject to Title III.<sup>14</sup> The Ninth Circuit previously held that there must be “some connection” between the goods and services being offered through non-physical means (a website) and a place of public accommodation.<sup>15</sup> On the other hand, the First Circuit held that a website is a stand-alone entity and therefore a place of public accommodation.<sup>16</sup> Since the split, courts in other circuits have either followed the First or Ninth Circuit approach when analyzing if a website is place of public accommodation.<sup>17</sup>

The majority of cases are settled after a motion to dismiss is denied because companies do not want to spend money on litigation.<sup>18</sup> However, this leaves websites in a vulnerable position because there are no standards for compliance.<sup>19</sup> Courts have called on the Department of Justice (the “DOJ”) to provide the necessary guidance and standards.<sup>20</sup> In 2010, the DOJ issued an Advanced Notice of Proposed Rulemaking (“ANPR”)

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surfing the web. *See Internet/Broadband Fact Sheet*, PEW RESEARCH CENTER (Feb. 5, 2018), <http://www.pewinternet.org/fact-sheet/internet-broadband/>. Researchers collected data showing the increase in Internet users from fifty-two percent of adults in 2000 to eighty-eight percent in 2016. *Id.*

<sup>13</sup> *Compare Nat’l Ass’n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 200–202 (D. Mass. 2012), *with Cullen v. Netflix*, 880 F. Supp. 2d 1017, 1023–24 (N.D. Cal. 2012).

<sup>14</sup> *Compare Nat’l Ass’n of the Deaf*, 869 F. Supp. 2d at 202, *with Cullen*, 880 F. Supp. 2d at 1024.

<sup>15</sup> *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000).

<sup>16</sup> *Nat’l Ass’n of the Deaf*, 869 F. Supp. 2d at 202. Although Netflix did not have a physical location, the website was sufficient to constitute a public place of accommodation. *Id.*

<sup>17</sup> *See infra* Part II.D.

<sup>18</sup> *See Toni Cannady, Avoiding the Website Accessibility Shakedown*, ABA BANKING J. (Feb. 6, 2017), <https://bankingjournal.aba.com/2017/02/avoiding-the-website-accessibility-shakedown/>.

<sup>19</sup> *See id.* The DOJ prefers, but has not adopted, the Web Content Accessibility Guidelines 2.0. *Id.*

<sup>20</sup> *Robles v. Dominos Pizza LLC*, No. 16-CV-06599SJO, 2017 WL 1330216, at \*8 (C.D. Cal. Mar. 20, 2017); *Access Now, Inc. v. Blue Apron, LLC*, No. 17-CV-116-JL, 2017 WL 5186354, at \*9 (D.N.H. Nov. 8, 2017).

intending to solicit comments and propose a final rule.<sup>21</sup> But, that was eight years ago and the DOJ has not proposed a final rule.<sup>22</sup>

This Note argues that Title III of the ADA should extend to websites and mobile applications as “places of public accommodation” and suggests a framework to determine which accommodations should be adopted to make websites accessible to people with visual disabilities. Specifically, it calls on Congress and the DOJ to fix this hole in the law and ensure the Act protects all persons with disabilities, as it was intended to. Part I will introduce the ADA, including its legislative history and amendments, and then will describe the standards private agencies have developed to make the Internet accessible to those with visual disabilities. Part II will describe competing interpretations of “place of public accommodation” and analyze court decisions applying Title III to websites. Finally, Part III proposes that any website that qualifies as an enumerated place of public accommodation under the statute, regardless of whether or not it is associated with a physical location, must comply with the ADA. The Web Content Accessibility Guidelines 2.1 should serve as the basis for measuring compliance.<sup>23</sup> Websites should have to comply with A, AA, or AAA standards depending on the number of services offered at their virtual locations.

#### I. THE ENACTMENT OF TITLE III AND DEVELOPMENT OF THE INTERNET

Part I begins by reviewing the history of Title III and those with disabilities in society, noting that the purpose of the ADA was to remove barriers that prevented individuals with disabilities from functioning in society.<sup>24</sup> Then, it moves to the most recent DOJ amendment, which shows the broad, inclusive

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<sup>21</sup> Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460–01 (July 26, 2010) (to be codified at 28 C.F.R. pts. 35 & 36).

<sup>22</sup> *Id.*; see also OFFICE OF FED. REG., *A Guide to the Rulemaking Process* (Jan. 2011), [https://www.federalregister.gov/uploads/2011/01/the\\_rulemaking\\_process.pdf](https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf). The ANPR is issued during the preliminary stages of the rulemaking process. *Id.* The agency intends to gather information from the public and interested groups that go into the proposal. *Id.*

<sup>23</sup> See *infra* Part I.D.

<sup>24</sup> President George H.W. Bush, Remarks at the Signing of the Americans with Disabilities Act (July 26, 1990) (transcript available at [https://www.eeoc.gov/eeoc/history/35th/videos/ada\\_signing\\_text.html](https://www.eeoc.gov/eeoc/history/35th/videos/ada_signing_text.html)).

nature of Title III. The Act provides a wide range of coverage for individuals who need protection in society. Finally, it discusses the development of the Internet after the adoption of Title III and the work private groups have done to make the Internet accessible to everyone. The Internet gained popularity after Title III but still holds the potential to make the world more accessible for those with disabilities.

#### A. *The Enactment of Title III*

The ADA prohibits discrimination in a variety of settings, including in employment, private and governmental contexts.<sup>25</sup> Congress found there had been a history of isolation and segregation of individuals with disabilities in society.<sup>26</sup> The purpose of this Act was to eliminate discrimination against individuals with disabilities at a national level, by providing “clear, strong, consistent, enforceable standards addressing discrimination.”<sup>27</sup>

The goal of the ADA was to “assure equality of opportunity” for individuals with disabilities.<sup>28</sup> A person has a disability when he or she suffers from a physical or mental impairment that “substantially limits one or more major life activities of such individual.”<sup>29</sup> A person who is blind or visually impaired is limited in a major life activity, the ability to see.<sup>30</sup> Sources estimate over 6.6 million people in the United States are blind or visually impaired.<sup>31</sup> Since the enactment of the ADA, America has accommodated physically impaired individuals by making

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<sup>25</sup> See 42 U.S.C. § 12182 (2012).

<sup>26</sup> *Id.* § 12101(a)(2).

<sup>27</sup> See Crowley, *supra* note 11, at 653; see also 42 U.S.C. § 12101(b) (2012).

<sup>28</sup> 42 U.S.C. § 12101(a)(7).

<sup>29</sup> *Id.* § 12102(1)(A) (2012); H.R. REP. NO. 101-485, pt. 2, at 23 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 304. According to the statute, “substantially limits” is determined regardless of the use of “assistive technology” such as JAWS. 42 U.S.C. § 12102(4)(E)(i). For example, even if a blind person’s use of JAWS makes it so they are not substantially limited from activities, he or she still has a disability according to the statute. *Id.*

<sup>30</sup> U.S. EQUAL EMP. OPPORTUNITY COMM’N, QUESTIONS & ANSWERS ABOUT BLINDNESS AND VISION IMPAIRMENTS IN THE WORKPLACE AND THE AMERICANS WITH DISABILITIES ACT (ADA).

<sup>31</sup> *Id.*

public places more accessible.<sup>32</sup> Places of public accommodation are required by law to provide certain facilities and ensure a level of accessibility.<sup>33</sup>

People with disabilities tend to live isolated lives because it can be difficult for them to function or get around in public accommodations.<sup>34</sup> The ADA was intended to minimize this discomfort and encourage individuals with disabilities to participate in society.<sup>35</sup> After officially signing Title III, President George H.W. Bush said the ADA was aimed at securing for individuals with disabilities “independence, freedom of choice, control of their lives, [and] the opportunity to blend fully and equally into the rich mosaic of the American mainstream.”<sup>36</sup> The Attorney General at the time, Richard Thornburgh, echoed the President: “[W]e must bring Americans with disabilities into the mainstream of society ‘in other words, full participation in and access to all aspects of society.’”<sup>37</sup>

Public accommodations must ensure there are no physical or communication barriers for individuals with disabilities.<sup>38</sup> Prior to the enactment of Title III, there was no legal recourse available for discrimination based on disability, yet other groups who frequently faced discrimination had legal protection.<sup>39</sup> As a matter of public policy, when a group is incapable of protecting themselves the law should step in to fill in the gap. Congress borrowed language from the Civil Rights Act of 1964 when

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<sup>32</sup> See Crowley, *supra* note 11, at 654.

<sup>33</sup> *Id.* at 655.

<sup>34</sup> Americans with Disabilities Act of 1990 § 2; 42 U.S.C. § 12101.

<sup>35</sup> 42 U.S.C. § 12101.

<sup>36</sup> President George H.W. Bush, Remarks, *supra* note 24. The President declared the need to “remove the physical barriers we have created and the social barriers that we have accepted.” *Id.*

<sup>37</sup> H.R. REP. NO. 101-485, pt. 2, at 35 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 317.

<sup>38</sup> *Id.* at 23; *see also* Crowley, *supra* note 11, at 655 (“The ADA differs from other civil rights legislation—where a place of public accommodation is typically only prohibited from denying access . . . on the basis of some characteristic—by requiring places of public accommodation to affirmatively ensure that individuals with disabilities have equal access to the good or services.”).

<sup>39</sup> 42 U.S.C. § 12101(a)(4); *see also* Marca Bristo, *Promises to Keep: A Decade of Federal Enforcement of the Americans with Disabilities Act*, NAT'L COUNCIL ON DISABILITY (June 27, 2000), [http://ncl.d.gov/rawmedia\\_repository/497e788f\\_1ab2\\_4ae2\\_b240\\_4aefa363230c.pdf](http://ncl.d.gov/rawmedia_repository/497e788f_1ab2_4ae2_b240_4aefa363230c.pdf); Crowley, *supra* note 11, at 654.

drafting the ADA.<sup>40</sup> Title III established a “clear and comprehensive prohibition of discrimination on the basis of disability.”<sup>41</sup>

In order to pursue a claim under Title III, a plaintiff must establish he or she has a disability that subjects him or her to discrimination.<sup>42</sup> The plaintiff must then show the accused party is a private entity that is considered a public accommodation affecting commerce and that he or she was denied the “full and equal enjoyment” of the goods or services based on his or her disability.<sup>43</sup> Finally, the plaintiff must demonstrate his or her proposed accommodation is reasonable and will not result in an “undue burden.”<sup>44</sup> Once the plaintiff establishes these elements, the burden shifts to the defendant to prove that the proposed accommodation is an “undue burden.”<sup>45</sup>

The various committee reports leading up to the enactment of the ADA<sup>46</sup> recognized that technological advances would continue to make future accommodations more accessible and more easily adoptable by public places of accommodation.<sup>47</sup> Technological advances should open doors for individuals with disabilities and facilitate accessibility, not hinder their freedom by creating additional barriers.<sup>48</sup> The ADA did not intend to limit its policy of non-discrimination to the types of technology available in 1990.<sup>49</sup> The types of accommodations and services

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<sup>40</sup> See Crowley, *supra* note 11, at 653 (citing Robert L Burgdorf, Jr., *Restoring the ADA and Beyond: Disability in the 21<sup>st</sup> Century*, 13 TEX. J. C.L. & C.R. 241, 250–51, 285 (2008)). The ADA was also modeled after the Rehabilitation Act of 1973. *Id.*

<sup>41</sup> 136 CONG. REC. S16,826–04 (daily ed. Oct. 23, 1990).

<sup>42</sup> See Crowley, *supra* note 11, at 656; see also *Schroedel v. N.Y.U. Med. Ctr.*, 885 F. Supp. 594, 598–99 (S.D.N.Y. 1995).

<sup>43</sup> 42 U.S.C. §§ 12181(7), 12182(a); see Crowley, *supra* note 11, at 656–57. The plaintiff must establish that the private entity “owns, leases, or operates a place of public accommodation that fits under one of the twelve enumerated categories listed in [the statute].” *Id.* at 657.

<sup>44</sup> See *infra* Part III.A.iv.

<sup>45</sup> Crowley, *supra* note 11, at 657. Plaintiffs usually seek attorneys’ fees, injunctions, damages, and other forms of recovery. *Id.*; J. Donald Best & Amy O. Burchs, *Is Your Website ADA Compliant?*, NAT’L L. REV. (May 20, 2016), <http://www.natlawreview.com/article/your-website-ada-compliant>.

<sup>46</sup> H.R. REP. NO. 101-485, pt. 2, at 1 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 303. The Committee on Education and Labor was one of the many committees that recommended passing the bill as amended. *Id.*

<sup>47</sup> *Id.* at 108.

<sup>48</sup> *Id.*

<sup>49</sup> “[V]arious types of reasonable accommodations for individuals with . . . disabilities is essential to accomplishing the critical goal of this legislation—to allow individuals with disabilities to be part of the economic

provided under this title “should keep pace with the rapidly changing technology of the times.”<sup>50</sup> The Attorney General, and therefore the DOJ, was charged with issuing regulations and standards to carry out Title III.<sup>51</sup>

### B. Amendments

Congress delegated the power to provide standards for places of public accommodation to the DOJ.<sup>52</sup> The DOJ published initial regulations on July 26, 1991—the “ADA Standards”—exactly one year after President George H.W. Bush signed Title III.<sup>53</sup> Almost twenty years later, in 2010, the DOJ updated the ADA Standards to include the adoption of “Accessible Design” standards mostly regarding physical accommodations.<sup>54</sup> In 2016, Attorney General Loretta Lynch approved a rule that clarified the definition of “disability” under the ADA to guarantee it would be “construed broadly” and applied without “extensive analysis,” thus making clear the Act is intended to be overly inclusive.<sup>55</sup> Although there has been discussion about the Internet and its application to the ADA, no final rules have been issued. As it stands, Title III does not explicitly list the Internet as a place of public accommodation.<sup>56</sup> This could be because the Internet was in its most primitive phase when the law was enacted.

### C. The Internet & E-Commerce

After Congress enacted Title III in 1990, the Internet became widely accessible to the public. In fact, the growth of the Internet was dependent on it being available to anyone, anywhere.<sup>57</sup> The goal was to create an abstract, “common information space” as

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mainstream of our society.” *Id.* at 34. “It is critical to define places of public accommodations to include all places open to the public . . . because discrimination against people with disabilities is not limited to specific categories of public accommodations.” *Id.* at 35.

<sup>50</sup> *Id.* at 108 (“This is a period of tremendous change and growth involving technology assistance and the Committee wishes to encourage this process.”).

<sup>51</sup> 42 U.S.C. § 12186(b) (2012).

<sup>52</sup> *Id.*

<sup>53</sup> U.S. DEPT OF JUSTICE, CIVIL RIGHTS DIV., 1991 ADA STANDARDS FOR ACCESSIBLE DESIGN (1991), [https://www.ada.gov/1991ADASTandards\\_index.htm](https://www.ada.gov/1991ADASTandards_index.htm).

<sup>54</sup> *Id.*; 28 C.F.R. § 36.101(a) (2016).

<sup>55</sup> 28 C.F.R. § 36.101(b) (2016).

<sup>56</sup> *See generally* 42 U.S.C. § 12182.

<sup>57</sup> Tim Berners-Lee, Frequently Asked Questions, WORLD WIDE WEB CONSORTIUM, <https://www.w3.org/People/Berners-Lee/FAQ.html> (last visited Sept. 16, 2019).

the primary way for people to interact with one another.<sup>58</sup> Stores quickly began marketing their products online, and soon consumers were making purchases without ever stepping foot in a store.<sup>59</sup>

E-commerce markets started as an extension of physical locations. Stores with physical locations created websites to keep up with competition and the shift in cultural preference to shop online.<sup>60</sup> The virtual location serves the same purposes as the physical store. For example, a consumer can browse, purchase, and return a product without ever stepping foot in a physical store. Further, stores that are only accessible online offer discounts to brand name products sold in physical locations. The Internet has allowed companies without physical locations, like Amazon and eBay, to progress and flourish. Amazon sells its own products almost exclusively online, maintaining warehouses only to ship consumer goods. Amazon also has a “Marketplace” that connects consumers directly to sellers.<sup>61</sup> Its Marketplace is like a virtual street fair, where individual sellers can use the Amazon platform to market their own goods.<sup>62</sup>

The ability to create a website has opened the door to success for “mom-and-pop” types of shops. These small, online-only companies need not worry about rent costs or paying retail employees because they can “set up shop” online.<sup>63</sup> This type of online-only store greatly benefits from the Internet but,

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<sup>58</sup> *Id.*

<sup>59</sup> Bob Tedeschi, *E-Commerce Report; No Longer a Niche Marketing Outlet, the Internet Is Now Attracting Shoppers from Almost All Walks of Life*, N.Y. TIMES (Mar. 29, 2004), <http://www.nytimes.com/2004/03/29/business/e-commerce-report-no-longer-niche-marketing-outlet-internet-now-attracting.html>; see also Torbjörn Fredriksson, *E-commerce and Development: Key Trends and Issues*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT 2 (Apr. 8, 2013), [https://www.wto.org/english/tratop\\_e/devel\\_e/wkshop\\_apr13\\_e/fredriksson\\_ecommerce\\_e.pdf](https://www.wto.org/english/tratop_e/devel_e/wkshop_apr13_e/fredriksson_ecommerce_e.pdf) (defining e-commerce as the “sale or purchase of goods or services over computer mediated networks (broad definition) [or] the Internet (narrow definition).”). Amazon’s sales in North America grew from \$2.5 billion in 2001 to around \$35 billion in 2012. *Id.* at 6.

<sup>60</sup> Karine Perset, *The Economic and Social Role of Internet Intermediaries*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT 40 (Apr. 2010), <https://www.oecd.org/internet/ieconomy/44949023.pdf>.

<sup>61</sup> *Supporting Small Businesses*, AMAZON, <http://www.aboutamazon.com/supporting-small-businesses> (last visited Sept. 16, 2018).

<sup>62</sup> *Id.*

<sup>63</sup> *Sell on Etsy*, ETSY, <http://www.etsy.com/sell?ref=ftr> (last visited Sept. 16, 2018). Etsy.com is an online store where small business owners can pay Etsy a fee to list their products in order to reach new audiences. *Id.* Etsy also provides help and tips for the individual sellers. *Id.*

depending on the jurisdiction, may not be considered a place of public accommodation.<sup>64</sup> Failing to include these websites under Title III effectively allows them to discriminate against the blind.<sup>65</sup> If the website is not required to be accessible, a blind person using JAWS or another similar program will never be able to access those goods or services.

Stores have started to develop the latest technology, mobile applications, as platforms compatible with mobile devices to promote their brands.<sup>66</sup> These applications function on one's phone, like a regular website, without the need for a computer.<sup>67</sup> Advances in technology continue to make society more accessible, at least for those who have the ability to navigate the Internet.

#### D. *Web Accessibility Initiative*

Websites and mobile applications are highly interactive and rich in content, but a lot of potential is unrealized due to access barriers. The Internet has the ability to "revolutionize disability access to information."<sup>68</sup> In order to maximize this potential, private groups have developed standards to ensure web accessibility.<sup>69</sup> Both judges and the DOJ have referenced the Web Content Accessibility Guidelines (the "WCAG")<sup>70</sup> as a standard for a website to comply with the ADA as a place of public accommodation.<sup>71</sup>

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<sup>64</sup> See *infra* Part II.C.

<sup>65</sup> See Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 956 (N.D. Cal. 2006); see also Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43,460 (July 26, 2010) (to be codified at 28 C.F.R. pts. 35 & 36).

<sup>66</sup> Mehul Rajput, *Tracing the History and Evolution of Mobile Apps*, TECH.CO (Nov. 27, 2015, 8:00 PM), <http://tech.co/mobile-app-history-evolution-2015-11>. iPhone users have downloaded over thirty billion applications. *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Introduction to Web Accessibility*, WEBAIM, <http://webaim.org/intro/> (last updated Mar. 15, 2016). Before the Internet, a blind person relied on friends or family to read them the newspaper. *Id.* Now, a blind person can go to that newspaper's website and use a screen reader. *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> See *Web Content Accessibility Guidelines (WCAG) Overview*, WORLD WIDE WEB CONSORTIUM (W3C), <http://www.w3.org/WAI/standards-guidelines/wcag/> (last updated June 22, 2018).

<sup>71</sup> See *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340, 1350 (S.D. Fla. 2017); see also Consent Decree at 12, *Nat'l Fed'n of the Blind v. HRB Digital LLC*, 2014 WL 4999221 (D. Mass. Mar. 24, 2014).

## 1. Internet Standards

Members of the World Wide Web Consortium (“W3C”), which include volunteers, full-time staff, and the developers of the Internet,<sup>72</sup> work together to develop a “single shared standard for web content accessibility.”<sup>73</sup> The WCAG 2.1 was updated as recently as June 5, 2018.<sup>74</sup> Its twelve guidelines are organized under four main principles: “Perceivable,” “Operable,” “Understandable,” and “Robust.”<sup>75</sup> Within each category a website can receive a rank of A, AA, or AAA.<sup>76</sup> Currently, these guidelines are influential,<sup>77</sup> but there is no legal requirement for websites of any size or capacity to comply with the standards.<sup>78</sup>

Level “A” is the lowest level of accessibility. Requirements include that all non-text has a text alternative, that web pages have titles to describe the topic or purpose, and that instructions

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<sup>72</sup> *Facts About W3C*, WORLD WIDE WEB CONSORTIUM (W3C), <http://www.w3.org/Consortium/facts> (last visited Sept. 16, 2018).

<sup>73</sup> *Web Content Accessibility Guidelines (WCAG) Overview*, WORLD WIDE WEB CONSORTIUM (W3C), <http://www.w3.org/WAI/standards-guidelines/wcag/> (last updated June 22, 2018).

<sup>74</sup> *Id.*

<sup>75</sup> *Introduction to Understanding WCAG 2.0*, WORLD WIDE WEB CONSORTIUM (W3C), <http://www.w3.org/TR/UNDERSTANDING-WCAG20/intro.html#introduction-fourprincs-head> (last visited Sept. 16, 2018). To be “[p]erceivable,” the website “must be presentable to users.” *Id.* To be “[o]perable,” users must be able to navigate the website and its interface. *Id.* To be “[u]nderstandable, . . . users must be able to understand the information [and] the operation of the user interface.” *Id.* To be “[r]obust, [c]ontent must be robust enough that it can be interpreted reliably by a wide variety of user agents, including assistive technologies.” *Id.*

<sup>76</sup> *Understanding Conformance*, WORLD WIDE WEB CONSORTIUM (W3C), <http://www.w3.org/TR/UNDERSTANDING-WCAG20/conformance.html#uc-conformance-requirements-head> (last visited Sept. 16, 2018). A ranking of AAA is the highest a website can receive. *Id.*

<sup>77</sup> *See* *Robles v. Dominos Pizza LLC*, No. 16-CV-06599 SJO, 2017 WL 1330216, at \*4, \*7 (C.D. Cal. Mar. 20, 2017); Consent Decree at 12, *Nat’l Fed’n of the Blind v. HRB Digital LLC*, 2014 WL 4999221 (D. Mass. Mar. 24, 2014); *see also* Press Release, U.S. Dep’t of Justice, Justice Dep’t Enters into a Settlement Agreement with Peapod to Ensure that Peapod Grocery Delivery Website is Accessible to Individuals with Disabilities (Nov. 17, 2014), <http://www.justice.gov/opa/pr/justice-department-enters-settlement-agreement-peapod-ensure-peapod-grocery-delivery-website> [hereinafter Press Release, Peapod].

<sup>78</sup> *See* *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340, 1350–51 (S.D. Fla. 2017). The court required Winn-Dixie to comply with the WCAG 2.0 guidelines but this decision is not binding on any other district and the judge did not set a specific standard of A, AA or AAA compliance. *Id.*; Minh N. Vu, *First Federal Court Rules That Having an Inaccessible Website Violates Title III of the ADA*, LEXOLOGY: ADA TITLE III NEWS & INSIGHTS BLOG (June 13, 2017), <http://www.lexology.com/library/detail.aspx?g=4b64d336-5e39-46f6-a7ff-ae7962e538e1>.

are provided when content requires user input.<sup>79</sup> Level “AA” incorporates Level A standards and imposes higher requirements. For example, Level AA websites must have audio descriptions recorded for prerecorded content in synchronized media, the ability for text to be resized without assistive technology up to 200 percent, and more than one way to locate a web page within a set of web pages.<sup>80</sup> Level “AAA” guarantees the highest degree of access. The technical requirements at this level entail the use of images as text only for pure decoration or where a particular presentation of text is essential to the information being conveyed, “[a]ll functionality of the content is operable through a keyboard interface without requiring specific timings for individual keystrokes,” and “[w]hen an authenticated session expires, the user can continue the activity without loss of data [or] re-authenticating.”<sup>81</sup>

## 2. Mobile Application Standards

W3C volunteers also developed standards for mobile phones. The Mobile Web Best Practices (the “BP 1.0”) is a guide for making websites usable on mobile devices.<sup>82</sup> The BP 1.0 was released to assist developers in getting Internet content delivered to mobile phones.<sup>83</sup> Similarly, the Mobile Web Application Best Practices (the “MWABP”) was released in 2010 to “aid the development” of mobile applications by promoting the “most relevant engineering practices” in order to facilitate a better user experience.<sup>84</sup> The MWABP provides principles to follow, defines the meaning of the principles, and provides “How to do it” sections.<sup>85</sup>

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<sup>79</sup> See generally *How to Meet WCAG 2 (Quick Reference)*, WORLD WIDE WEB CONSORTIUM (W3C), <http://www.w3.org/WAI/WCAG20/quickref/#content-structure-separation-programmatic> (last updated Sept. 13, 2018).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Mobile Web Application Best Practices*, WORLD WIDE WEB CONSORTIUM (W3C), <http://www.w3.org/TR/mwabp/> (Dec. 14, 2010) (“Where the focus of BP 1.0 is primarily the extension of Web *browsing* to mobile devices, this document considers the development of Web *applications* on mobile devices.”) (emphasis in original).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* It should be noted these guidelines are forward-looking and may not reflect the most accurate development of mobile applications in the seven years since they were published.

<sup>85</sup> *Id.*

## II. IS THE INTERNET A PLACE OF PUBLIC ACCOMMODATION?

Part II begins by discussing the different interpretations of the phrase “place of public accommodation” based on word choice and policy. It then explains the DOJ’s recognition of the interpretation issue but failure to propose a clarifying rule. Next, it reviews the split in *Netflix I* and *Netflix II*, highlighting how two courts interpreted the same statute in very different ways, leading to opposite outcomes for the same set of facts. The two major questions highlighted in recent court decisions are: (1) whether a website with no nexus to a physical location can be subject to the ADA; and (2) when a website is subject to the ADA, which standards should be imposed. The courts have called on the DOJ to step in and provide guidance not only for the courts, but also for website owners and people with disabilities. Finally, Part II details the actions and settlements the DOJ has made in light of the split, from which, although they are not binding, the DOJ’s position can be inferred.

### A. *Interpreting “of any place of public accommodation”*<sup>86</sup>

Title III prohibits discrimination against people with disabilities in “place[s] of public accommodation.”<sup>87</sup> The first place to look when interpreting the meaning of a phrase is the language and the definitions contained in the statute itself.<sup>88</sup> Congress’s word choice and sentence structure are meaningful: “[Title III] applies to the [goods and] services *of* a place of public accommodation, not [goods and] services *in* a place of public accommodation.”<sup>89</sup> If Congress had specified goods “*in* a place,” it would severely limit the potential for any reading other than goods inside a physical location.<sup>90</sup> Although one could argue that goods available for purchase online are located “in” an Internet website, the semantics of the statute do indicate there needs to

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<sup>86</sup> 42 U.S.C. § 12182(a) (2012) (emphasis added).

<sup>87</sup> *Id.*

<sup>88</sup> PETER M. KELLY, STATE BAR OF TEXAS, TXCLE ADVANCED CIV. APP. PRAC. 26.III: THE PRIMARY MODES OF STATUTORY INTERPRETATION (2016).

<sup>89</sup> Nat’l Fed’n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 953 (N.D. Cal. 2006) (emphasis in original). The Ninth Circuit denied Target’s motion to dismiss the claim of ADA violations. *Id.* at 956 (“[T]o the extent that plaintiffs allege that the inaccessibility of Target.com impedes the full and equal enjoyment of goods and services offered in Target stores, the plaintiffs state a claim.”). The court limited the application of Title III only to the extent that the goods and services offered on the website are also available in the physical location. *Id.*

<sup>90</sup> *Id.*

be a physical structure to house the goods. However, restricting the application of Title III to services and goods inside the physical location of an enumerated entity goes against the plain meaning of the statute.<sup>91</sup>

Section 12181(7) enumerates examples of “private entities [that] are considered public accommodations for purposes of [Title III], if the operations of such entities affect commerce.”<sup>92</sup> The twelve enumerated categories give examples of places of public accommodation, but recognize the list is not exhaustive. Almost every category ends with “or other . . . establishment.”<sup>93</sup> Establishment is not defined in the statute, but according to Cambridge Dictionary, an establishment could be a business organization,<sup>94</sup> and business organizations are not limited to physical structures.<sup>95</sup> The definition of “place of public accommodation” must “include all places open to the public . . . because discrimination against people with disabilities is not limited to specific categories of public accommodations.”<sup>96</sup>

### B. *Advanced Notice of Proposed Rulemaking*

The Attorney General, and therefore the DOJ, was given the power to issue regulations and enforce the provisions of the ADA.<sup>97</sup> An agency has the power to issue regulations within its delegated statutory authority.<sup>98</sup> The DOJ received repeated requests to explicitly include websites in the purview of the ADA and began soliciting comments for a proposed rule in 2010.<sup>99</sup> Based on the Internet's significant growth, the DOJ decided to

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<sup>91</sup> *Id.* at 953. This implication is clear because Congress wanted to bar anything that impaired the full enjoyment of a person with disabilities or denied him or her equal participation. *Id.*; 42 U.S.C. § 12182(a).

<sup>92</sup> 42 U.S.C. § 12181(7).

<sup>93</sup> *See id.* For example, sections end with, “or other sales or rental establishment,” “or other establishment serving food,” and “or other service establishment.” *Id.*

<sup>94</sup> *Establishment*, CAMBRIDGE DICTIONARY (11th ed. 2017).

<sup>95</sup> *Id.*

<sup>96</sup> H.R. REP. NO. 101-485, pt. 2, at 35 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 317.

<sup>97</sup> *See* 42 U.S.C. § 12186(b). Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460–01, 43,461 (July 26, 2010) (to be codified at 28 C.F.R. pts. 35 & 36).

<sup>98</sup> OFFICE OF FED. REGISTER, *supra* note 22, at 2.

<sup>99</sup> Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. at 43460.

consider amending Title III to require that public accommodations that use websites to provide products to the public be accessible and usable by individuals with disabilities.<sup>100</sup>

The DOJ requested comments from the public, especially those who have a stake in Internet regulation for individuals with disabilities.<sup>101</sup> The Advanced Notice of Proposed Rulemaking (“ANPR”) suggested Title III should cover all websites that provide goods or services that fall within the statute’s twelve enumerated categories.<sup>102</sup> But the proposed rule does not extend coverage to websites providing informal or occasional selling or bartering of goods and services by private individuals in an online marketplace.<sup>103</sup> The DOJ never proposed a final rule after soliciting comments, and it seems unlikely a rule will be issued soon because the new administration has moved website regulations to the inactive agenda.<sup>104</sup> Even if the DOJ decides to move forward, it may need to submit a new ANPR, considering the changes in technology since 2010.<sup>105</sup>

Due to the lack of uniformity among the courts, there needs to be a clear requirement so the disabled community will not be limited in access and websites will have clear guidance on what is necessary for compliance under the ADA. Websites are accessible through the Internet and therefore are available in every jurisdiction. Under the current law, a California resident would not have a valid cause of action against a website that has no nexus to a physical location, but a Massachusetts resident would have a valid cause of action under Title III against the same website.<sup>106</sup>

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.* The DOJ’s questions include: “Should the Department adopt the WCAG 2.0’s ‘Level AA Success Criteria’ as its standard for Web site accessibility . . . ?” and “[s]hould the Department adopt any specific parameters regarding its proposed coverable limitations?” *Id.* at 43465.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* This limitation is particularly significant because it completely prohibits individuals with disabilities from accessing these products. *Id.* Stores like Etsy and Poshmark with no physical locations are free to discriminate. *Id.*

<sup>104</sup> See Vivian Wang, *College Websites Must Accommodate Disabled Students, Lawsuit Says*, N.Y. TIMES (Oct. 11, 2017), <http://www.nytimes.com/2017/10/11/nyregion/college-websites-disabled.html>; Gregory Krieg & Will Mullery, *Trump’s Budget by the Numbers: What Gets Cut and Why*, CNN (May 23, 2017), <http://www.cnn.com/2017/05/>

23/politics/trump-budget-cuts-programs/index.html (showing President Trump has allocated the DOJ’s time to border enforcement and border security initiatives).

<sup>105</sup> OFFICE OF FED. REGISTER, *supra* note 22, at 6.

<sup>106</sup> See *infra* Part II.C.

### C. *Netflix I and Netflix II*

In 2012, Netflix was the defendant in two separate lawsuits alleging discrimination under the ADA.<sup>107</sup> In both cases, the plaintiffs<sup>108</sup> were deaf subscribers to Netflix, an online streaming system with no physical location.<sup>109</sup> Netflix provides only a few programs with closed captioning, making it impossible for deaf users to fully access the website's services.<sup>110</sup> The plaintiffs in both *Nat'l Ass'n of the Deaf v. Netflix* ("Netflix I") and *Cullen v. Netflix* ("Netflix II") alleged that Netflix's failure to provide all programs with closed captions was discrimination on the basis of disability in violation of Title III.<sup>111</sup>

In *Netflix I*, the court held that under First Circuit jurisprudence, Netflix's website was a stand-alone entity that fell within four of the statute's enumerated entities and was therefore a place of public accommodation.<sup>112</sup> Relying on precedent, the plaintiffs argued that "places of public accommodation[s]' [were] not limited to 'actual physical structures.'"<sup>113</sup> The court referenced congressional statements showing the broad scope of Title III; the entity being charged with discrimination does not need to be listed but must fit

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<sup>107</sup> *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 198 (D. Mass. 2012); *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017, 1023 (N.D. Cal. 2012).

<sup>108</sup> The plaintiffs in *National Association of the Deaf* included two non-profit organizations, the National Association of the Deaf and the Western Massachusetts Association of the Deaf and Hearing Impaired, as well as a deaf individual. *Nat'l Ass'n of the Deaf*, 869 F. Supp. 2d at 198. The plaintiffs in *Cullen* were part of a class action suit. *Cullen*, 880 F. Supp. 2d at 1020.

<sup>109</sup> *Nat'l Ass'n of the Deaf*, 869 F. Supp. 2d at 199; *Cullen*, 880 F. Supp. 2d at 1020. The court in *Cullen* held that websites are not physical places and thus are not places of public accommodation. *Id.* at 1023–24.

<sup>110</sup> *Nat'l Ass'n of the Deaf*, 869 F. Supp. 2d at 199; *Cullen*, 880 F. Supp. 2d at 1021.

<sup>111</sup> *Nat'l Ass'n of the Deaf*, 869 F. Supp. 2d at 199; *Cullen*, 880 F. Supp. 2d at 1021.

<sup>112</sup> *Nat'l Ass'n of the Deaf*, 869 F. Supp. 2d at 201–02. The four categories included: "place of exhibition and entertainment," "place of recreation," "sales or rental establishment," and "service establishment." *Id.* at 200 (quoting 42 U.S.C. § 12181(7) (2012)).

<sup>113</sup> *Nat'l Ass'n of the Deaf*, 869 F. Supp. 2d at 200 (citing *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New Eng., Inc.*, 37 F.3d 12, 19 (1st Cir. 1994)). Although the statutory and regulatory definitions never expressly state whether websites are "public accommodations," in *Carparts*, the First Circuit reasoned that including "travel service" in the twelve categories of enumerated entities indicates "places of public accommodation" are not limited to "actual physical structures." *Carparts*, 37 F.3d 12 at 19.

Under *Carparts*, a website that has no physical structure is subject to ADA regulations. *Id.*

“within the overall category.”<sup>114</sup> It found that Congress could not have intended that people who walk into stores to purchase goods or services are entitled to the ADA’s protections but those who purchase the same goods or services over the phone, on the Internet, or through the mail are not.<sup>115</sup> Specifically, the court said that

[i]n a society in which business is increasingly conducted online, excluding businesses that sell services through the Internet . . . would “run afoul of the purposes of the ADA and would severely frustrate Congress’s intent that individuals with disabilities fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public.”<sup>116</sup>

Looking directly at the statutory text, “[t]he ADA covers the services ‘of a public accommodation, not services ‘at’ or ‘in’ a public accommodation.”<sup>117</sup> Limiting Title III’s protections to services in a physical location frustrates the plain meaning of the statute.<sup>118</sup>

Unlike the court in *Netflix I*, in *Netflix II*, the Northern District of California took a different position, declaring that the ADA did not apply to Netflix: “[W]ebsites are not places of public accommodations . . . because they are not actual physical places.”<sup>119</sup> The court in *Netflix II* noted the decision of the court in *Netflix I* but declined to follow it due to Ninth Circuit precedent.<sup>120</sup> According to Ninth Circuit precedent in *Weyer v. Twentieth Century Fox Film Corporation*, the language of the ADA implicitly requires a connection between a good and an actual physical place.<sup>121</sup> Because the statute explicitly enumerates accommodations, the court in *Weyer* looked to the

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<sup>114</sup> *Nat’l Ass’n of the Deaf*, 869 F. Supp. 2d at 201 (quoting H.R. REP. NO. 101-485, pt. 3, at 54 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 477).

<sup>115</sup> *Id.* at 200.

<sup>116</sup> *Id.* (quoting *Carparts*, 37 F.3d at 20).

<sup>117</sup> *Id.* at 201 (citing 42 U.S.C. § 12182(a)); *see supra* Part II.A; *see also* Nat’l Fed’n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 953 (N.D. Cal. 2006) (“The statute applies to the services of a place of public accommodation, not services in a place of public accommodation.”) (emphasis in original). *See supra* Part II.A.

<sup>118</sup> *Nat’l Ass’n of the Deaf*, 869 F. Supp. 2d at 201.

<sup>119</sup> *Cullen*, 880 F. Supp. 2d at 1023; *see, e.g.*, *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9th Cir. 2000).

<sup>120</sup> *Cullen*, 880 F. Supp. 2d at 1023.

<sup>121</sup> *Weyer*, 198 F.3d at 1114. The principle of *noscitur a sociis* requires the term in question to be interpreted in the context of the other words in the statute. *Id.*

commonalities among the enumerated accommodations.<sup>122</sup> The court recognized that all the examples are actual physical locations and therefore inferred the statute should cover only physical locations.<sup>123</sup> After *Weyer*, the *Target* court extended coverage to websites that have a “nexus” to a physical place of public accommodation.<sup>124</sup> The *Target* court held that any services offered on Target.com and offered in the store must be accessible to all individuals. This holding was limited because it did not include services or features that were only accessible online. Following this test, the court in *Netflix II* held that Netflix is not subject to the ADA because it is a streaming website with no nexus to a physical location.<sup>125</sup> The Ninth Circuit affirmed the *Netflix II* decision in a memorandum decision.<sup>126</sup>

#### D. *In the Wake of Netflix I and Netflix II*

Depending on the jurisdiction where a lawsuit is filed, there can be two different outcomes. While some circuits follow the Ninth Circuit’s “nexus” test, others follow the First Circuit, and treat websites as stand-alone entities subject to ADA regulation.<sup>127</sup> For example, the claims in *Access Now, Inc. v. Blue Apron, LLC* might not have survived a motion to dismiss if the lawsuit had been filed in a jurisdiction following the “nexus” test.<sup>128</sup> Blue Apron is an online-only grocery service that sends ingredients directly to subscribing customers. Only under *Netflix I* would Blue Apron be subject to the ADA.<sup>129</sup> However, even when courts determine a website is subject to the ADA, there are no guidelines to determine what regulations should apply. For

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 952 (N.D. Cal. 2006) (citing *Weyer*, 198 F.3d at 1115).

<sup>125</sup> *Cullen*, 880 F. Supp. 2d at 1023.

<sup>126</sup> *Cullen v. Netflix, Inc.*, 600 F. App’x 508, 509 (9th Cir. 2015) (mem.).

<sup>127</sup> *Compare Nat’l Ass’n of the Deaf*, 869 F. Supp. 2d at 201, with *Earl v. eBay, Inc.*, 599 F. App’x 695, 696 (9th Cir. 2015) (The court in *eBay* held that “[b]ecause eBay’s services [were] not connected to any ‘actual, physical place,’ eBay [was] not subject to the ADA.”).

<sup>128</sup> *Compare Access Now, Inc. v. Blue Apron, LLC*, No. 17-CV-116 (JL), 2017 WL 5186354, at \* 4 (D.N.H. Nov. 8, 2017) (denying motion to dismiss despite defendant’s lack of nexus to a physical location), with *Cullen*, 880 F. Supp. 2d at 1023 (dismissing the suit because Netflix was a stand-alone website without a nexus to a physical location).

<sup>129</sup> See *Nat’l Ass’n of the Deaf*, 869 F. Supp. 2d at 201–02. Under *Netflix II*, the ADA would not apply to Blue Apron because there is no nexus to a physical location. *Cullen*, 880 F. Supp. 2d at 1023–24.

example, the court in *Robles v. Dominos Pizza, LLC*, was not willing to impose strict technical guidelines without any ruling from the DOJ.<sup>130</sup> But the court in *Gil v. Winn-Dixie Stores, Inc.* imposed WCAG 2.0 standards.<sup>131</sup> Without guidance from the DOJ, courts and websites are left in a zone of uncertainty and the blind face discrimination.

### 1. *Robles v. Dominos Pizza, LLC*

Domino's Pizza has a website and a mobile application where customers can browse the menu and place orders.<sup>132</sup> According to the plaintiff in *Robles v. Dominos Pizza, LLC*, neither complied with the WCAG 2.0 guidelines.<sup>133</sup> The website was not compatible with JAWS and the mobile application was not compatible with VoiceOver.<sup>134</sup> After the suit was filed, Domino's Pizza added accessibility banners to its mobile application and website directing users with problems accessing the website through a screen reading program to call a hotline for assistance.<sup>135</sup> Domino's Pizza's physical location falls into one of the twelve categories defined by the statute.<sup>136</sup> The court noted that "the DOJ has consistently stated its view that the ADA's accessibility requirements apply to websites."<sup>137</sup>

However, the court was not willing to impose the WCAG 2.0 guidelines generally on regulated entities "without specifying a particular level of success criteria and without the DOJ offering meaningful guidance on this topic."<sup>138</sup> Although there was a

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<sup>130</sup> *Robles v. Dominos Pizza, LLC*, No. 16-CV-06599 (SJO), 2017 WL 1330216, at \*2 (C.D. Cal. Mar. 20, 2017).

<sup>131</sup> *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340, 1350, 1351 (S.D. Fla. 2017).

<sup>132</sup> *Dominos Pizza*, 2017 WL 1330216, at \*1. See generally DOMINOS PIZZA, <http://www.dominos.com/en/> (last visited Sept. 16, 2018).

<sup>133</sup> *Dominos Pizza*, 2017 WL 1330216 at \*1.

<sup>134</sup> See *id.* at \*2. JAWS and VoiceOver are software commonly used by those with visual disabilities as screen reading programs. *Id.*

<sup>135</sup> *Id.* at \*1 ("If you are using a screen reader and are having problems using the website, please call 800-254-4031 for assistance."). Although the hotline is staffed with live representatives, callers may be placed on hold and experience delays. *Id.*

<sup>136</sup> *Id.* at \*4; see also 42 U.S.C. § 12181(7) (2012).

<sup>137</sup> *Dominos Pizza*, 2017 WL 1330216 at \*4.

<sup>138</sup> *Id.* at \*5. Although the plaintiff pointed to several DOJ consent decrees obligating websites to follow WCAG 2.0 guidelines, the Ninth Circuit does not give deference to these statements or proposed regulations until they are officially adopted by the DOJ. *Id.* at \*6. The court reasoned that requiring the defendant to comply with the WCAG 2.0 Guidelines would violate its due process rights because there is no explicit criterion and the DOJ has not given any guidance on this issue. *Id.* at \*5.

nexus between the website and the physical location, the lawsuit was dismissed because the court found the plaintiff had alternate options to access the goods.<sup>139</sup> This decision does not consider that some people with disabilities might not have access to a phone or the ability to get to a physical location. In reaching its decision, the court called on Congress and the DOJ to “take action to set minimum web accessibility standards for the benefit of the disabled community, [websites] subject to Title III, and the judiciary.”<sup>140</sup>

## 2. Reed v. CVS Pharmacy

In *CVS Pharmacy*, the Ninth Circuit denied a motion to dismiss by CVS Pharmacy (“CVS”) because the plaintiff properly alleged that CVS’s website is a place of public accommodation that discriminates against individuals with disabilities.<sup>141</sup> CVS has a website and a mobile application for customers to find store locations, search for available products, and obtain coupon information.<sup>142</sup> The plaintiff alleged that she was unable to fully access CVS’s website and mobile application because of access barriers and therefore was denied full and equal enjoyment of the goods and services offered.<sup>143</sup> The court concluded that CVS was a place of public accommodation under the statute and its website had a nexus to a physical location.<sup>144</sup> While denying the motion to dismiss, the court did not determine if CVS was liable at this stage in the litigation; it recognized that a determination of liability does not require the court to mandate “complicated web standards,” but only that website customers have the same level of accessibility as they would at physical locations.<sup>145</sup> This

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<sup>139</sup> *Id.* at \*6; *see also* Wang, *supra* note 104.

<sup>140</sup> *Dominos Pizza*, 2017 WL 1330216 at \*8.

<sup>141</sup> *See* Reed v. CVS Pharmacy, Inc., No. 17-CV-3877 (MWF), 2017 WL 4457508, at \*1 (C.D. Cal. Oct. 3, 2017); *see also supra* Part II.A. CVS is a sales establishment. 42 U.S.C. § 12181(7)(E).

<sup>142</sup> *CVS Pharmacy*, 2017 WL 4457508, at \*1. The store locator function was inaccessible to a person using JAWS, making it harder for him or her to find a physical store location. *Id.* The plaintiff also had trouble using the browsing products function on the app. *Id.*

<sup>143</sup> *Id.* at \*1. The “find a location” feature was inaccessible to the plaintiff using JAWS because the edit field was not properly labeled. *Id.* While using VoiceOver to navigate the application, the plaintiff was unable to determine what products were on sale because of unlabeled links and buttons. *Id.*

<sup>144</sup> *Id.* at \*3; *see also* 42 U.S.C. § 12181(7)(E).

<sup>145</sup> *CVS Pharmacy*, 2017 WL 4457508 at \*6. The primary jurisdiction doctrine did not apply because the plaintiff did not ask the court to fashion a specific remedy but rather to ensure that the disabled community have full and equal enjoyment of

case survived the motion to dismiss and was explicitly distinguished from *Dominos Pizza* because the plaintiff did not ask for a specific standard of enforcement.<sup>146</sup>

### 3. *Gil v. Winn-Dixie Stores, Inc.*

Recently, a district court in the Eleventh Circuit held a trial to determine whether a grocery store's website violated the ADA.<sup>147</sup> The plaintiff tried to access Winn-Dixie's website using JAWS and other screen reading programs to refill his prescription.<sup>148</sup> The plaintiff could not use the online refill service because the website was not accessible using screen reading software.<sup>149</sup> The website has a store locator and gives customers access to coupons but does not allow purchases.<sup>150</sup>

The Eleventh Circuit had not directly addressed the ADA for purposes of websites, but in other contexts had said, "the plain language of Title III of the ADA covers both tangible, physical barriers . . . as well as 'intangible barriers.'"<sup>151</sup> This shows the Eleventh Circuit did not think a website required a nexus to a physical location. However, the *Winn-Dixie* court did not address the question of whether the Internet was a stand-alone entity because there was a clear nexus between Winn-Dixie's website and its physical locations.<sup>152</sup> Winn-Dixie's website was "heavily integrated with physical store locations and operate[d] as a gateway to the physical store locations."<sup>153</sup> The website violated Title III because it was "inaccessible to visually impaired

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these accommodations. *Id.* (quoting *Gorecki v. Hobby Lobby Stores, Inc.*, No. CV 17-1131-JFW(SKX), 2017 WL 2957736, at \*7 (C.D. Cal. June 15, 2017)).

<sup>146</sup> *CVS Pharmacy*, 2017 WL 4457508 at \*5.

<sup>147</sup> *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340, 1342 (S.D. Fla. 2017); see also Minh N. Vu, *First Federal Court Rules That Having an Inaccessible Website Violates Title III of the ADA*, LEXOLOGY: ADA TITLE III NEWS & INSIGHTS BLOG (June 13, 2017), <http://www.lexology.com/library/detail.aspx?g=4b64d336-5e39-46f6-a7ff-ae7962e538e1>. Cases brought under the ADA are usually settled before trial so we rarely get judicial interpretation. *Id.*

<sup>148</sup> *Winn-Dixie*, 257 F. Supp. 3d at 1333, 1344; see also *supra* notes 1–7 and accompanying text.

<sup>149</sup> *Winn-Dixie*, 257 F. Supp. 3d at 1344. "These services, privileges, advantages, and accommodations are especially important for visually impaired individuals since it is difficult, if not impossible, for such individuals to . . . physically go to a pharmacy location in order to fill prescriptions." *Id.* at 1349.

<sup>150</sup> *Id.* at 1344, 45.

<sup>151</sup> *Id.* at 1348 (quoting *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279, 1283 (11th Cir. 2002)).

<sup>152</sup> *Id.* at 1349.

<sup>153</sup> *Id.* at 1348.

individuals who must use screen reader software” and therefore “denied [the plaintiff] the full and equal enjoyment of the goods [and] services” available at Winn-Dixie.<sup>154</sup> Unlike the *Dominos Pizza* and *CVS Pharmacy* courts, the *Winn-Dixie* court was willing to impose strict technical standards and require Winn-Dixie to comply with WCAG 2.0.<sup>155</sup> However, this holding is limited, because it is not binding on any other district and the court did not specify what level of the WCAG 2.0 the website must meet.<sup>156</sup>

#### 4. *Access Now, Inc. v. Blue Apron, LLC*

In *Blue Apron*, a New Hampshire district court denied Blue Apron’s motion to dismiss because under First Circuit precedent, a website alone may amount to a public accommodation.<sup>157</sup> Blue Apron is a website that allows consumers to purchase meal plans for home delivery.<sup>158</sup> The plaintiffs alleged they were unable to use Blue Apron’s website with screen-reader software and, as a result, could not fully use Blue Apron’s services.<sup>159</sup>

Blue Apron has no nexus to a physical store and therefore, the defendant argued, the case should be dismissed because a website without such a nexus is not subject to the ADA.<sup>160</sup> Under First Circuit precedent, the plaintiff must show that the website falls within one of the enumerated categories under the ADA.<sup>161</sup> Blue Apron could be considered an online “grocery store” or a “sales” or “service establishment” under the ADA.<sup>162</sup> The court pointed out that the plaintiffs had not alleged the violation of Title III stems from Blue Apron’s failure to meet WCAG 2.0 standards, and identified “compliance with the WCAG 2.0 AA standards as a sufficient condition, but not a necessary condition,” to ensure equal access.<sup>163</sup> Similar to *Dominos Pizza* and *CVS Pharmacy*, the court did not say whether it would

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<sup>154</sup> *Id.* at 1349.

<sup>155</sup> *Id.* at 1350.

<sup>156</sup> *Id.* at 1350–51; Vu, *supra* note 147.

<sup>157</sup> *Access Now, Inc. v. Blue Apron, LLC*, No. 17-CV-116 (JL), 2017 WL 5186354, at \*2, \*5 (D.N.H. Nov. 8, 2017).

<sup>158</sup> *Id.* at \*1.

<sup>159</sup> *Id.* at \*1, \*3.

<sup>160</sup> *Id.* at \*2, \*3; *see also supra* Part II.C.

<sup>161</sup> *Blue Apron*, 2017 WL 5186354, at \*3 (citing *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New Eng., Inc.*, 37 F.3d 12, 19 (1st Cir. 1994)).

<sup>162</sup> *See* 42 U.S.C. § 12181(7)(E)–(F) (2012).

<sup>163</sup> *Blue Apron*, 2017 WL 5186354, at \*7.

require Blue Apron to comply with WCAG 2.0 standards.<sup>164</sup> Again, the court recognized the DOJ has yet to make any official rules and likely will not be making any rules in the near future.<sup>165</sup>

#### *E. DOJ's Decree*

While the DOJ has not issued any final rules, it has moved to intervene in cases where a plaintiff alleges violations of the ADA in regards to the defendant's website or mobile application.<sup>166</sup> A consent decree is an order enforceable by the court that "reflects the settlement terms agreed to by the parties."<sup>167</sup> The DOJ can enter into a consent decree with a defendant, subject to court approval, requiring the defendant's website to comply with specific standards or form an accessibility initiative.<sup>168</sup> The various decrees written and agreed to by the DOJ are not binding on other websites but confirm the DOJ's position that the ADA applies to websites.<sup>169</sup>

For example, the National Federation of the Blind (the "NFB") filed a lawsuit against H&R Block alleging its website and mobile application were not compatible with various screen reading programs.<sup>170</sup> The NFB noted that this technology has been available for decades and that the WCAG 2.0 provides guidelines for accessibility.<sup>171</sup> H&R Block reached an agreement with the DOJ to make its website and mobile application conform to Level AA of the WCAG 2.0 before the start of the next tax season.<sup>172</sup>

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<sup>164</sup> *See id.* at \*10.

<sup>165</sup> *Id.* at \*9 (noting that the DOJ has "abandoned consideration of website-accessibility standards for the immediate future"); *see also* Current Unified Agenda of Regulatory and Deregulatory Actions, 2017 Inactive Actions List, [http://www.reginfo.gov/public/jsp/eAgenda/InactiveRINs\\_2017\\_Agenda\\_Update.pdf](http://www.reginfo.gov/public/jsp/eAgenda/InactiveRINs_2017_Agenda_Update.pdf) (RIN 1190-AA61).

<sup>166</sup> *See* Press Release, U.S. Dep't of Justice, Justice Dep't Enters Consent Decree with National Tax Preparer H&R Block Requiring Accessibility of Websites and Mobile Apps Under Americans with Disabilities Act (Mar. 6, 2014), <http://www.justice.gov/opa/pr/justice-department-enters-consent-decree-national-tax-preparer-hr-block-requiring> [hereinafter Press Release, H&R Block].

<sup>167</sup> Anthony DiSarro, *Six Decrees of Separation: Settlement Agreements and Consent Orders in Federal Civil Litigation*, 60 AM. U. L. REV. 275, 277-78 (2010).

<sup>168</sup> *See* Press Release, H&R Block, *supra* note 166.

<sup>169</sup> *See id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* This shows the DOJ believes websites are subject to the ADA and the WCAG 2.0 are standards for compliance.

Similarly, the DOJ intervened in a case against PeaPod, an online grocery store that delivers goods directly to customers.<sup>173</sup> The DOJ and PeaPod agreed that PeaPod.com was not accessible by all individuals with disabilities in violation of Title III.<sup>174</sup> PeaPod does not have a physical location, which indicates the DOJ's position that a website does not require such a nexus to fall within the scope of Title III.<sup>175</sup> The parties agreed PeaPod would remove accessibility barriers in order to meet WCAG 2.0 AA standards.<sup>176</sup> While there has been no official rule, the courts and websites should consider DOJ action when determining website accessibility.

### III. THE PROPOSED FRAMEWORK

Part III argues that Internet websites should be considered places of public accommodation, regardless of whether a nexus to a physical location exists, by summarizing legislative intent, policy, and DOJ action. It then discusses the need for the DOJ to implement standards similar to those in place for physical locations. Finally, it proposes a framework for compliance depending on the type of website. The framework emphasizes the need to protect the blind while also balancing the burden compliance puts on websites.

#### A. *The Internet is a Place of Public Accommodation*

The ADA should apply to websites that fall within the places of public accommodation enumerated in the statute regardless of their association with a physical location.<sup>177</sup> The statute's listed examples of places of public accommodation are not exhaustive.<sup>178</sup> The First Circuit correctly held that a website is a place of public accommodation as supported by the purpose and legislative

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<sup>173</sup> See Press Release, Peapod, *supra* note 77; see also Settlement Agreement Between the United States of America and Ahold USA, Inc. and Peapod, LLC, Under the Americans with Disabilities Act, DJ 202-63-169 (on file with the Dep't of Justice), <http://www.justice.gov/file/163956/download>.

<sup>174</sup> See Press Release, Peapod, *supra* note 77.

<sup>175</sup> See Manatt, Phelps & Phillips, LLP, *Online-Only Retailer Settles with DOJ over ADA Violations*, JDSUPRA: ADVERTISING LAW BLOG (Dec. 29, 2014), <https://www.jdsupra.com/legalnews/advertising-law-december-2014-4-46743/>.

<sup>176</sup> See *id.*; see also Press Release, Peapod, *supra* note 77.

<sup>177</sup> See 42 U.S.C. § 12182 (2012); see also *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 201-02 (D. Mass. 2012) (holding that a website is a stand-alone entity and a place of public accommodation).

<sup>178</sup> See 42 U.S.C. § 12181(7).

intent of the ADA, the inclusive nature of the statute, and the DOJ's decrees.<sup>179</sup> Any website that provides a service, even inside a private home, can qualify as a public place of accommodation.<sup>180</sup> Further, a website that provides services in someone's home, through the Internet, is subject to ADA requirements.<sup>181</sup> The statute should not be limited to websites that have a "nexus" to a physical location.

### 1. Legislative Intent

The purpose behind the ADA is inclusion; the Act aims to assure individuals with disabilities that they are a part of society and have access to all parts of life.<sup>182</sup> Places of public accommodation were required to take affirmative steps in accordance with ADA guidelines to remove any barriers separating people with disabilities.<sup>183</sup> To argue that § 12182 of Title III does not apply to the Internet distorts the policy and purpose behind the statute.

A person can go to a sales establishment<sup>184</sup> to purchase a jacket, head to a place of public transportation<sup>185</sup> to buy bus tickets, and then go to a service establishment<sup>186</sup> to deposit a check. Each physical location visited must comply with Title III requirements to remove barriers, such as removing protruding objects, rearranging displays for equal access, or providing braille text. But the same person can also purchase a jacket, buy bus tickets, and access a bank account on the computer, without leaving the house. The purpose of the statute would be "severely frustrate[d]" if virtual locations that serve the same purposes as physical locations were not required to comply with ADA regulations.<sup>187</sup>

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<sup>179</sup> See generally *Nat'l Ass'n of the Deaf*, 869 F. Supp. 2d at 200–02; see also *supra* Part II.C.

<sup>180</sup> *Nat'l Ass'n of the Deaf*, 869 F. Supp. 2d at 201.

<sup>181</sup> *Id.* at 202.

<sup>182</sup> See President George H.W. Bush, Remarks, *supra* note 24; see also *supra* notes 26–50 and accompanying text; see also H.R. REP. NO. 101-485, pt. 2, at 37 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 319.

<sup>183</sup> President George H.W. Bush, Remarks, *supra* note 24.

<sup>184</sup> 42 U.S.C. § 12181(7)(E) (2012).

<sup>185</sup> *Id.* § 12181(7)(G).

<sup>186</sup> *Id.* § 12181(7)(F).

<sup>187</sup> *Nat'l Ass'n of the Deaf*, 869 F. Supp. 2d at 200 (quoting *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New Eng., Inc.*, 37 F.3d 12, 20 (1st Cir. 1994) (internal quotation marks omitted)).

A person without disabilities likely has an easier time getting around and need not rely on others or software programs for assistance. A person without disabilities has the ability to access both virtual locations and physical locations. On the other hand, if a website is not accessible to the blind, those individuals will be forced to visit the physical store or forfeit access to the services or goods entirely. United States Attorney Carmen Ortiz commented on the DOJ's settlement with H&R Block: "For those with disabilities, an inaccessible website puts them at a great disadvantage and further perpetuates a feeling of dependence and reliance on others."<sup>188</sup> In a physical location, any barrier to the full enjoyment of the goods or services offered would be a violation of Title III.<sup>189</sup> Restricted access to a website is a barrier that discriminates against users with disabilities and should be treated as a violation.

Furthermore, a company that exists solely online must have a website accessible to all individuals because this is the only way a person can access its products and services. An online-only company that does not comply with Title III excludes those who rely on software programs from accessing its "store." Because there are no physical locations, a person with disabilities would be totally denied "full and equal enjoyment" of any products or services offered by that website.<sup>190</sup>

## 2. Exhaustive Versus Partial List

Congress included definitions for certain provisions when enacting the ADA.<sup>191</sup> For example, § 12181(7) lists twelve categories of entities that should be considered places of public accommodation.<sup>192</sup> The Ninth Circuit, applying *noscitor a sociis*,<sup>193</sup> reasoned that because each example was a physical location, the scope of Title III was limited to websites that had a nexus to a physical location.<sup>194</sup> However, the listed examples are

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<sup>188</sup> Press Release, H&R Block, *supra* note 166. Attorney Ortiz continued: "With thoughtful and proper web design, businesses and organizations can have a great impact on the daily lives of people with disabilities who, like everyone else, seek to enjoy the benefits of technology." *Id.*

<sup>189</sup> 42 U.S.C. § 12182(a).

<sup>190</sup> *See id.*

<sup>191</sup> *See generally id.* § 12181.

<sup>192</sup> *Id.* § 12181(7).

<sup>193</sup> *See Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1113 (9th Cir. 2000).

<sup>194</sup> *Supra* notes 113–119 and accompanying text; *Cullen v. Netflix*, 880 F. Supp. 2d 1017, 1023–24 (N.D. Cal. 2012).

not exhaustive. The legislation recognizes there are unlisted examples that fall within each enumerated category.<sup>195</sup> To show discrimination, a claimant need not show that the discrimination occurred at one of the specifically listed entities, but rather that it fits within the overall category.<sup>196</sup>

While *noscitor a sociis* is a valid method of textual interpretation, it does not take into account the unlisted examples. Legislative history demonstrates it is important to define public places to include all places open to the public because discrimination is not limited to specifically enumerated categories.<sup>197</sup> Reading the list of enumerated entities in light of the inclusive nature of Title III would include websites that serve the same purpose as the listed establishments.

### 3. The DOJ's Actions

The DOJ recently clarified the definition of “disability” to make sure it is broad and inclusive.<sup>198</sup> This clarification is exactly what the DOJ must do for “places of public accommodation.” Considering the DOJ adopted a broad construction of “disability,” it likely would adopt a broad construction of “places of public accommodation” because it wants to ensure the statute is inclusive in order to protect individuals with disabilities.

The DOJ was given the authority to issue regulations to enforce the provisions of the ADA.<sup>199</sup> Although the DOJ has not proposed a final rule, its intent can be inferred from the various decrees. Both decrees discussed above required the respective companies to make their websites accessible under WCAG 2.0 standards.<sup>200</sup> Notably, the DOJ's decree with PeaPod, a website that has no physical location, consisted of an agreement to make PeaPod's website compatible with WCAG 2.0 standards.<sup>201</sup> The DOJ's consent decrees and issuing statements should serve as a

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<sup>195</sup> For example, “a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment.” 42 U.S.C. § 12181 (7)(E) (emphasis added).

<sup>196</sup> See *supra* note 107.

<sup>197</sup> H.R. REP. NO. 101-485, pt. 2, at 35 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 317.

<sup>198</sup> 28 C.F.R. § 36.105(a)(2)(i) (2016).

<sup>199</sup> See Crowley, *supra* note 11, at 656; see also 42 U.S.C. § 12186(b).

<sup>200</sup> See Press Release, H&R Block, *supra* note 166; see also Press Release, Peapod, *supra* note 77.

<sup>201</sup> See Press Release, Peapod, *supra* note 77.

warning that every company with a website will likely be held responsible for ensuring its website is accessible to those with disabilities.

#### 4. The “Undue Burden” Is on Individuals with Disabilities

Just as physical locations are required to install wheelchair ramps and handicap accessible bathrooms, websites should be required to use proper codes and text to ensure compatibility with JAWS and VoiceOver. The ADA demands that businesses take affirmative action to comply with the physical standards developed by the DOJ.<sup>202</sup> There are exceptions under the statute for businesses that can show making an alteration or modification would fundamentally alter the nature of their goods or services and result in an “undue burden.”<sup>203</sup> If the business can show an undue burden, it must attempt to make its goods or services available through other channels.<sup>204</sup> For example, a company may show an undue burden if changing its website would require more money than it makes or substantially frustrate the purpose or function of the website. In this context, when a website is not accessible, the “other channel” would require individuals with disabilities to visit the physical store. The burdens on the website and on people with disabilities must be balanced.

Assistive technologies such as JAWS and refreshable Braille displays have been “widely used for decades.”<sup>205</sup> Even further, WCAG 2.1 is freely accessible online for those checking to see if their websites are in compliance.<sup>206</sup> A website that fails to adopt an already widely used standard for accessibility places an undue burden on the disability community by giving access to everyone not using a screen reading program and forcing the blind to use an alternate option. At the same time, requiring websites to comply with the WCAG 2.1 without defining a specific level of

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<sup>202</sup> 42 U.S.C. § 12101(b).

<sup>203</sup> *Id.* § 12182(b)(2)(A)(ii)–(iv); Crowley, *supra* note 11, at 655.

<sup>204</sup> A website that cannot comply with the WCAG can consider alternatives, such as opening a physical location, having a telephone service, or other ways to reach a wide variety of customers.

<sup>205</sup> Press Release, H&R Block, *supra* note 166.

<sup>206</sup> *Id.* See generally *Web Content Accessibility Guidelines (WCAG) Overview*, WORLD WIDE WEB CONSORTIUM (W3C), <http://www.w3.org/WAI/standards-guidelines/wcag/> (last visited Sept. 16, 2018).

required compliance could be considered an undue burden.<sup>207</sup> Websites and courts need explicit guidelines. Without them, a website can be sued without notice of a violation.<sup>208</sup>

### *B. Internet Compliance with Title III*

Assuming websites are places of public accommodation, it is necessary to set standards. “[A] clear requirement that provides the disability community consistent access to Web sites and covered entities clear guidance on what is required under the ADA does not exist.”<sup>209</sup> Websites need to be aware of the standards under which they will be held accountable and the disability community needs to be protected from discrimination.

Under the ADA, physical locations must comply with specific standards in order to avoid violations.<sup>210</sup> For example, the ADA’s Accessibility Guidelines include the ratio of handicap accessible parking spots required in a parking lot and that physical places must have at least one handicap accessible route with no protruding objects, accessible doors, and accommodations for changes in elevation.<sup>211</sup> Just like a physical location must accommodate the wheelchair of a person with disabilities, a website should accommodate the screen reading program of a person with disabilities. When the required accommodations are “technically infeasible,” the public place must provide

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<sup>207</sup> See *infra* Part III.

<sup>208</sup> See *Robles v. Dominos Pizza, LLC*, No. 16-CV-06599 (SJO), 2017 WL 1330216, at \*5 (C.D. Cal. Mar. 20, 2017).

<sup>209</sup> Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460–01, 43,464 (July 26, 2010) (to be codified at 28 C.F.R. pts. 35 & 36).

<sup>210</sup> 42 U.S.C. § 12183 (2012). In 2010, the DOJ announced its most recent set of standards for public accommodations and commercial facilities under the ADA. 28 C.F.R. § 36.101 (2016). Specifically, the “[p]ath of travel” and the “[d]uty to provide accessible features” are covered. 28 C.F.R. § 36.403(e), (g) (2010); see also *2010 ADA Standards for Accessible Design*, DEPT OF JUSTICE (Sept. 15, 2010), <http://www.ada.gov/regs2010/2010ADASTandards/2010ADASTandards.htm#titleIII>.

<sup>211</sup> *2010 ADA Standards for Accessible Design*, DEPT OF JUSTICE (Sept. 15, 2010), <http://www.ada.gov/regs2010/2010ADASTandards/2010ADASTandards.htm#titleIII>.

accessibility to the “maximum extent feasible.”<sup>212</sup> Treating websites as places of public accommodation means the DOJ must provide explicit standards for compliance.<sup>213</sup>

Over six thousand complaints were filed with the DOJ in 2015 regarding accessibility.<sup>214</sup> Plaintiffs’ lawyers have sent demand letters to hundreds of companies on behalf of blind or visually impaired individuals alleging their websites violated the ADA because they do not comply with the WCAG 2.0 AA standards.<sup>215</sup> Although the DOJ has endorsed WCAG 2.0 standards, they are not the law.<sup>216</sup> Demand letters seek settlement negotiations including injunctive relief and attorney’s fees and costs.<sup>217</sup> Many cases settle after the demand letter as the parties wish to avoid the costs of litigation.<sup>218</sup> The few cases filed in court usually settle if the case survives a motion to dismiss.<sup>219</sup> Private litigation is not solving the problem because, depending on where the suit is filed, there might be a different result. Meanwhile, if each company waits until a suit is filed before addressing its website accessibility issues, it could be years before all websites are accessible. The DOJ could solve this problem by using the power Congress delegated to it under the

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<sup>212</sup> *Id.*

<sup>213</sup> Wang, *supra* note 104 (“The result of these conflicting rulings is a legal gray area ripe for . . . either significant civil rights advances or exploitation by lawyers looking to make a quick buck through settlements.”).

<sup>214</sup> J. Donald Best, *Is Your Website ADA Compliant?*, NAT’L L. REV. (May 20, 2016), <http://www.natlawreview.com/article/your-website-ada-compliant>. This was a forty percent increase from the previous year. *Id.*; see also Minh N. Vu, Kristina M. Launey & Susan Ryan, *ADA Title III Lawsuits Increase by 37 Percent in 2016*, SEYFARTH SHAW: ADA TITLE III NEWS & INSIGHTS BLOGS (Jan. 23, 2017), <http://www.adatitleiii.com/2017/01/ada-title-iii-lawsuits-increase-by-37-percent-in-2016/>. There were more than 250 lawsuits filed about alleged inaccessible applications or websites. *Id.* Utah, which had only one case filed in 2015, saw a significant increase because Carolyn Ford filed 105 lawsuits in 2016. *Id.* Many states face similar plaintiffs who file upwards of 200 lawsuits each year. *Id.*

<sup>215</sup> Best, *supra* note 214.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* Remedial measures include assigning responsibility to implement changes to the company’s website and reporting its compliance within a reasonable time. *Id.* Companies also agree to enact a website accessibility policy that is consistent with prevailing standards. *Id.*

<sup>218</sup> See Cannady, *supra* note 18. Lawyers file cut-and-paste lawsuits intending to make money from the gray area in the law. Wang, *supra* note 104. On the other hand, it is important to note that there are lawyers who take these cases in order to promote web accessibility given the lack of government action. *Id.*

<sup>219</sup> Cannady, *supra* note 18.

statute to create standards that protect corporations from strike suits but also protect the disability community from being denied access.<sup>220</sup>

A recent court decision and DOJ decrees utilize the standards set out in the WCAG 2.0.<sup>221</sup> A website operating under the guidelines will be accessible to a person using screen reading software. Depending on the size and purpose of the physical location, there are different levels of accommodations. Similarly, websites can be broken down into different categories in order to maximize the benefit for people with disabilities without putting too much of a burden on the website. Any website that acts as an enumerated entity must comply with this framework.

In order to accommodate both persons with disabilities and stores that use the internet to sell their goods, this proposed framework defines three categories of websites that should implement WCAG 2.1 standards. The first category is a “directory website,” or a website that acts solely as a means to accessing a physical store. These websites have store locators and sale information, but customers cannot complete transactions online. The second category is a “transaction website,” which allows consumers to make purchases directly through the website. The third category is a “super site,” where the company exists only online, with no nexus to a physical location. The final category is an “online market place,” which covers all websites that act as platforms allowing individual sellers to post goods and sell directly to other consumers.

#### 1. WCAG 2.1 A Standards

A website that stands only as a directory for a physical location should comply with WCAG 2.1 A standards. Directory means the only functions offered are the ability to locate a physical store or get information about the goods and services. These websites facilitate commerce by informing customers and guiding individuals to the store. For example, Marshalls.com and HomeGoods.com allow customers to search departments, but

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<sup>220</sup> See 42 U.S.C. § 12186(b) (2012); *see also* Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460–01, 43461 (July 26, 2010) (to be codified at 28 C.F.R. pts. 35 & 36).

<sup>221</sup> See *supra* notes 68–77 and accompanying text.

no transactions can be made online.<sup>222</sup> This is the minimum level of accessibility under the WCAG 2.1. These websites require lower levels of accessibility because they do not provide many services or benefits. Regardless of accessibility, the customer still must visit the physical store to make a purchase. The physical store is already subject to ADA regulations.

## 2. WCAG 2.1 AA Standards

A transaction website that allows a user to purchase a product or service should meet AA standards.<sup>223</sup> This level provides more protection for the disability community without requiring unnecessary or burdensome standards. For example, CVS, Domino's Pizza and Winn-Dixie would be required to comply with AA standards because their websites provide customers with the ability to purchase products and access services. Although alternatives are available, most options would place a significant burden on people with disabilities and deny them "full and equal enjoyment" of the website.<sup>224</sup> Standards for transaction websites need to be higher because, unlike directory websites, a person who can access the transaction website properly need not visit the store.

Online market place websites that do not have a nexus to a physical location and serve as a platforms to connect consumers should also comply with AA standards.<sup>225</sup> For example, Etsy, eBay, and Craigslist are places where sellers can list their goods online and connect directly with buyers.<sup>226</sup> A bracelet maker in Massachusetts can sell her product to a person in California via Etsy's website. This transaction is interstate commerce, and Etsy is considered the virtual sales establishment<sup>227</sup> for the purchase. Not requiring Etsy to conform to the WCAG 2.1 AA

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<sup>222</sup> See generally *HOMEGOODS*, <http://www.homegoods.com> (last visited Sept. 16, 2018); *MARSHALLS*, <http://www.marshallsonline.com> (last visited Sept. 16, 2018).

<sup>223</sup> See *supra* note 75 and accompanying text.

<sup>224</sup> 42 U.S.C. § 12182(a).

<sup>225</sup> See *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations*, 75 Fed. Reg. 43460-01 (July 26, 2010) (to be codified at 28 C.F.R. pts. 35 & 36). The proposed regulations exclude websites that have limited selling or individuals selling. See *id.* Under the proposed rule, Netflix would need to comply with WCAG 2.0 because it is a rental establishment, service establishment, and place of entertainment.

<sup>226</sup> *Sell on Etsy*, *ETSY*, <http://www.etsy.com/sell?ref=fttr> (last visited Sept. 16, 2018).

<sup>227</sup> 42 U.S.C. § 12181(7)(E).

standards would undermine the purpose of the statute and totally prevent a person with disabilities from accessing the goods or services offered.

Online market place websites should not be subject to AAA standards because doing so would create an undue burden for these websites. The Internet has made it possible for online market places to develop and flourish, so it is important not to hinder their growth. Requiring an online market place to adopt AAA requirements like the super site<sup>228</sup> could frustrate the function and purpose of the online market place. Higher standards might conflict with an individual's ability to sell products on the online market place. As long as individuals with disabilities do not encounter barriers and are given full and equal access to goods and services, Title III is serving its purpose.<sup>229</sup>

### 3. WCAG 2.1 AAA Standards

A super site covers all companies that exist solely online with no nexus to a physical location. This category includes websites like Blue Apron and PeaPod. "AAA" standards are the strictest under the WCAG 2.1 and should be reserved for websites that require the highest level of accessibility. Online-only websites are required to provide the most access because they receive the most benefit from the Internet and are not associated with a physical location. If the website is not accessible through a screen reading program, the blind are totally cut off from full and equal enjoyment of the company's goods and services. These websites are different from the online market place because the company is the only entity selling goods and services on the website and the only entity receiving a benefit. Super sites can show AAA regulations have resulted in an undue burden and would then be required to comply with AA standards.

Similarly, streaming websites such as Netflix and Spotify are online-only. These services must comply with AAA standards because they transact business and offer services only over the Internet.<sup>230</sup>

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<sup>228</sup> See *infra* Part III.B.iii.

<sup>229</sup> See H.R. REP. NO. 101-485, pt. 2, at 34 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 316.

<sup>230</sup> See *supra* Part II.C.

#### 4. Exempt Websites

Websites that do not fall into any of the enumerated entities under the statute need not comply with the standards, just as physical locations that do not fall into any of the categories are not subject to Title III. Exempt websites will be encouraged to adhere to WCAG standards because other sites that must comply will not be able to contract with services below their level of compliance. For example, if HomeGoods wanted to use Google Maps as part of its store locator service, Google Maps would need to meet WCAG 2.1 "A" standards. HomeGoods is not responsible for the compliance of Google Maps, but cannot contract with a service that does not meet the correct standards. The hope is that exempt websites will voluntarily choose to adopt WCAG 2.1 standards based on moral and social responsibility, and that increased accessibility will lead to greater sales. Failure to comply with the standards and remove barriers for the disability community will create a negative reputation for websites.

#### C. *Opposition to Regulation*

Since the development of the Internet, the government has had a hands-off policy and generally opposed regulation for fear it might hinder the growth of technology.<sup>231</sup> While this is an important factor to consider, the guidelines provided by the Web Accessibility Initiative (the "WAI") have grown and adapted to changing technology.<sup>232</sup> As new technology develops, the WAI will continue to update guidelines protecting the disability community and informing websites of the newest standard. The WAI is committed to maintaining the Internet's accessibility to all users. If a website operator believes the current standards are restricting the functions and purpose of its website, it can argue the standards are an undue burden. The standards are not meant to restrict or punish websites, so some situations might require flexibility, in which case companies will be allowed to comply with lower standards if there is an undue burden.

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<sup>231</sup> Interview by James Pehtokoukis with Eli Dourado, Director of George Mason University's Technology Policy Program (June 3, 2016), <http://www.aei.org/publication/big-government-regulation-slowing-tech-progress-eli-dourado/> (comparing the need for technological freedom to the freedom of speech).

<sup>232</sup> See *supra* notes 72–73 and accompanying text.

## CONCLUSION

The Americans with Disabilities Act was intended to end discrimination against those with disabilities. Title III in particular aimed to end discrimination in places of public accommodation. Websites, although not explicitly listed in the statute, serve the same purposes as the enumerated entities under the statute. Although it is impossible to ensure total accessibility to all areas of life, this area has the technology to ensure significant accessibility.

Just as physical locations have standards to ensure accessibility, so too should websites be treated as places of public accommodation that must adhere to certain standards. Technology has the potential to open doors for the disability community in many ways. It can provide an automatic push-to-open feature, and more importantly, it can allow individuals with disabilities to complete daily activities on their own. The technology to make websites accessible to the blind already exists and is widely used. There are also privately developed standards, such as WCAG 2.0, that were created to ensure websites are compatible with software reading functions. The only way to safeguard the policy of Title III is to hold websites accountable to explicit standards.

Having a set of regulations will benefit all parties with interests in this area. The blind will no longer face discrimination and will gain independence and access to all parts of society. Websites will have notice of the level of compliance they will be charged with observing and will no longer be subject to vexatious litigation or forced settlements, because it will be clearer when they have violated Title III. The courts will be able to apply the standards to websites to determine whether there has been a violation rather than try to figure out if the website offers the same amount of accessibility as a physical location.<sup>233</sup> The responsibility of protecting the disability community under the Americans with Disabilities Act lies in the hands of the Department of Justice.

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<sup>233</sup> See *Reed v. CVS Pharmacy, Inc.*, No. 17-CV-3877 (MWF), 2017 WL 4457508 at \*136 (C.D. Cal. Oct. 3, 2017).