

Beyond Sight: Modernizing the Americans with Disabilities Act and Ensuring Internet Equality for the Visually Impaired

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I. FOREWORD

Having recently celebrated the thirtieth anniversary of the Americans with Disabilities Act, it is vital to continue pursuing the equality and justice which the spirit of the statute envisioned. Certainly, as the 2008 Amendments show, the Act itself was intended to protect all Americans in every facet of daily life. As we enter the fourth decade since the passage of the Americans with Disabilities Act, I would like to acknowledge Senator Tom Harkin of Iowa, who sponsored the Act and ensured its passage into law. Senator Harkin introduced the bill in 1989 and was a major proponent in ensuring its passage. As an Iowan, Senator Harkin exemplified the state's continued commitment to ensuring fairness and opportunity for all. Indeed, Iowa was the first state to integrate schools, the first to bar a female lawyer,

and it is hardly surprising that an Iowa Senator took the mantle and fought for the rights of all disabled Americans to enjoy the advantages and opportunities this nation has to offer. Thank you, Senator Harkin, for your representation and the transformative effect it has had on millions of Americans. Furthermore, I want to thank the *Journal of Gender, Race & Justice* for their diligence and excellence in preparing this note for publication, as well as my family and friends for their support throughout the process. I would also like to extend my utmost gratitude to Professor Leonard Sandler, whose guidance propelled my research and without whom this note would not have been possible.

II. INTRODUCTION

It was over thirty years ago that Congress passed the Americans with Disabilities Act (“ADA” or “the Act”).¹ The ADA is an ambitious and comprehensive legislative mandate, designed to guarantee protections for, and prohibit discrimination against, people living with disabilities, thus ensuring them the same opportunities as everyone else to participate in everyday life.² The ADA was “[m]odeled after the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, religion, sex, or national origin – and Section 504 of the Rehabilitation Act of 1973,” which forbids organizations and employers from excluding or denying individuals with disabilities an equal opportunity to receive program benefits and services.³

Since the ADA’s implementation, the nation has evolved in terms of technological advancements and their increasingly critical function in the life of an average American. Incredible technological advancements have allowed many people to live beyond the limits of a disability. For instance, blind or otherwise visually impaired people are now able to use computers to their full capacity, thereby allowing visually impaired people to access the internet, and the vast array of opportunity available there. Whether this is for online shopping, schooling, banking, social networking, or beyond, such online access has empowered many visually impaired Americans to reap the benefits of internet use.⁴

¹ Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213; *Introduction to the ADA*, U.S. DEPT OF JUST. C.R. DIV., https://www.ada.gov/ada_intro.htm [<https://perma.cc/C9UA-2ZRV>]. The ADA was passed into law in 1990. *Id.*

² *Id.*

³ *Id.*

⁴ See Susannah Fox & Lee Rainie, *The Web at 25 in the U.S.: Part 2: Americans’ Views About the Role of the Internet in Their Lives*, PEW RSCH. CTR. (Feb. 27, 2014), <https://www.pewresearch.org/internet/2014/02/27/part-2-americans-views-about-the-role-of-the-internet-in-their-lives> [<https://perma.cc/Q5TZ-JQFD>] (explaining how Americans have become increasingly reliant on internet usage in everyday life); see also Manuel

However, accessibility barriers remain a major stumbling block to the visually impaired enjoying all the internet has to offer, even though nearly all American adults use the internet in their daily lives.⁵ With divergent case law and a lack of legislative guidance, many complications regarding the applicability of the ADA to the internet remain unresolved. Therefore, this Note will examine why the internet ought to be understood as a place of public accommodation under the ADA and will encourage the development of guidelines instructing the federal judiciary to consider the internet as a place of public accommodation for the benefit of visually impaired users. Per the ADA, places of public accommodation must be made accessible to all.⁶

This Note will begin by exploring the history and scope of the ADA. It will then delve into the realities of internet usage among visually impaired Americans, the technologies visually impaired persons use to access the internet, accessibility barriers which further impair their ability to enjoy equal access to the internet, and the impact the ADA has had thus far. Next, this Note will examine the judicial decisions which have shaped the ADA's coverage of internet accessibility, before exploring differing case law and how it affects visually impaired internet users. Finally, this Note will consider the future of internet accessibility and what guidelines may be implemented to further ensure equal access for Americans with disabilities.

III. BACKGROUND

Congress passed the ADA based on their finding that “society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.”⁷ Furthermore, Congress found that discrimination against disabled individuals persisted in areas such as “employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization,

Castells, *The Impact of the Internet on Society: A Global Perspective*, in CHANGE: 19 KEY ESSAYS ON HOW INTERNET IS CHANGING OUR LIVES 127 (OpenMind: BBVA ed., 2014), available at <https://www.bbvaopenmind.com/en/articles/the-impact-of-the-internet-on-society-a-global-perspective/> [https://perma.cc/2H54-S7HW]; Madison Troyer, *25 Fast Facts About How Americans Use the Internet Today*, STACKER (Jan. 29, 2020), <https://stacker.com/stories/3897/25-fast-facts-about-how-americans-use-internet-today> [https://perma.cc/E74H-XEGP].

⁵ Andrew Perrin & Sara Atske, *7% of Americans Don't Use the Internet. Who Are They?*, PEW RSCH. CTR. (Apr. 2, 2021), <https://www.pewresearch.org/fact-tank/2021/04/02/7-of-americans-dont-use-the-internet-who-are-they/> [https://perma.cc/248K-5HJL] (showing that, as of 2021, over ninety percent of adults in America use the internet).

⁶ 42 U.S.C. §§ 12181–89.

⁷ *Id.* § 12101(a)(2).

health services, voting, and access to public services” and that such discrimination denied disabled people the “opportunity to compete on an equal basis.”⁸ Based on these findings, Congress legislated and enacted the ADA.

A. History and Scope of the ADA

The ADA is an expansive piece of legislation, with its protections extending to employment (Title I),⁹ public services and transportation (Title II),¹⁰ public accommodations (Title III),¹¹ and beyond.¹² Public accommodations are businesses and private entities which are open to the public or which provide goods and services to the public.¹³ This Note focuses on Title III of the ADA and the implications of defining what is considered a place of public accommodation.

Title III concentrates on discrimination in places of public accommodation and services which are operating and managed by private (non-government) entities.¹⁴ Title III lays out the general rule that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”¹⁵ Title III therefore “prohibits discrimination against the disabled in the full and equal enjoyment of public accommodations.”¹⁶ Courts have ruled (quite broadly)¹⁷ that businesses must ensure their facilities are accessible to the physically disabled,¹⁸ that accommodations for the disabled must allow for enjoyment of services comparable to that of other

⁸ *Id.* § 12101(a)(3), (8).

⁹ *Id.* §§ 12111–17.

¹⁰ *Id.* §§ 12131–65.

¹¹ *Id.* §§ 12181–89.

¹² Titles IV and V cover telecommunications and miscellaneous provisions. *See* 47 U.S.C. § 225 (2018); 42 U.S.C. §§ 12201–13.

¹³ 42 U.S.C. §§ 12181–89.

¹⁴ *Id.*

¹⁵ *Id.* § 12182(a).

¹⁶ *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 128 (2005).

¹⁷ *See, e.g., Hillesheim v. Myron's Cards and Gifts, Inc.*, 897 F.3d 953, 956–57 (8th Cir. 2018) (ruling that temporary barriers to wheelchair access in a store meant that it was not readily accessible as required under Title III).

¹⁸ *See Moreno v. La Curacao*, 463 F. App'x. 669, 670 (9th Cir. 2011); *United States v. Cinemark USA, Inc.*, 348 F.3d 569, 573 (6th Cir. 2003).

patrons,¹⁹ and that businesses must make “readily achievable” changes to remain or become compliant with the ADA.²⁰

The ADA did not suddenly materialize in 1990. It was the result of decades of legislation, advocacy, and recognition that the concerns of human dignity necessitated change.²¹ In 1973, Congress passed Section 504 of the 1973 Rehabilitation Act, historically changing disability policy.²² Modeled after race and sex discrimination laws, the Rehabilitation Act banned discrimination against people with disabilities in federally-funded programs and activities.²³

Following on the successes of Titles II²⁴ and VII of the Civil Rights Act of 1964,²⁵ Section 504 of the Rehabilitation Act of 1973,²⁶ and the Fair Housing Act,²⁷ Congress passed the Americans with Disabilities Act in 1990.²⁸ The ADA consists of five titles which prohibit discrimination against the disabled in employment, public services, public accommodations, telecommunications, and beyond.²⁹

American history before the passage of the ADA illustrates the rather terrifying landscape which existed prior to the passage of laws protecting people with disabilities.³⁰ For example, in the 1927 case *Buck v. Bell*, the

¹⁹ See *Cinemark*, 348 F.3d at 575–76; *Antoninetti v. Chipotle Mexican Grill, Inc.*, 643 F.3d 1165, 1171–72 (9th Cir. 2010).

²⁰ See *Steger v. Franco, Inc.*, 228 F.3d 889, 894–96 (8th Cir. 2000).

²¹ See Joel K. Goldstein, *Constitutional Dialogue and the Civil Rights Act of 1964*, 49 ST. LOUIS U. L.J. 1095, 1105–13 (2005).

²² 29 U.S.C. § 794; see 47 U.S.C. § 225; 42 U.S.C. §§ 12201–13.

²³ See 29 U.S.C. § 794; see also Arlene Mayerson, *The History of the Americans with Disabilities Act: A Movement Perspective*, DISABILITY RTS. EDUC. & DEF. FUND (1992), <https://dredf.org/about-us/publications/the-history-of-the-ada/> [https://perma.cc/EJ9N-6RWV]; Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1808 (2005); see also generally Peter D. Blanck & Leonard A. Sandler, *ADA Title III and the Internet: Technology and Civil Rights*, 24 MENTAL & PHYSICAL DISABILITY L. REP. 855 (2000) (discussing how technology impacts civil liberties and how accessibility is a key component).

²⁴ 42 U.S.C. § 2000(a)–2000(a)(6).

²⁵ *Id.* § 2000(e)–2000(e)(17).

²⁶ 29 U.S.C. § 794.

²⁷ 42 U.S.C. § 3601–19.

²⁸ *Id.* §§ 12101–12213.

²⁹ *Id.*

³⁰ See generally *Buck v. Bell*, 274 U.S. 200 (1927) (holding that people with disabilities could be forcibly sterilized).

Supreme Court ruled that people with disabilities could be forcibly sterilized.³¹ The Nazis later used that appalling decision to justify their support of forced sterilizations.³² The Supreme Court still has not overturned *Buck v. Bell*, and even cited it in *Roe v. Wade* in 1973.³³

The Court has come a long way since the days of *Buck*. However, even with the passage of legislation such as Section 504, people with disabilities continued to be discriminated against. The only consequence of a Section 504 violation was that Congress would deny federal funding to any discriminating entity.³⁴ It was even shown that state laws attempting to prevent discrimination could be rendered ineffective.³⁵ In *Pennhurst v. Halderman*, the Supreme Court ruled that a federal district court could not enforce a Pennsylvania state law offering protections for the mentally disabled, saying the Eleventh Amendment prohibited federal courts from ordering states to comply with their own state law.³⁶

Despite activism pushing Congress to draft the ADA, opponents to its passage remained, such that thousands of Americans felt compelled to participate in the “Capitol Crawl” three months prior to its passage, abandoning wheelchairs and crawling up the steps of the Capitol to pressure Congress to pass the ADA.³⁷ Congress responded to the pressure in July 1990, passing the broadest disability protection and anti-discrimination law yet seen, the ADA.³⁸

³¹ See *id.* at 207 (Justice Holmes claiming that it would be better for the world to eliminate those with disabilities).

³² Derek Warden, *The Americans with Disabilities Act at Thirty*, 11 CALIF. L. REV. ONLINE 308 (2020), <http://www.californialawreview.org/americans-with-disabilities-act-thirty> [https://perma.cc/7LNV-Y5NR]; see also Michael G. Silver, Note, *Eugenics and Compulsory Sterilization Laws: Providing Redress for the Victims of a Shameful Era in United States History*, 72 GEO. WASH. L. REV. 862, 871–72 (2004) (during the Nuremberg Trials, Nazi scientists cited the holding in *Buck* as legal precedent for their “race purity programs”).

³³ *Roe v. Wade*, 410 U.S. 113, 154 (1973) (citing *Buck v. Bell* in discussion of their refusal to recognize an unlimited right for a person to do as they please with their body).

³⁴ See 29 U.S.C. § 794.

³⁵ See e.g., *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 117 (1984) (ruling that the Eleventh Amendment prohibited a federal district court from ordering state officials to comply with state law).

³⁶ See *id.*

³⁷ See Stephen Kaufman, *They Abandoned Their Wheelchairs and Crawled Up the Capitol Steps*, SHAREAMERICA (Mar. 12, 2015), <https://share.america.gov/crawling-up-steps-demand-their-rights/> [https://perma.cc/G3N3-5SRE]; Becky Little, *When the ‘Capitol Crawl’ Dramatized the Need for Americans with Disabilities Act*, HISTORY.COM (July 24, 2020), <https://www.history.com/news/americans-with-disabilities-act-1990-capitol-crawl> [https://perma.cc/2XDL-7RWZ]; Dan Wilkins, *A Look Back – Capitol Crawl*, ABILITY CTR. (Mar. 12, 2020), <https://www.abilitycenter.org/2020/03/a-look-back-capitol-crawl/> [https://perma.cc/W36P-CUU8].

³⁸ See Mayerson, *supra* note 23.

The statute begins by detailing congressional findings regarding the discrimination people with disabilities experience every day, and so Congress “invoke[s] the sweep of congressional authority . . . to address the major areas of discrimination faced day-to-day by people with disabilities.”³⁹ The statute then defines disability as having any “mental or physical impairment that substantially limits any number of major life activities,” “having a record of such impairment,” or “being regarded as having such.”⁴⁰ Title III provides broad protections in places of public accommodation, which are operated by private parties.⁴¹

Congress intended for the ADA to be broadly construed, as Congress clearly noted in the 2008 Amendments Act.⁴² Title III’s public accommodations apply to any private (nongovernmental) entities offering goods and services to the general public, and cover any conduct affecting commerce directed at the public.⁴³ When President Bush signed the ADA into law, he declared that the ADA “signal[ed] the end to the unjustified segregation and exclusion of persons with disabilities from the *mainstream* of American life,” evincing the fact the ADA was meant to be broadly interpreted to end the segregation and exclusion of disabled Americans.⁴⁴

Furthermore, legislative history shows that the ADA was not intended to exclude future technological advancements, noting that accommodations should “keep pace with the rapidly changing technology of the times.”⁴⁵ There was a clear intention for the law to adapt and keep pace with rapid

³⁹ 42 U.S.C. § 12101(b)(4).

⁴⁰ *Id.* § 12102.

⁴¹ *Id.* §§ 12181–89.

⁴² *See id.* § 12101(a); *see also generally* Senator Tom Harkin, *The Americans with Disabilities Act Ten Years Later: A Framework for the Future*, 85 IOWA L. REV. 1575 (2000) (writing that the ADA has taken a place among the great civil rights laws in the history of the nation); MARC D. STOLMAN, A GUIDE TO LEGAL RIGHTS FOR PEOPLE WITH DISABILITIES 2 (1994) (quoting Senator Edward Kennedy calling the bill an “emancipation proclamation for people with disabilities”). *Compare* 29 U.S.C. § 794 (banning discrimination against people with disabilities in federally-funded programs and activities), *with* 42 U.S.C. § 12182(a) (providing broad protections in places of public accommodation that are operated by private parties). Unlike the Rehabilitation Act, which provided protection for disabled people against discrimination only in federally funded programs, the ADA is more broadly construed to include protection from discrimination in any place of public accommodation. *See also* Ricardo Alvarado, *Online Businesses Beware: ADA Lawsuits Demand Website Accessibility for Blind Plaintiffs*, 21 SMU SCI. & TECH. L. REV. 259, 287 (2020).

⁴³ Blanck & Sandler, *supra* note 23; *see also* 42 U.S.C. § 12181(7).

⁴⁴ Blake E. Reid, *Internet Architecture and Disability*, 95 IND. L. J. 591, 595 (2019) (emphasis added).

⁴⁵ H.R. REP. NO. 10-485, pt. 2, at 391 (1990).

advancements in technology, the very technological marvels that allow a visually impaired person to use the internet today. The fact language concerning computers, websites, and the internet was not included in the bill is simply a relic of the time.⁴⁶ And the ADA Amendments Act of 2008 was passed in response to Supreme Court decisions Congress felt limited the rights of people with disabilities, rather than being passed due to modern technological advancements.⁴⁷

B. *Age of the Internet: Access for the Visually Impaired*

Thirty years ago, it would have been difficult to imagine the extent to which internet usage would become a part of life for many Americans, let alone the fact that a visually impaired person would be able to use computers and the internet. Even today some people might be surprised that a blind person is perfectly capable of browsing the internet. If you cannot see the screen, or even part of the screen, how can you use the internet? How can you shop on Cyber Monday? How can you fill out an online form applying for a job or insurance? How can a blind person download and read their homework assignments from the internet?

Internet retail, or e-commerce, has increased year after year, going from one percent of all retail sales in 2000 to over eleven percent in 2019.⁴⁸ E-commerce is responsible for over \$100 billion of retail spending each year.⁴⁹ Over 160 million Americans bank online.⁵⁰ Over thirty-five percent of Americans consume their news via the internet.⁵¹ Over eighty percent of

⁴⁶ Five years after passage of the ADA, Tim Berners-Lee hosted the first internet website. See JONATHAN LAZAR, DANIEL GOLDSTEIN & ANNE TAYLOR, ENSURING DIGITAL ACCESSIBILITY THROUGH PROCESS AND POLICY 60 (2015). And it was not until 1995 that the Federal Networking Council (FNC) officially recognized the internet in the form it exists in today. Reid, *supra* note 44, at 596–97; see also Barry M. Leiner et al., *A Brief History of the Internet*, 39 COMPUT. COMMUN. REV. 22, 30 (2009) <https://groups.csail.mit.edu/ana/A%20brief%20history%20of%20the%20internet%20-%20p22-leiner.pdf> [<https://perma.cc/WYQ3-P45Z>]. On October 24, 1995, the FNC passed a resolution defining the term internet in consultation with members of the internet and intellectual property rights communities. *Id.* Their definition classified the internet as a global information system “logically linked together by a globally unique address space based on the Internet Protocol . . .” *Id.* at 30. Thus, describing what the internet is today.

⁴⁷ ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended at 42 U.S.C. § 12101(a)). In the 2008 amendment, Congress said the Supreme Court had incorrectly interpreted the statute—specifically regarding the scope of public accommodations—in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2001) by narrowing the protections the ADA was intended to offer. *Id.* Congress made no mention of technological advancements as a reason for the amendments. See *id.*

⁴⁸ Troyer, *supra* note 4.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

school age children use computers at home for schoolwork.⁵² Computer technology has quickly become a staple in life for Americans of all ages and is used for a variety of purposes. The internet is a unique tool which allows anyone, from any place, to participate in society and avail themselves of the services of countless areas of commerce and social participation. Holding the internet to be a place of public accommodation ensures equality in internet accessibility and the ability of all Americans to meaningfully participate in society regardless of disability.

In an ever-increasing online world, it is time that society began to think of the internet as a right, rather than as a commodity. The United Nations has promulgated such a belief with the Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.⁵³ While the United Nations report does not plainly state that internet access is a human right, it classifies the internet as a key means by which people can exercise their rights to freedom of opinion and expression.⁵⁴ Recognition that the internet is a means to enjoy such rights and freedoms suggests that restrictions upon it should be limited so as not to violate these rights or freedoms.⁵⁵

Furthermore, we have seen incredible technological advancements over the past few decades. These advancements mean blind and visually impaired people actually can use computers, phones, and other electronic devices just as anyone with sight would, they just do so a bit differently.⁵⁶ Blind and visually impaired people use assistive technologies such as screen readers, refreshable braille displays, and screen magnification tools to be able to use computers and other electronic or digital devices.⁵⁷

Screen readers are one of the most common devices used by the visually impaired to traverse the internet and computers, since they cannot track a

⁵² *Computer and Internet Use*, NAT'L CTR. FOR EDUC. STAT., <https://nces.ed.gov/fastfacts/display.asp?id=46> [<https://perma.cc/9AJ5-HJM7>].

⁵³ See Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression at 5, U.N. Doc. A/HRC/17/27/Add.1 (2011) (classifying the internet as a key means by which people can exercise their rights to freedom of opinion and expression).

⁵⁴ Stephanie Borg Psaila, 'UN Declares Internet Access a Human Right' – Did It Really?, DIPLO (June 10, 2011), <https://www.diplomacy.edu/blog/un-declares-internet-access-human-right-did-it-really/> [<https://perma.cc/V7GA-88ZL>].

⁵⁵ See *id.*

⁵⁶ *How Do People Who Are Blind Use Computers and Other Technology?*, WONDEROPOLIS, <https://www.wonderopolis.org/wonder/how-do-people-who-are-blind-use-computers-and-other-technology> [<https://perma.cc/Q43L-BWGD>].

⁵⁷ *Id.*

cursor on the screen when using a mouse.⁵⁸ While some visually impaired people have enough vision to be able to simply magnify their computer screen to decipher text, many must rely on assistive technology. A screen reader typically works by “reading” text, beginning from the top of a website or document, and then relaying that information to the user through a voice rendition or onto a braille display the user can touch and interpret.⁵⁹ By using keyboard commands, such as pressing “tab,” the screen reader will advance to the subsequent item on a page and navigate documents and webpages while communicating the information on the screen to the user.⁶⁰ Such technology allows a person to listen to webpages at speeds exceeding 300 words per minute, quicker than most people would be able to read it.⁶¹ When utilizing a screen reader, a person can use the technology and its vast amounts of keyboard shortcuts to navigate websites, search the web, fill out forms, and more.⁶² Alternatively, a screen reader can be hooked up to a braille display (a keyboard sized display with braille bumps that move up and down through holes) which will physically display the words on a screen in braille for a user who might not want or might not be able to use the text to speech technology.⁶³

Screen readers are still the most common accessibility device used by the visually impaired, with many of the over seven million visually impaired Americans using them for web access.⁶⁴ The software is available for all types

⁵⁸ Daniela Dold, *How Do Blind People Use a Computer?*, THE BLIND TRANSLATOR (May 28, 2016), <https://theblindtranslator.wordpress.com/2016/05/28/how-do-blind-people-use-a-computer/> [https://perma.cc/NL9X-6D88].

⁵⁹ *What is a Screen Reader and How Does it Work?*, UNIV. OF CONN. INFO. TECH. SERVS. (Aug. 22, 2018), <https://accessibility.its.uconn.edu/2018/08/22/what-is-a-screen-reader-and-how-does-it-work/> [https://perma.cc/K4TF-MGP2]; see also Office of Information Technology, Colorado University-Boulder, *Screen Reader Demo*, YOUTUBE (Aug. 31, 2016), <https://www.youtube.com/watch?v=CNNDdU64-zY&t=79s> [https://perma.cc/3TQC-Z9BR].

⁶⁰ *Id.*

⁶¹ *Designing for Screen Reader Compatibility*, WEB ACCESSIBILITY IN MIND (Apr. 21, 2017), <https://webaim.org/techniques/screenreader/> [https://perma.cc/Q94L-SALQ].

⁶² Chris Ashton, *I Used the Web for a Day Using a Screen Reader*, SMASHING MAG. (Dec. 19, 2018), <https://www.smashingmagazine.com/2018/12/voiceover-screen-reader-web-apps/> [https://perma.cc/E5T8-762R].

⁶³ Dold, *supra* note 58. A braille display is roughly the size of a keyboard and has holes from which braille bumps can rise up and recede again. *Id.* As a screen reader progresses through information on the screen, the braille display will physically present the words in braille. *The Visually Impaired Web User's Technology*, AM. FOUND. FOR THE BLIND, <https://www.afb.org/about-afb/what-we-do/afb-consulting/afb-accessibility-resources/users-technology> [https://perma.cc/3JYN-4ZSA]; see generally *Refreshable Braille Displays*, AM. FOUND. FOR THE BLIND, <https://www.afb.org/node/16207/refreshable-braille-displays> [https://perma.cc/LQ3M-49NA].

⁶⁴ *What Are Screen Readers and How They Enable Blind People to Surf the Internet?*, ACCESSIBE (Oct. 20, 2019), <https://accessibe.com/blog/knowledgebase/what-are-screen-readers-and-how>

of computer operating systems and can be accessed for free (although some can cost upwards of one thousand dollars).⁶⁵ Keyboard commands can be used to read a word, a sentence, a full line or screen of text, to find a string of text, to locate the mouse cursor, find certain colored text, identify menu choices and more.⁶⁶ Screen readers are linked to a speech synthesizer, which actually speaks out the words on screen to the user and can be adjusted to speak at different rates, with different voices, and even in different languages.⁶⁷

With such devices, a blind person can meaningfully use the internet and navigate it for their needs. They can participate in online banking, shopping, social media, etc. without being excluded by their inability to see a screen. The Web Content Accessibility Guidelines, an internationally recognized set of standards for web accessibility,⁶⁸ provide specifics on how websites should be coded to allow assistive technologies to decipher webpages and be accessible to visually impaired people.⁶⁹ By following these guidelines during webpage development, screen readers will actually function as intended in describing the webpage.

C. (Un)Accessible: Continuing Barriers to Internet Access

Despite the broad success of Title III, it has not been sufficiently expanded to prevent discriminatory programming which negatively impacts visually impaired people in internet usage.⁷⁰ While Congress could not have foreseen the rapid advancements in technology which gave rise to the widespread use of the internet, it did intend for the ADA to keep pace with

they-enable-blind-people-to-surf-the-internet [https://perma.cc/4XYG-WESU] [hereinafter *What Are Screen Readers?*].

⁶⁵ *Screen Readers*, AM. FOUND. FOR THE BLIND, <https://www.afb.org/blindness-and-low-vision/using-technology/assistive-technology-products/screen-readers> [https://perma.cc/B235-AEJD].

⁶⁶ *Id.*

⁶⁷ *Speech Synthesizers*, AM. FOUND. FOR THE BLIND, <https://www.afb.org/node/16207/speech-synthesizers> [https://perma.cc/XG8C-HYKK].

⁶⁸ *What Are Screen Readers?*, *supra* note 64.

⁶⁹ *Web Content Accessibility Guidelines (WCAG) 2.1*, W3C (June 5, 2018), <https://www.w3.org/TR/WCAG21/> [https://perma.cc/SW57-4HUX].

⁷⁰ *Achieving the Promise of the Americans with Disabilities Act in the Digital Age – Current Issues, Challenges, and Opportunities*: Hearing Before the Subcomm. on the Const., C.R., & C.L. of the H. Comm. on the Judiciary, 111th Cong. 80 (2010) (statement of Daniel F. Goldstein, Partner, Brown, Goldstein & Levy, LLP) [hereinafter *Achieving the Promise of the ADA*].

changes in society.⁷¹ Today, barriers to internet accessibility still exist, with many websites being developed and maintained without consideration for visually impaired people who are unable to fully access them.⁷²

The American Foundation for the Blind reports that those with visual impairments are over thirty percent less likely to access the internet or use a computer than those without difficulty seeing.⁷³ While the World Wide Web Consortium⁷⁴ offers guidelines on how to develop and maintain websites which are accessible to the visually impaired,⁷⁵ problems remain in ensuring accessible webpages to the visually impaired among numerous websites and developers.⁷⁶

Many of these issues are inherent in developing webpages. For example, the layout of a website may be unstructured, so that accessibility tools do not properly read webpages from left to right and up to down.⁷⁷ Other issues include improper format of headings, so that screen readers and other accessibility tools cannot identify the headings a user is searching for; images without descriptive tags, which a visually impaired user would need to understand what information the image on the webpage is conveying; and websites reliant on JavaScript, which not all accessibility tools can decipher.⁷⁸

For the advanced technologies of today to actually assist visually impaired users in accessing the internet, it is necessary for websites to be designed in a manner allowing these tools to properly function.⁷⁹ When using a screen reader with an improperly designed or incompatible webpage, a user might be met with the reader repeatedly saying “button” or “link 1,752!” if

⁷¹ See *id.* at 6 (statement of Rep. Jerrold Nadler, Chairman, H. Subcomm. on the Const., C.R., & C.L.) (“[C]ongress could not have foreseen these advances in technology . . . Yet Congress understood the world around us would change and believed . . . the ADA should be broad and flexible enough to keep pace.”).

⁷² Bradley A. Areheart & Michael A. Stein, *Integrating the Internet*, 83 GEO. WASH. L. REV. 449, 452 (2015).

⁷³ *The Challenges of Web Accessibility*, AM. FOUND. FOR THE BLIND, <https://www.afb.org/about-afb/what-we-do/afb-consulting/afb-accessibility-resources/challenges-web-accessibility> [<https://perma.cc/6XQN-XGQH>].

⁷⁴ The World Wide Web Consortium (also known as W3C) is an international community working to develop internet standards. See *About W3C*, W3C, <https://www.w3.org/Consortium/> [<https://perma.cc/3KP3-34SQ>].

⁷⁵ See *id.*

⁷⁶ *The Challenges of Web Accessibility*, *supra* note 73.

⁷⁷ *12 Common Web Accessibility Issues for the Visually Impaired*, MONSIDO (August 30, 2021) <https://monsido.com/blog/accessibility-issues> [<https://perma.cc/YN2U-39NC>] [hereinafter *Web Accessibility Issues*].

⁷⁸ *Id.*

⁷⁹ See *New Research Shows How “The Internet is Unavailable” to Blind Users*, DEQUE SYS. (Aug. 15, 2019), <https://www.deque.com/blog/research-shows-internet-is-unavailable-to-blind-users> [<https://perma.cc/2PH9-XRU8>].

the inaccessible webpage design does not allow the screen reader to properly function.⁸⁰ As one can imagine, these sorts of technological errors make using the internet difficult for the visually impaired. Laura Kalbag, website designer and author of *Accessibility for Everyone*, believes that ensuring accessible web design is easy.⁸¹ Kalbag says, “[i]t’s not hard to do . . . It basically just involves HTML coding, which even a blogger can do. If it is a huge website, it might take some time, but the work itself is not complicated.”⁸²

Congress believed the ADA would cover website accessibility.⁸³ By passing such comprehensive legislation, Congress did not mean to exclude future entities such as businesses and other webpages accessed via the internet, as such entities would quickly become a staple in American life over the following decades.⁸⁴ While screen readers are an incredible technological advancement, they are not perfect, and proper webpage design and formatting can help ensure that screen readers function properly. It might be easy to take for granted the amount of information presented on a webpage, but screen readers do not have this luxury. This software will read and identify all types of punctuation, acronyms, page headings, menu options, fillable boxes, titles, alternative text on images and videos, website links, and more.⁸⁵

While screen readers do convert text into synthesized speech, they are not intelligent humans who can decipher every part of a webpage. When websites have incompatible features like unlabeled graphics, forms without field labels, or links without descriptive names, then screen readers are not able to convey what is on the screen in an understandable way, they just read what is there.⁸⁶ In fact, a recent study found that over seventy percent of

⁸⁰ *Why Much of the Internet is Closed Off to Blind People*, BBC NEWS (Sept. 28, 2019), <https://www.bbc.com/news/world-us-canada-49694453> [<https://perma.cc/R9YE-FJS2>].

⁸¹ *Id.*

⁸² *Id.* The associated costs are essentially just the insubstantial additional time it takes to design a web page properly. *See id.*

⁸³ *See* Achieving the Promise of the ADA, *supra* note 70, at 2 (2010) (statement by Rep. Nadler) (explaining that the Department of Justice has consistently held that equal access extends to the internet and expressing the hope of avoiding a repeat of the judiciary’s mistaken interpretation of the word disability in the ADA in judgements of whether a place of public accommodation needs a physical nexus to be covered by the ADA, saying “[Congress] will not tolerate a narrow reading of the ADA.”); *see also* Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New England, Inc., 37 F.3d 12, 19 (1st Cir. 1994) (ruling that public accommodations are not limited to physical places).

⁸⁴ Perrin & Atske, *supra* note 5.

⁸⁵ *See* *Designing for Screen Reader Compatibility*, *supra* note 61.

⁸⁶ *Id.*

websites are inaccessible due to accessibility issues which “render the prime directive of that site inaccessible.”⁸⁷

This analysis studied the internet usage of dozens of visually impaired adults to understand how internet accessibility issues affect the visually impaired population.⁸⁸ Visually impaired users abandon about two-thirds of all internet transactions due to accessibility issues.⁸⁹ That means nearly seven billion dollars a year is diverted from online retail and instead spent at accessible alternatives,⁹⁰ and also, that visually impaired users must call customer service about once a week due to website inaccessibility.⁹¹

Screen readers can run into several accessibility issues with improperly designed websites. While some screen readers read the cascading style sheet (CSS) of a page, most will work to decipher the more common hypertext markup language (HTML).⁹² HTML is the standard “language” used to create web pages,⁹³ while CSS is less commonly used and describes to the webpage how to display HTML elements.⁹⁴ For a screen reader to make sense of a webpage and read it as intended the website should be designed for HTML to be read from top to bottom and left to right. This is generally a straightforward step to accomplish since the English language is read that way and websites are set up as such.

Another common issue screen readers run into is problems with website headings.⁹⁵ Rather than scanning the entire webpage and relaying that information, a screen reader’s user is likely to look for headings to find the information they are interested in.⁹⁶ But if a website is not properly formatted to include headings, then the user is unlikely to find what they are looking for.⁹⁷ Screen readers also run into issues with non-HTML (or CSS) content, such as PDF files, Word documents, PowerPoints, and so on.⁹⁸ Since these types of files do not contain text which can be read and relayed by a screen

⁸⁷ REBECCA WETTEMANN & TREVOR WHITE, NUCLEUS RSCH., THE INTERNET IS UNAVAILABLE 2 (2019).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 1.

⁹¹ *Id.* at 2.

⁹² *Web Accessibility Issues*, *supra* note 77.

⁹³ *HTML Introduction*, W3SCHOOLS, https://www.w3schools.com/html/html_intro.asp [<https://perma.cc/J9M3-D6WB>].

⁹⁴ *Id.*

⁹⁵ See Daniel Göransson, *Text Splitting Causes Screen Reader Problems*, AXESS LAB (Mar. 4, 2018), <https://axesslab.com/text-splitting/> [<https://perma.cc/6JF8-8GWG>].

⁹⁶ *Web Accessibility Issues*, *supra* note 77.

⁹⁷ *Id.*

⁹⁸ *Id.*

reader, a screen reader will not be able to convey the information on the screen to the user.⁹⁹

Images and text on websites can present persistent accessibility problems. If an image is not formatted to include an empty or null HTML code, then a screen reader will attempt to read the image without success.¹⁰⁰ As one can imagine, this can cause confusion for visually impaired users of screen readers. If a website does not designate through HTML that the image is indeed an image, the screen reader will try to read it, and if it is described as such but does not have an alternative text describing the image, then the user of a screen reader will still be unaware of the information the image is conveying (such as an informational graph).¹⁰¹

Websites might also include alternative text for images at times.¹⁰² If the image is labeled as “image,” “photo,” “img_5678.jpg,” or else incorrectly labeled then a screen reader will simply read aloud that label, causing confusion for the user.¹⁰³ Sometimes a webpage might have bolded text where it is not exactly necessary, and screen readers may incorrectly interpret this to be a heading.¹⁰⁴ If a visually impaired user is using keyboard commands to skip to headings and find what they are looking for, then random bolded text can cause confusion.

Even as early as 1999, the National Federation of the Blind found it necessary to bring legal action addressing internet accessibility.¹⁰⁵ In that case, the Federation initially brought suit alleging that AOL’s software and content

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ See generally Jessica Navarro, *The 10 Most Common Accessibility Issues*, SITEIMPROVE (July 6, 2021), <https://siteimprove.com/en-us/blog/common-accessibility-issues/> [<https://perma.cc/CN79-PYVF>]; (describing some of the most common accessibility issues faced, such as missing or inaccurate alternative text, inaccurate heading structure, buttons or links without alternative text, and more); *Web Accessibility Issues*, *supra* note 77; Shawn Dryden, *Common Website Accessibility Mistakes and How to Fix Them*, NEW BOS. CREATIVE GRP. (June 14, 2021), <https://newboscreative.com/blog/2021/06/14/common-website-accessibility-mistakes-and-how-to-fix-them> [<https://perma.cc/GR7F-LTW3>].

¹⁰² See Anna Belle Leiserson et al., *Decorative Images*, W3C (July 27, 2019), <https://www.w3.org/WAI/tutorials/images/decorative/> [<https://perma.cc/VFP6-DUQE>].

¹⁰³ *Id.*; see also Dryden, *supra* note 101; *Web Accessibility Issues*, *supra* note 77.

¹⁰⁴ Navarro, *supra* note 101.

¹⁰⁵ Oscar S. Cisneros, *AOL Settles Accessibility Suit*, WIRED (July 28, 2000, 3:00 AM), <https://www.wired.com/2000/07/aol-settles-accessibility-suit/> [<https://perma.cc/837C-EXU5>].

was not accessible to screen readers.¹⁰⁶ Such accessibility issues continue to persist, even with advances in technology.

D. Legal Developments Surrounding the ADA and Internet Access

In recent years, an abundance of case law from around the nation has examined whether the internet should be a public accommodation covered by the ADA.¹⁰⁷ The language of the ADA is a vestige of 1990, when the internet was in its infancy and Congress was ignorant of the tremendous effect technology would have on American society in the near future.¹⁰⁸ In the absence of a clear mandate requiring companies to make their websites accessible, the responsibility has fallen upon the judiciary to interpret the ADA's protections. In such a case, the judiciary must evaluate the intent of the legislature in passing the ADA.

The text of the ADA plainly says that its purpose is to eliminate discrimination against people with disabilities.¹⁰⁹ Title III advances this goal by providing that “[n]o individual shall be discriminated against on the basis of disability in the *full and equal* enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.”¹¹⁰ Furthermore, the ADA provides that a place of public accommodation unlawfully discriminates when it fails to take necessary steps to ensure no disabled individual is “excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services.”¹¹¹ It can be seen that Congress intended for the ADA to be a sweeping piece of legislation which would also cover future technologies not necessarily at the forefront in 1990. Despite the success of the ADA Amendments Act in broadening the categorical interpretations of who is considered to be a person with a disability,¹¹² Congress failed to

¹⁰⁶ *Id.*

¹⁰⁷ See William Goren, *Internet as a Place of Public Accommodation and Standing*, BLOG: UNDERSTANDING THE ADA (Jan. 30, 2018), <https://www.understandingtheada.com/blog/2018/01/30/internet-place-of-public-accommodation-standing/> [https://perma.cc/YW3V-KCFF].

¹⁰⁸ See generally Jonathan Hogeback, *Who Invented the Internet?*, BRITANNICA, <https://www.britannica.com/story/who-invented-the-internet> [https://perma.cc/4P8W-DF4C] (explaining the early stages of internet development and showing that early technology was primitive).

¹⁰⁹ 42 U.S.C. § 12101(b)(1).

¹¹⁰ 42 U.S.C. § 12182(a) (emphasis added).

¹¹¹ *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 904 (9th Cir. 2019).

¹¹² Kara Mayer Robinson, *The Impact of the ADA Amendments Act*, MINORITY CORP. COUNS. ASS'N, <https://www.mcca.com/mcca-article/impact-of-the-ada-amendments-act/> [https://perma.cc/7YAK-57GJ]; Stephen F. Befort, *An Empirical Analysis of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2051–52 (2013).

address internet accessibility for the visually impaired in the 2008 amendments. It is not clear why Congress neglected to address the internet.

However, without a clear edict from Congress directing courts to treat the internet as a place of public accommodation, judicial conclusions on that issue have varied. Federal Courts tend to agree that internet webpages are considered places of public accommodation, however, the courts differ on how liberally to extend this understanding.¹¹³ As a result, there is a developing Circuit split regarding whether internet webpages are considered places of public accommodation under the ADA.¹¹⁴

1. The Nexus Test

The disagreements over whether the internet is to be considered a place of public accommodation have manifested into what some courts call the nexus test.¹¹⁵ Such a test examines whether a webpage has a sufficient “nexus” to a physical location, such that the website ought to be considered a place of public accommodation and made accessible to all.¹¹⁶ This has resulted in the development of a circuit split, with some circuits requiring such a nexus for a successful Title III claim, and other circuits holding no such nexus is necessary.¹¹⁷

Judicial decisions on internet accessibility have split on how to determine if a website is properly considered a public accommodation to be covered by

¹¹³ See generally *Robles*, 913 F.3d at 904 (holding that a website was a place of public accommodation, with the existence of a physical location being “critical” to the analysis); *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New England*, 37 F.3d 12 (1st Cir. 1994) (holding that a business did not require association with an actual physical location to be within the reach of Title III, and saying to rule otherwise would frustrate the intent of Congress); *Morgan v. Joint Admin. Bd., Ret. Plan of Pillsbury Co. and Am. Fed’n of Grain Millers*, 268 F.3d 456, 459 (7th Cir. 2001) (explaining that the site of a transaction is irrelevant to the congressional goal of ensuring equal access to disabled people); *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 395 (E.D.N.Y. 2017) (explaining that the “broad mandate” and “comprehensive character” of the ADA mean it should keep pace with the fact that the internet is as pertinent now as physical reality was at the time the statute was enacted).

¹¹⁴ LEWIS S. WIENER & AMY XU, PARTNERING PERSPECTIVES, WEBSITES AS PUBLIC ACCOMMODATIONS: THE CIRCUIT SPLIT ON WHETHER WEBSITES CONSTITUTE PLACES OF PUBLIC ACCOMMODATION 4 (2016), <http://www.accdigitaldocket.com/accdocket/partneringperspectives201605?pg=4#pg4> [https://perma.cc/QKZ6-FB3T].

¹¹⁵ See e.g., *Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312, 1318 (S.D. Fla. 2002); *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017, 1023–24 (N.D. Cal. 2012); *Earll v. eBay, Inc.*, 599 F. App’x 695, 696 (9th Cir. 2015); *Robles*, 913 F.3d at 904–05; *Gil v. Winn Dixie Stores, Inc.*, 242 F. Supp. 3d 1315, 1320 (S.D. Fla. 2017).

¹¹⁶ See *Robles*, 913 F.3d at 904–05.

¹¹⁷ *Id.*

the ADA. In the Ninth and Eleventh Circuits, the courts have decided that a website alone is not a public accommodation, but that websites can be subject to Title III litigation if they have a nexus to an actual physical location, such as the website for a pizza chain or another retailer.¹¹⁸ Other circuits have made more commonsense decisions expanding the rights of Americans under Title III. In the First, Second, and Seventh Circuits, courts do not use the nexus test.¹¹⁹ These Circuits have instead held that a website, absent an associated physical location, is still properly considered a place of public accommodation under Title III.¹²⁰

The Third Circuit has been the most restrictive in their decisions regarding applicability of the ADA to the internet, with the law in that Circuit developing as quite limited in contrast to the broad intentions of Congress. In the Third Circuit, it has been held that websites are not considered public accommodations, and that a nexus to a physical location does not make a difference.¹²¹ These limiting decisions severely restrict the application of Title III of the ADA to any online activity, meaning that a disabled person is only protected from discrimination when out in public.

2. The Circuit Split

With a developing Circuit split (indicating a possible Supreme Court challenge in the future) it is imperative to understand the different ways the Federal Circuits have interpreted Title III in relation to the internet. Title III of the ADA clearly prohibits discrimination against disabled people in any place of public accommodation.¹²² The statute reads “[n]o individual shall be

¹¹⁸ Compare *Access Now*, 227 F. Supp. 2d at 1318 (holding that an airliner’s website was not a place of public accommodation under Title III as the plaintiff had failed to establish a nexus between the airliner’s website and a physical, concrete place of public accommodation), and *Cullen*, 880 F. Supp. 2d at 1023–24 (stating that Netflix’s website was not connected to a physical location, meaning it was not a place of public accommodation under Title III), and *Earll*, 599 F. App’x at 696 (holding that eBay’s website was not subject to Title III because it had no connection to an actual physical location), with *Robles*, 913 F.3d at 904–05 (holding that the Domino’s Pizza website was subject to a Title III claim as there was a sufficient nexus between the website and physical pizza store locations), and *Gil*, 242 F. Supp. 3d at 1318–21 (ruling that a Title III claim was properly upheld because the retailer’s website had a sufficient nexus to the actual physical grocery store locations).

¹¹⁹ See generally *Morgan v. Joint Admin. Bd., Ret. Plan of Pillsbury Co. and Am. Fed’n of Grain Millers*, 268 F.3d 456 (7th Cir. 2001) (holding that a public accommodation under Title III does not literally denote a physical site); *Andrews*, 269 F. Supp. 3d at 387 (ruling that a webpage for an art supplier is a place of public accommodation for purposes of Title III).

¹²⁰ See *infra* Part IV.A.

¹²¹ See, e.g., *Peoples v. Discover Fin. Servs., Inc.*, 387 F. App’x 179, 184 (3rd Cir. 2010) (dismissing a blind customer’s Title III claim for credit card support services); *Anderson v. Macy’s Inc.*, No. 2:12-CV-00556, 2012 WL 3155717, at *4-5 (W.D. Pa. Aug. 2, 2012) (rejecting a Title III claim, even though the Macy’s website did have a connection to the physical Macy’s location).

¹²² 42 U.S.C. § 12182(a) (1990).

discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of *any place of public accommodation*.¹²³ Cases bringing forth ADA Title III claims have shown how the Circuits split on the issue of whether a website is a place of public accommodation and must therefore be ADA compliant.

In the Ninth Circuit, the courts have put forward a rather narrow understanding of when a website is to be considered a place of public accommodation.¹²⁴ Decisions in the Ninth Circuit have held that a place of public accommodation is to be understood as requiring “some connection between the good or service complained of and an actual physical place. . .”¹²⁵ There are several instances where courts in the Ninth Circuit have utilized this requirement of a nexus, a link or connection, between an actual physical location and the inaccessible accommodation.¹²⁶

One such example of the nexus requirement is seen in *National Federation of the Blind v. Target Corp.*¹²⁷ In *National Federation*, the association brought forth an action against Target, alleging that Target’s website was inaccessible to blind users and assistive technologies in violation of Title III of the ADA.¹²⁸ The Plaintiffs alleged that Target’s website was inaccessible despite it being a technologically simple and relatively cheap process to design the website to be compatible with screen readers used by blind internet users.¹²⁹ Since Target’s website lacked the features which would enable visually impaired users to navigate the website, the visually impaired users were unable to use the website to shop online, check store hours, order prescriptions through the pharmacy, or print coupons to use in the store.¹³⁰

The Northern District of California noted that the discrimination under the ADA encompassed a “denial of the opportunity . . . to participate in programs or services” and, to ensure equal enjoyment in places of public accommodation to the disabled, the ADA required “the provision of auxiliary aids.”¹³¹ Despite this broad understanding of equality, the Court adhered to

¹²³ *Id.* (emphasis added).

¹²⁴ *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898, 902 (9th Cir. 2019).

¹²⁵ *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000).

¹²⁶ *See infra* notes 127–44 and accompanying text.

¹²⁷ *See, e.g., Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 952 (N.D. Cal. 2006).

¹²⁸ *Id.* at 949.

¹²⁹ *Id.*

¹³⁰ *Id.* at 949–50.

¹³¹ *Id.* at 951.

the Ninth Circuit's earlier decision in *Weyer v. Twentieth Century Fox Film Corp.*, holding there must be a nexus, or connection, between the challenged service and a place of public accommodation, a physical place.¹³² The Court thus reasoned that the rights of the plaintiff in such an action would depend on whether the inaccessible website is connected to an actual physical location.¹³³

Another example can be seen in *Robles v. Domino's Pizza, LLC*, where the Ninth Circuit said that the "nexus" between a website or app and a physical location is critical to the analysis of whether the website or app was a place of public accommodation.¹³⁴ In *Robles*, the plaintiff brought suit against the pizza chain because of their failure to "design, construct, maintain, and operate" their website and mobile application to be fully accessible to blind or visually impaired users due to incompatibility with screen reader technology.¹³⁵ While the Court did rule that the ADA applied to the Defendant's website and app, it did so on the basis of the inaccessibility impeding access to the goods and services of actual physical pizza locations—which it did regard as places of public accommodation.¹³⁶ The Court said the fact website and app "connect[ed] customers to the goods and services" of a physical pizza shop location was why they were held inaccessible under the ADA.¹³⁷

Courts in other circuits have similarly held that the rights of a plaintiff under the ADA are reliant on the inaccessibility being linked to a physical location. For example, in *Rendon v. Valleycrest Productions, Ltd.*, plaintiffs were deaf individuals who called Valleycrest Productions for a chance to be a contestant on the popular game show *Who Wants to be a Millionaire*.¹³⁸ However, the potential contestants were unable to answer the screening questions because the phone questionnaire was not accessible to the software used by deaf people and no such software was offered, so they brought suit alleging violations of the ADA.¹³⁹ The Department of Justice also intervened, joining the Plaintiffs in the suit, and the Court ruled in their favor.¹⁴⁰ The Court reasoned that the ADA covered discrimination in the form of tangible barriers to physical places of public accommodation, which the studio filming

¹³² *Id.* at 955.

¹³³ Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 953 (N.D. Cal. 2006).

¹³⁴ *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 905 (9th Cir. 2019).

¹³⁵ *Id.* at 902.

¹³⁶ *Id.* at 905.

¹³⁷ *Id.* at 905–06.

¹³⁸ *Rendon v. Valleycrest Productions, Ltd.*, 294 F.3d 1279, 1280 (11th Cir. 2002).

¹³⁹ *Id.* at 1281.

¹⁴⁰ *Id.*

the show was, as well as any intangible barriers preventing enjoyment of the public accommodation.¹⁴¹

Similar decisions have been reached in the Third, Fifth, and Sixth Circuits, with the Circuits refusing to extend the understanding of public accommodation under Title III to include services without a nexus to a physical location.¹⁴² While these rulings are at least an improvement on past decisions which only covered discrimination in a physical location,¹⁴³ they did not consider how these limited protections could negatively impact the disabled in instances such as internet inaccessibility.

However, determinations on the extent to which the internet and webpages are considered public accommodations in other Circuits have done better to keep up with an evolving world and ensure protections for the disabled against discrimination. One such example comes from the First Circuit in *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.*¹⁴⁴ In *Carparts*, the Court noted that “one can easily imagine the existence of other service establishments conducting business by mail and phone without providing facilities for their customers to enter in order to utilize their services.”¹⁴⁵ The Court further held that the definition of public accommodation under Title III of the ADA was not limited to actual physical structures.¹⁴⁶

¹⁴¹ *Id.* at 1283.

¹⁴² See generally *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998) (finding that public accommodation does not refer to non-physical access); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006 (6th Cir. 1997) (holding that an insurance policy acquired through an employer rather than a physical location did not allow it to fall under the meaning of public accommodation); *McNeil v. Time Ins. Co.*, 205 F.3d 179 (5th Cir. 2000) (affirming a ruling that Title III requires physical locations to be a place of public accommodation). *But see Parker*, 121 F.3d at 1020 (Martin, C.J., dissenting) (disagreeing with the ruling of the Court, and contending that limiting Title III to only physical locations would serve to deprive disabled people of the rights guaranteed by Title III because the world is evolving to rely on virtual marketplaces, and arguing that the Court's ruling, in consideration of modern trends towards non-physical marketplaces, would “dilute” the protections of Title III).

¹⁴³ See, e.g., *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1118 (9th Cir. 2000) (stating that an interpretation of the phrase places of public accommodations, within the context of accompanying words in the statute, suggested that a connection to an actual physical place is required; agreeing with Third and Sixth Circuit decisions that held places of public accommodations are physical places).

¹⁴⁴ *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994).

¹⁴⁵ *Id.* at 19.

¹⁴⁶ *Id.* at 20.

Other courts in the First Circuit have similarly ruled that an online business can properly be considered a place of public accommodation under Title III.¹⁴⁷ For example, in *Access Now, Inc. v. Blue Apron, LLC*, the District of New Hampshire was faced with the question of whether the Defendant's website constituted a public accommodation under Title III of the ADA.¹⁴⁸ The Plaintiffs had brought suit alleging the website was inaccessible to blind and visually impaired users, due to website design issues inhibiting the functionality of screen readers.¹⁴⁹ The court followed the First Circuit precedent recognized in *Carparts*, holding that a website, even absent a physical location, is a public accommodation under Title III.¹⁵⁰

Such a decision can open the door for visually impaired people to use the Blue Apron website, rather than being excluded because of faulty web design being incompatible with a screen reader. Furthermore, as Title III only offers injunctive relief,¹⁵¹ it is unlikely that plaintiffs will bring suit for individual monetary gain. The only benefit offered by injunctive relief is that inaccessible facilities will be required to be made "accessible to and usable by individuals with disabilities" so that they can equally enjoy the services of public accommodations.¹⁵² Combined with the fact that there are fair exemptions included in Title III,¹⁵³ rulings similar to the First Circuit can fairly be seen as equitable decisions for all.

Courts in the First Circuit are not alone in their broad interpretations of what is to be considered a public accommodation, and thus covered under Title III. In the Second Circuit, decisions have furthered the rights of visually impaired people to avail themselves of the internet.¹⁵⁴ In *Del-Orden v. Bonobos, Inc.*, a visually impaired customer brought suit against the Defendant retailer,

¹⁴⁷ *Access Now, Inc. v. Blue Apron, LLC*, No. 17-CV-116-JL, 2017 WL 5186354, at *4 (D.N.H. Nov. 8, 2017). Blue Apron is a popular meal prep service, where a customer's prepared food orders are delivered straight to their door. *Our Vision*, BLUE APRON, <https://www.blueapron.com/pages/vision> [<https://perma.cc/93M7-2CM5>].

¹⁴⁸ *Access Now*, 2017 WL 5186354, at *1.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at *4.

¹⁵¹ 42 U.S.C. § 12188(a)(2).

¹⁵² *Id.*

¹⁵³ See 42 U.S.C. §§ 12182(b)(2)(A)(ii) (Title III provides exemptions for certain entities and only requires reasonable modifications be made in "policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities . . ." unless it can be shown that such modifications would "fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations . . ."); see also *Americans With Disabilities Act: Title III Highlights*, FINDLAW (Apr. 26, 2016), <https://corporate.findlaw.com/litigation-disputes/americans-with-disabilities-act-title-iii-highlights.html> [<https://perma.cc/HP3L-XY52>].

¹⁵⁴ See *Del-Orden v. Bonobos, Inc.*, No. 17 CIV. 2744, 2017 WL 6547902 at *3 (S.D.N.Y. Dec. 20, 2017).

alleging their website was designed in a way which caused accessibility barriers for visually impaired users by virtue of the website being inaccessible to screen reader technology.¹⁵⁵ The Court held that websites qualify as places of public accommodation under the ADA, and that ADA protections extended to visually impaired people who face discriminatory access to websites.¹⁵⁶

The *Del-Orden* decision mirrored the *Access Now* ruling, with the Court noting it “joins the growing number of courts to hold that commercial websites qualify as ‘public accommodations’ within the meaning of the ADA, such that . . . protections extend to blind persons who claim discriminatory access to such websites.”¹⁵⁷ Such interpretations seem to expand the ADA’s protections in the manner Congress intended, allowing people with disabilities to have equal access to businesses.

Another Second Circuit court ruled similarly in *National Federation of the Blind v. Scribd Inc.*¹⁵⁸ In *Scribd*, a claim was brought against the Defendant, who was an internet based digital library, alleging that the reading subscription service’s website and mobile app were inaccessible to blind users because of their incompatibility with screen readers and other such software used by the visually impaired.¹⁵⁹ The court found that digital services such as websites and mobile apps were properly considered places of public accommodation under Title III.¹⁶⁰ Another Second Circuit decision ruled that a restaurant’s website was also covered under Title III “either as its own place of public accommodation or as a result of its close relationship as a service of defendant’s restaurants . . .”¹⁶¹

Other cases in the Circuit have reached similarly broad interpretations covering websites as public accommodations under Title III. One such case, *Andrews v. Blick Art Materials, LLC*, held that even without a nexus to a physical location, a company’s website was covered by Title III.¹⁶² In *Andrews*, a blind customer alleged the Defendant’s website did not adhere to website

¹⁵⁵ *Id.* at *2.

¹⁵⁶ *Id.* at *1.

¹⁵⁷ *Id.*

¹⁵⁸ Nat’l Fed’n of the Blind v. Scribd Inc., 97 F. Supp. 3d 565, 574 (D. Vt. 2015).

¹⁵⁹ *Id.* at 567.

¹⁶⁰ *Id.* at 565.

¹⁶¹ Markett v. Five Guys Enters. LLC, No. 17-CV-788, 2017 WL 5054568, at *2 (S.D.N.Y. July 21, 2017).

¹⁶² Andrews v. Blick Art Materials, LLC, 268 F. Supp. 3d 381, 393-95 (E.D.N.Y. 2017).

accessibility guidelines¹⁶³ and rendered the website inaccessible to visually impaired people.¹⁶⁴ The Court found that the “broad mandate” of the ADA and its ‘comprehensive character’ were resilient enough to keep pace with the reality of how significant the internet has become in modern life and the fact that although the rise of the internet could not have been foreseen by Congress, it did not mean the application of the ADA to websites and the internet was ambiguous.¹⁶⁵ Thus, the Court held a website was to be understood as a place of public accommodation and covered by Title III of the ADA.¹⁶⁶

The Seventh Circuit has also reached parallel conclusions, interpreting Title III prohibitions on discrimination to reach both physical and electronic spaces as places of public accommodation.¹⁶⁷ In a Seventh Circuit case, the Court was asked by the Defendant to interpret public accommodation in a literal sense, as “denoting a physical site.”¹⁶⁸ However, Judge Posner rejected that interpretation, instead holding that “the site of the sale is irrelevant to Congress’s goal of granting the disabled equal access to sellers of goods and services. What matters is that the good or service be offered to the public.”¹⁶⁹ Such an authoritative holding from an acclaimed jurist is yet another example of how courts should correctly apply Title III to the internet to protect the rights of the disabled. This rule statement is an example of how broadly Title III’s public accommodations can be read to extend discrimination protections to visually impaired internet users.

IV. ANALYSIS

Imagine being blind or otherwise visually impaired and hearing the news that your favorite local clothing store is closing the brick-and-mortar location and having a sale to finish off their inventory. While this may seem like bad news at first you then think, “I’ll check out the website and try to take

¹⁶³ See Ben Caldwell et al., *Web Content Accessibility Guidelines (WCAG) 2.0*, W3C (June 2010), <https://www.w3.org/WAI/GL/WCAG20/> [https://perma.cc/9CRM-RRJR]; Shawn Lawton Henry, *Web Content Accessibility Guidelines (WCAG) Overview*, W3C (Apr. 29, 2021), <https://www.w3.org/WAI/standards-guidelines/wcag/> [https://perma.cc/HRG8-Z94Q].

¹⁶⁴ *Andrews*, 268 F. Supp. 3d at 386.

¹⁶⁵ *Id.* at 395.

¹⁶⁶ *Id.* at 398.

¹⁶⁷ See generally *Doe v. Mut. Of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999) (saying that the ADA language on places of public accommodation extended to insurance policies, with Judge Posner stating an insurance company could not refuse to remotely sell a policy to a person with AIDS); *Morgan v. Joint Admin. Bd., Ret. Plan of Pillsbury Co. & Am. Fed’n of Grain Millers*, 268 F.3d 456 (7th Cir. 2001) (interpreting places of public accommodation to cover more than a physical site when stating an insurance company could not refuse to sell a disabled person a policy over the internet, any more than a furniture store could refuse to sell merchandise to a disabled person in the store).

¹⁶⁸ *Morgan*, 268 F.3d at 459.

¹⁶⁹ *Id.*

advantage of these deals.” You visit the website with the assistance of your screen reader, navigate to the section you are interested in and start browsing clothes. However, when you click on the first clothing item the screen reader says, “graphic graphic graphic,” “link 1872 link 1872,” “image 12345,” or some similar nonsensical description. For some blind or otherwise visually impaired users, these are common problems.¹⁷⁰

These are problems arising from improper web design. Making websites accessible is a matter of website designers understanding the problems accessibility tools encounter and designing their websites to eliminate such obstacles. In fact, it is cheaper to design a website properly from the beginning rather than having to redesign it later.¹⁷¹ Design is what makes a website accessible, it will take tweaks in the design to make a website accessible to assistive technologies, rather than significant financial investment in some new product. Furthermore, an inaccessible website can incur costs significantly greater than the initial outlay in designing a webpage to be accessible, by virtue of lost profits or potential litigation.¹⁷² In reality, the cost of making webpages accessible to the visually impaired is quite low, just the extra time it would take for a web designer to properly format and design the website.¹⁷³

This extra care must be taken to ensure equality in access. Regardless of the assistive technology which is or is not used, for a website to be truly accessible, everyone and anyone must be able to use and navigate it to its full extent. When seventy percent of websites are inaccessible in some way, and

¹⁷⁰ Arielle Pardes, *The Internet is for Everyone, Right? Not With a Screen Reader*, WIRED (Oct. 24, 2019, 8:00 AM), <https://www.wired.com/story/web-accessibility-blind-users-dominos/> [<https://perma.cc/B7K6-LECN>].

¹⁷¹ *Financial Factors in Developing a Web Accessibility Business Case for Your Organization*, WEB ACCESSIBILITY INITIATIVE (Sept. 7, 2012) <https://www.w3.org/WAI/business-case/archive/fin> [<https://perma.cc/599R-BEZE>].

¹⁷² See generally *Class Settlement Agreement and Release at 5, Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946 (N.D. Cal. 2006) (agreeing to settle for six million dollars). Settlement agreement can be found at https://dralegal.org/wp-content/uploads/2012/09/settlementagreement_2.pdf [<https://perma.cc/67K3-3RHN>].

¹⁷³ See generally Karl Groves, *How Expensive is Web Accessibility?*, KARLGROVES.COM (Nov. 30, 2011), <https://karlgroves.com/2011/11/30/how-expensive-is-accessibility> [<https://perma.cc/EB8Z-VMS7>] (commenting on the fact that there is no additional initial outlay cost to make websites accessible, that it is just a matter of properly designing and formatting the website to be accessible to assistive technologies). Groves also notes the potential costs of consulting and determining what must be done for accessibility, such as modifying existing webpages, developing internal best practices, training new staff, etc. *Id.*

most internet transactions are abandoned by visually impaired users,¹⁷⁴ then it is evident a change is needed to ensure equal accessibility for all.

While America may not yet think of the internet as a right, it ought to be treated as such because of the wide variety of societal participation which it allows for all. Despite the ADA guaranteeing protections for all Americans regardless of any disability, it does not guarantee the right to use the internet free from discrimination.¹⁷⁵ However, the ADA does guarantee that Americans will not suffer discrimination on the basis of any disability in employment, public services, and in places of public accommodation.¹⁷⁶

The question is whether expanding the understanding of what constitutes a place of public accommodation to include the internet is proper. Several courts have answered in the affirmative, holding that the internet is properly understood as a place of public accommodation.¹⁷⁷ However, the discussion does not end there, for other courts have taken a more restrictive view on whether the internet is a place of public accommodation.¹⁷⁸ The correct reasoning should understand that the internet is a multi-faceted tool, allowing even the most isolated members of society to participate, contribute, and engage in the world around them. While legally sound, determinations that a physical nexus is required to deem a website a place of public accommodation are incorrect. Because of the sheer convenience and propensity for allowing societal participation, any website should properly be considered a place of public accommodation.

A. The Way Forward: Following the Proper Application of the ADA as Laid Out by the First, Second, and Seventh Circuits

With the differing conclusions reached across the Circuits, one can see the development of a Circuit split on the issue of whether websites and other internet resources are to be considered places of public accommodation under Title III of the ADA. The split has even been noted in legal decisions.¹⁷⁹ Courts in the First, Second, and Seventh Circuits have appropriately determined that a website is to be considered a public accommodation without a need for it to be connected to a physical space.¹⁸⁰ Such decisions have focused on congressional intent in providing broad

¹⁷⁴ WEITTEMANN & WHITE, *supra* note 87, at 2.

¹⁷⁵ See 42 U.S.C. § 12101(b).

¹⁷⁶ See *id.*

¹⁷⁷ See *infra* Part IV.A.

¹⁷⁸ See *infra* Part IV.B.

¹⁷⁹ See *Gil v. Winn Dixie Stores, Inc.*, 242 F. Supp. 3d 1315, 1318 (S.D. Fla. 2017).

¹⁸⁰ See *infra* Part IV.A.

protections for disabled Americans and the legislative history, showing an intent for the law to adapt to modern realities.¹⁸¹

However, other conclusions can be harmful to the overarching goals of the ADA. By not allowing suit under Title III unless there is a nexus to a physical location, courts are essentially excluding the visually impaired from having the right to equal enjoyment of many services. For example, a holding that a pizza chain has sufficient nexus to a physical location, and must make their website accessible, is a victory for visually disabled patrons who want to use the chain's website to order a pizza.

Yet, one can imagine other scenarios where the lack of nexus to a physical location means that visually impaired people have no Title III claim to bring suit for an inaccessible website. For example, a flower delivery service with no location for customers to visit, but with a website where customers can order and customize bouquets and send them with messages, would not be covered under Title III for being inaccessible in these jurisdictions. This is the problem with the nexus argument. It allows for the perpetuation of inaccessible websites, thus discriminating against and excluding the visually impaired, by virtue of having no physical location associated with a website.

Such an understanding follows Congressional intent in broadly applying the ADA. This understanding would also apply to the floral website example above, and such a website would need to be made accessible for use by the visually impaired. With developments in technology giving people the ability to live and prosper without needing to leave their homes, and the effects of a global pandemic leading many people to become more reliant on the internet for many of their daily tasks, the Third Circuit's refusal to extend accessibility accommodations to the internet is particularly harmful to the many disabled Americans who face accessibility issues in the Circuit's jurisdiction.

B. Current Accessibility Guidelines

There are several signs strongly indicating that accessibility under the ADA must also extend to the internet and websites run by private entities. The ADA itself charges the DOJ with controlling the regulations under

¹⁸¹ J. Gregory Grisham, *Website Inaccessibility: The New Wave of ADA Title III Litigation*, THE FEDERALIST SOCIETY (Apr. 1, 2019), <https://fedsoc.org/commentary/publications/website-inaccessibility-the-new-wave-of-ada-title-iii-litigation#:~:text=Circuit%20Split%20Identified%20by%20Recent%20Decision&text=Courts%20are%20split%20on%20whether,website%20and%20a%20physical%20place> [https://perma.cc/38XP-6UYB].

which Title III is to be implemented.¹⁸² And in a 1996 memorandum to the Senate, the Department of Justice said that the ADA does apply to government agencies and private companies providing services and products via the internet.¹⁸³ The assistant Attorney General at the time, Deval Patrick, stated that “covered entities that use the internet . . . must be prepared to offer . . . communications through accessible means.”¹⁸⁴ According to the same memo, internet and e-commerce services offered via the web are considered places of public accommodation.¹⁸⁵ This is yet another example showing how the internet should not be considered beyond the grasp of the ADA.

There are governmental guidelines for what a public accommodation must do to stay ADA compliant.¹⁸⁶ The Department of Justice (“DOJ”) regularly issues guidance regarding compliance with statutes, like the ADA, with one such example coming from the DOJ’s issuance of an Advanced Notice of Proposed Rulemaking in 2010.¹⁸⁷ There, the DOJ stated that it was intending to “revis[e] the regulations implementing Title III . . . in order to establish requirements for making the goods, services, facilities, privileges, accommodations, or advantages offered by public accommodations via the Internet, specifically at . . . sites on the World Wide Web . . . accessible to individuals with disabilities.”¹⁸⁸ The DOJ wanted to “make clear” that entities covered by the ADA were obligated to make websites accessible.¹⁸⁹

However, an advanced notice of proposed rulemaking is just that—a proposal. While the DOJ did signify an intent, they never enacted official

¹⁸² 42 U.S.C. § 12186(b).

¹⁸³ See Judy Brewer, *US Department of Justice Opinion on Applicability of Americans with Disabilities Act to the Issue of Web Accessibility*, 10 NAT’L DISABILITY L. REP. 240 (1997), <https://www.w3.org/WAI/EO/EO-Policy-USDOJ> [<https://perma.cc/H9MR-3Y7X>]. Entities to Title II or III of the ADA must provide effective communication to individuals with disabilities, and covered entities that use the Internet to provide information regarding their programs, goods or services must be prepared to offer those communications through accessible means. *Id.* Such entities may provide web page information in text format which is accessible to screen reading devices and are used by people with visual impairments. *Id.* They may also offer alternative accessible formats that are identified in a screen-readable format on a web page. *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Guide to the ADA Accessibility Standards*, U.S. ACCESS BOARD, <https://www.access-board.gov/ada/guides/> [<https://perma.cc/9GBA-3V3K>].

¹⁸⁷ Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43395 (Jul. 26, 2010) (codified as 28 C.F.R. §§ 35–36).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 43464.

regulations during the remainder of the Obama years.¹⁹⁰ In fact, during the last few months of the Obama administration, the DOJ revealed that no changes would be made until 2018.¹⁹¹ Then, during the Trump administration, the DOJ placed the 2010 advanced notice on a list of inactive regulations.¹⁹² In December, 2017, the DOJ formally announced the withdrawal of the Advanced Notice of Proposed Rulemaking, stating that they were “evaluating whether promulgating regulations about the accessibility of Web information and services is necessary and appropriate.”¹⁹³

There remains a lack of guidance from a federal level on what websites and internet sources in general must do to stay compliant. With three years passing since the withdrawal, it seems the DOJ has no imminent plans to issue guidance on the expanse of protections under Title III. The DOJ’s silence leaves many website owners without guidance as to the extent of website accessibility required. The DOJ’s decision, along with a lack of legislative guidance, also means visually impaired internet users must vindicate their rights under the ADA in court, with increasing numbers of accessibility lawsuits being filed.¹⁹⁴ In 2019, over eleven thousand web accessibility suits were filed in federal court, a nearly nine percent increase from 2018.¹⁹⁵ The inadequacy of government guidance on internet accessibility means businesses must make accessibility decisions based on the mess of judicial rulings across several jurisdictions. To expect businesses with a nationwide reach to comply with the ADA when their only guidance is

¹⁹⁰ Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions, 80 Fed. Reg. 60932, 60932 (Dec. 26, 2017) (“The Department has not published any rulemaking document regarding title III Web accessibility since the 2010”).

¹⁹¹ Alvarado, *supra* note 42, at 265; *see also* Amanda Robert, *Attorneys: DOJ’s Years-long Delay on Regulations Hurting Companies Facing Disabilities Lawsuits Over Their Websites*, LEGAL NEWSLINE (Mar. 1, 2016), <https://legalnewsline.com/stories/510698224-attomeys-doj-s-years-long-delay-on-regulations-hurting-companies-facing-disabilities-lawsuits-over-their-websites> [https://perma.cc/UVZ6-Q58Z].

¹⁹² Alvarado, *supra* note 42, at 265.

¹⁹³ Nondiscrimination on the Basis of Disability, 80 Fed. Reg. at 60932.

¹⁹⁴ Minh Vu et al., *2019 Was Another Record-Breaking Year for Federal ADA Title III Lawsuits*, SEYFARTH (Feb. 20, 2020), <https://www.adatitleiii.com/2020/02/2019-was-another-record-breaking-year-for-federal-ada-title-iii-lawsuits/> [https://perma.cc/M2E2-N4CK].

¹⁹⁵ *Web Accessibility Lawsuits: What’s the Current Landscape?*, ESSENTIAL ACCESSIBILITY (Apr. 20, 2021), <https://www.essentialaccessibility.com/blog/web-accessibility-lawsuits#:~:text=In%202019%2C%20according%20to%20an,ruling%20by%20the%20U.S.%20Court> [https://perma.cc/6QB2-3LU2].

(often contrasting¹⁹⁶) decisions from courts in different jurisdictions, is not only unfair, but it also hurts the disabled individuals who cannot access the internet equally and must bring lawsuits to enforce their rights.

1. The Need for Accessibility Guideline Reform

Court decisions that set a precedent not requiring websites to be accessible as a public accommodation can seriously disparage the seven million Americans with a visual disability,¹⁹⁷ who make up just a portion of the nearly twenty-seven million Americans who report having trouble with vision.¹⁹⁸ Whilst the internet offers the opportunity for us to have the world at our fingertips, accessibility for visually impaired or disabled people can be challenging when websites are not designed in compliance with ADA standards, and narrow interpretations of what constitutes a public accommodation can further restrict the ability of visually impaired people to avail themselves of the internet.

As we enter the fourth decade since the passage of the ADA, it is plain to see the massive changes which have transpired in the use of technology and the internet in everyday life. A blind person browsing the web, a pipedream in 1990, is completely normal today. Fault cannot be laid upon the legislature for failing to predict the advances in technology which would occur over a period of thirty years. Nor can they be criticized for failing to predict in 1990 the tremendous importance the internet plays in the day-to-day life of Americans over thirty years later.

Rather than waiting for a particular case to reach the Supreme Court, the legislature ought to establish clear guidelines, if not an amendment, to steer the judiciary in applying the correct analysis to the law. Congress has already done so with the ADA once before in the ADA Amendments Act of 2008.¹⁹⁹ It is appropriate for Congress to now offer guidelines or amendments for the Courts to follow the broader interpretations of public accommodations under Title III reached by the First, Second, and Seventh Circuits. By doing so, Congress can bring ADA rulings in line with the realities of the modern-

¹⁹⁶ Compare *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1007 (6th Cir. 1997), and *Rendon v. Valleycrest Prod. Ltd.*, 294 F.3d 1279, 1280 (11th Cir. 2002), and *Weyer v. Twentieth Cen. Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 1999), with *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England*, 37 F.3d 12, 19 (1st Cir. 1994), and *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 558 (7th Cir. 1999), and *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 952 (N.D. Cal. 2006).

¹⁹⁷ *Burden of Vision Loss*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 12, 2020) <https://www.cdc.gov/visionhealth/risk/burden.htm> [<https://perma.cc/4WML-68XR>].

¹⁹⁸ Bill Holton, *Using a Computer with a Visual Impairment: A Beginner's Guide to Computer Accessibility*, AM. FOUND. FOR THE BLIND, <https://www.afb.org/blindness-and-low-vision/using-technology/using-computer> [<https://perma.cc/SR8P-CUXU>].

¹⁹⁹ ADA Amendments Act of 2008, 42 U.S.C. § 12101.

day reliance on the internet, and the rights of the visually impaired to use the internet.

It is imperative to considering the future of accessibility and the present-day implications of accessibility barriers. It cannot be expected that Congress issue amendment after amendment to the ADA. With the developing circuit split, and the Supreme Court having been wrong before,²⁰⁰ Congress must bring the ADA into the modern world in one fell swoop. The internet and digital technology have become critical to everyday life and the ADA must reflect and protect those realities.

While internet accessibility issues may promulgate a desire to hold individual websites and the businesses behind them accountable, it is important that attention is turned upon the entities responsible for defining the extent of ADA protections. Specifically, it ought to be legislators or the DOJ who offer guidance, rather than solely the courts. Leaving the question unresolved may lead to inequitable remedies in the future.²⁰¹ Title III's limitation on undue burdens might excuse certain entities from compliance if it would result in undue economic harms.²⁰² But delaying regulation which would require adherence to already promulgated accessibility guidelines²⁰³ any longer may mean that certain websites will have an exception to the accessibility requirements of the ADA by virtue of it being economically unjust to require adjustments be made. Thus, the dilemma remains whether a platform will be required to make changes if they have invested significantly or otherwise designed their website in a way which is economically unfeasible to change.

And while the courts may make incorrect determinations, Congress has the power to regulate the Judiciary,²⁰⁴ with one such method being the enactment of valid statutes to which the courts must adhere.²⁰⁵ Congress has shown a willingness to rectify incorrect judicial decisions spurred by flawed

²⁰⁰ See *supra* note 47 and accompanying text (discussing the ADA Amendments Act of 2008 and how Congress specifically amended the statute because of judicial rulings inconsistent with congressional intent).

²⁰¹ See generally Reid, *supra* note 44 (discussing the issues with a place-based approach to application of Title III of the ADA to websites).

²⁰² *Id.* at 629.

²⁰³ See generally *About W3C*, W3C, <https://www.w3.org/Consortium/> [<https://perma.cc/78WV-R74W>] (stating the organization's mission of enabling the internet to be used to its full potential through developing web standards).

²⁰⁴ Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 201 (2001).

²⁰⁵ *Id.*

statutory analysis in the courts by amending statutes, such as with the ADA Amendments Act of 2008.²⁰⁶ While some believe that the judiciary should not rely upon legislative history to construe congressional intent and properly interpret statutes,²⁰⁷ the fact that legislative amendments to a statute are clear instructions from Congress on how the courts are to interpret and apply the law cannot be ignored.

The Web Content Accessibility Guidelines (WCAG)²⁰⁸ remain one of the more robust recommendations on how websites can be designed to ensure accessibility for all.²⁰⁹ The WCAG offers detailed instruction on what a web designer must do to ensure an internet site can be accessible to all, regardless of disability and any assistive technology used.²¹⁰ One method to accomplish accessibility for the visually impaired would be for Congress to adopt these guidelines or offer similar guidance for ADA compliance. Dozens of nations have adopted these guidelines, and several US states have followed suit.²¹¹ At a federal level, however, only section 508 of the Rehabilitation Act requires adherence to the web content accessibility guidelines while the ADA remains silent.²¹²

Moreover, there have been recent initiatives in Congress which would help clarify what a website must do to be accessible under the ADA.²¹³ The Online Accessibility Act was introduced by Representatives Lou Correa and Ted Budd in October, 2020, and aims to amend the ADA “to include consumer facing websites and mobile applications owned or operated by a

²⁰⁶ 42 U.S.C. § 12101(a)(3)–(8) (describing congressional expectation of how the courts should interpret “disability” has not been fulfilled and explaining the way Supreme Court had narrowed the congressional intent of the ADA providing broad protection through their rulings of *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and *Toyota Motor Manufacturing, Kentucky, Inc., v. Williams*, 534 U.S. 184 (2002), which led to lower courts incorrectly finding that certain individuals did not have disabilities and imposing greater degrees of limitation in defining “substantially limits” and “significantly restricted”, inconsistent with congressional intent).

²⁰⁷ John F. Manning, *Inside Congress’s Mind*, 115 COLUM. L. REV. 1911, 1925–27 (2015).

²⁰⁸ See generally *About W3C*, *supra* note 203.

²⁰⁹ Caldwell et al., *supra* note 163; Henry, *supra* note 163.

²¹⁰ Caldwell et al., *supra* note 163; Henry, *supra* note 163.

²¹¹ Sofia Enamorado, *Countries that Have Adopted WCAG Standards [MAP]*, 3PLAYMEDIA (Mar. 9, 2021), <https://www.3playmedia.com/blog/countries-that-have-adopted-wcag-standards-map/> [<https://perma.cc/UH4-T5KD>] [hereinafter Enamorado, *Countries Adopted WCAG*]; see also Sofia Enamorado, *The Ultimate Section 508 Refresh Checklist*, 3PLAYMEDIA (June 3, 2019), <https://www.3playmedia.com/blog/the-ultimate-section-508-refresh-checklist/> [<https://perma.cc/9CKB-DKHL>].

²¹² Enamorado, *Countries Adopted WCAG*, *supra* note 211.

²¹³ Kris Rivenburgh, *Online Accessibility Act Review*, MEDIUM (Oct. 7, 2020), <https://krisrivenburgh.medium.com/online-accessibility-act-review-1f9b553d8dbe> [<https://perma.cc/LE3K-CDNL?type=image>].

private entity.”²¹⁴ This legislation would create a new title (Title VI) for the ADA, and would be wholly focused on consumer websites and mobile applications.²¹⁵ The proposed bill would require websites to be “substantial[ly] complian[t] with the Web Content Accessibility Guidelines . . . 2.0.”²¹⁶

This bill would also assign administrative duties to the Department of Justice and require plaintiffs to “plead ‘with particularity each element of the plaintiff’s claim, including the specific barriers to access.’”²¹⁷ Such an amendment to the ADA would enable clear guidelines on what a website must do to both attain and maintain accessibility, and would identify (and require plaintiffs to particularly identify) the elements causing inaccessibility and giving rise to a claim. The fact it would require “substantial compliance” also leaves the door open for some flexibility in making exceptions, as does Title III.

While this bill would essentially act as an amendment by creating Title VI, and would be a step in the right direction, it is not perfect. The bill would allow an inaccessible site to “provide an alternative means of access for individuals with disabilities that is equivalent . . .”²¹⁸ This is certainly a step in the right direction, but still goes against the spirit of the ADA in terms of ensuring equality in the enjoyment of the same mediums. Adherence to the web accessibility guidelines should not be qualified with an alternative means which would bar visually impaired users from the same enjoyment. The goal is to achieve equality, and not to separate the visually impaired by shoehorning them into using alternative sites. Nevertheless, the bill is undoubtedly a step in the right direction.

Additionally, amendments to the ADA are preferable to simply releasing legislative or DOJ guidelines. With an amendment, the courts would have an unequivocal obligation to treat websites as a place of public accommodation and offer the same discrimination protections to internet sites. This would lead to almost immediate results in favor of disabled individuals who have so

²¹⁴ Online Accessibility Act, H.R. 8478, 116th Cong. § 601 (2020).

²¹⁵ Joseph J. Lynett & Eve Tilley-Coulson, *Bill Introduced in Congress to Create Website Accessibility Standards*, NAT’L L. REV.: DISABILITY, LEAVE & HEALTH MGMT. BLOG (Nov. 10, 2020), <https://www.natlawreview.com/article/bill-introduced-congress-to-create-website-accessibility-standards> [<https://perma.cc/RUP8-L8YV>].

²¹⁶ H.R. 8478 § 601(b)(1).

²¹⁷ Lynette & Tilley-Coulson, *supra* note 215.

²¹⁸ H.R. 8478 § 601(b)(2).

far been denied equal access. An amendment would also resolve the issue of whether a website is covered under the ADA, thus ensuring the Circuit split does not need to be litigated through to the Supreme Court.

V. CONCLUSION

While the Americans with Disabilities Act has proven to be a robust law which has improved the lives of millions of Americans, the modern reality of unequal access to the internet has revealed flaws inherent in the law (more specifically, in the judicial interpretation of the law). The judiciary has done an admirable job in applying the ADA. But as can be seen, at a certain point the courts will reach differing opinions, and the very people the statute seeks to protect will suffer as a result. It is only to be expected that at some point the law must be modernized to remain relevant and to continue enforcing accessibility to public accommodations for all Americans. The ADA has laid a strong foundation for protecting the disabled and ensuring any person with a disability is not discriminated against, but internet accessibility must be seen as a necessity, and protection by way of recognizing it as a public accommodation is one way to do that.

Augmenting the law with a new Title aimed specifically at websites and mobile applications is the best path forward. This way courts would have less leeway in formulating tests and benchmarks for what is or is not to be considered a place of public accommodation. The Online Accessibility Act, if passed, would do well in advancing the goals of disabled Americans by requiring accessibility for the internet. However, amending the law to add a new title may prove difficult, if only because of the legislative process.

Until (and perhaps even beyond when) the ADA is amended with a new title, Congress should require observance of the web content accessibility guidelines. These guidelines are a simple tool which will help web developers ensure that websites are accessible for all. As discussed, these guidelines are simple and cost-effective measures, and would promote internet equality and break down accessibility barriers faced by many.

Considering the modern realities which enable essentially any person with any disability to access the internet, it is disconcerting that many accessibility barriers to equal enjoyment of the internet still remain. The ADA Amendments Act showed there is understanding that the statute has been improperly applied. The goal now should be to address shortcomings, expand protections, and ensure internet accessibility. The fight for accessibility still has a way to go, but there is reason to be optimistic that exclusion from equal access to the internet may soon be a vestige of the past, rather than a reality of the future.