



2023

## Disability Law—From Stair Flights to Websites: An Argument for Amending the Americans with Disabilities Act to Include Title VI That Applies to Online Spaces

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### Recommended Citation

Amelia Hensel, *Disability Law—From Stair Flights to Websites: An Argument for Amending the Americans with Disabilities Act to Include Title VI That Applies to Online Spaces*, 45 U. ARK. LITTLE ROCK L. REV. 509 (2023).

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DISABILITY LAW—FROM STAIR FLIGHTS TO WEBSITES: AN ARGUMENT  
FOR AMENDING THE AMERICANS WITH DISABILITIES ACT TO INCLUDE  
TITLE VI THAT APPLIES TO ONLINE SPACES

I. INTRODUCTION

In 1990, dozens of disabled protesters abandoned their wheelchairs and crutches to crawl up the seventy-eight steps of the United States Capitol as a demonstration of the daily struggles faced by people in the disabled community.<sup>1</sup> This protest later became known as the “Capitol Crawl.”<sup>2</sup> Jennifer Keelan-Chaffins, an eight-year-old diagnosed with cerebral palsy, ascended the steps with her fellow protesters that day.<sup>3</sup> Due to her disability, her climb took almost an hour, but she said she would have climbed all night if necessary.<sup>4</sup> Looking back, Keelan-Chaffins says she can still hear the rumble at the protest when the crowd realized that she was actually participating in the “Capitol Crawl.” Specifically, she remembers the awe-inspiring praise of the crowd telling her that she would make it to the top if she took one step at a time.<sup>5</sup>

Many onlookers felt it was demeaning for disabled individuals to crawl as they did, but Michael Winter, a spectator at the protest, described the event differently.<sup>6</sup> According to Winter, the shocking imagery of disabled persons crawling the steps was necessary to illustrate their daily obstacles.<sup>7</sup> The demonstration was essential to provoke legislators to finally listen to the pleas of disabled Americans begging for equal rights.<sup>8</sup> The protest proved successful as Congress passed the Americans with Disabilities Act (ADA) in response to this jarring event.<sup>9</sup>

Nevertheless, disabled Americans must continue to fight against discrimination and for equal access. Recently, this fight has turned to the area of online accessibility. For example, Guillermo Robles, a visually impaired

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1. *March 12, 1990: Disability Rights Activists Make “Capitol Crawl” for the ADA*, ZINN EDUC. PROJECT, <https://www.zinnedproject.org/news/tdih/capitol-crawl-for-ADA/> (last visited Mar. 8, 2022).

2. Lauren Lantry, *On 30th Anniversary of Disability Civil Rights Protest, Advocates Push for More*, ABC NEWS (Mar. 12, 2020, 4:01 AM), <https://abcnews.go.com/US/30th-anniversary-disability-civil-rights-protest-advocates-push/story?id=69491417>.

3. *Id.*

4. *Id.*

5. *Id.*

6. ZINN EDUC. PROJECT, *supra* note 1.

7. *Id.*

8. *Id.*

9. *Id.*

individual, requires software to vocalize visual information on Internet websites.<sup>10</sup> On multiple occasions, Robles could not even order a pizza online from his local Domino's because its website and mobile application were incompatible with his screen reader software.<sup>11</sup>

Faced with the lack of accessibility, Robles filed a lawsuit in federal court.<sup>12</sup> The Ninth Circuit ultimately held that Domino's website and mobile application must conform with the ADA and make online services fully accessible to disabled individuals.<sup>13</sup> Specifically, the court decided that Domino's is a place of public accommodation under Title III and must comply with the ADA's accessibility requirements because Domino's website and mobile application facilitate access to the goods and services of Domino's physical restaurant.<sup>14</sup> Domino's subsequently sought review of the Ninth Circuit's decision.<sup>15</sup> The Supreme Court of the United States, however, declined to resolve the issue of website and mobile application accessibility under Title III and gave no reason for its denial of certiorari.<sup>16</sup> As a result, the Supreme Court left many Americans with no clear answers or guidelines regarding website accessibility despite internet access being more important than ever.

The United Nations describes access to technology as a fundamental human right<sup>17</sup> and acknowledges individuals' right to benefit from technological advancements;<sup>18</sup> yet, the United States does not ensure that disabled persons have the opportunity to exercise this fundamental human right. The Chief of the Consumer and Governmental Affairs Bureau for the Federal Communications Commission's Disability Advisory Committee, Patrick Webre, noted that daily communications are now almost exclusively online.<sup>19</sup> The global pandemic has only amplified dependence on online platforms to provide food, medical resources, and other essential goods and services.<sup>20</sup> Despite the importance of internet access in modern times, disa-

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

11. *Id.*

12. *Id.*

13. *Id.* at 905–06.

14. *Id.* at 905.

15. *Id.* at 902.

16. Domino's Pizza, LLC v. Robles, 140 S. Ct. 122, 122 (2019).

17. G.A. Res. 3384 (XXX), Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind, 1, 6 (Nov. 10, 1975).

18. G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, art. 15(1)(b) (Dec. 16, 1966).

19. FCC, DISABILITY ADVISORY COMMITTEE (DAC) MEETING MINUTES 1 (2021), [https://www.fcc.gov/sites/default/files/documents/events/certified\\_feb\\_18\\_2021\\_dac\\_minutes\\_003.pdf](https://www.fcc.gov/sites/default/files/documents/events/certified_feb_18_2021_dac_minutes_003.pdf).

20. Michelle M. McGeogh et al., *Proposed 'Online Accessibility Act' Aims to Resolve Uncertainty Surrounding ADA Website Litigation*, BALLARD SPAHR (Oct. 7, 2020),

bled Americans still have to fight for their right to equal access to something as simple as ordering a pizza.<sup>21</sup>

If the Supreme Court had addressed this issue in 2019, disabled Americans would not have been forced to suffer in isolation through the unprecedented COVID-19 pandemic<sup>22</sup> with no clear guidance on whether they were receiving the full scope of protections promised by the ADA. Since the denial of Domino's petition for certiorari, 20% of ADA lawsuits filed in federal courts contain claims against businesses with inaccessible websites or mobile applications.<sup>23</sup> The resolution of *Robles* could have prevented the tsunami of litigation concerning the meaning of "public accommodation" in Title III of the ADA—dubbed the "surf-by" movement—that has flooded the court system.<sup>24</sup> Disagreement over the interpretation of the phrase "public accommodation" in Title III of the ADA and its application to websites and mobile applications has shaped a split among the federal circuit courts.<sup>25</sup> Resolution of this circuit split is urgent, not only to rectify accessibility discrepancies caused by the ever-changing interpretations of the ADA, but also because this inconsistency forces small businesses to bear the unfair burden of compliance compared to large corporations.<sup>26</sup>

The phrase "public accommodation" in Title III of the ADA does not provide clarity to the courts regarding its interpretation, or to business owners and disabled Americans about the extent of its protection in online accessibility; thus, Congress should pass a modified version of the Online Accessibility Act to officially broaden the scope of the ADA to websites and mobile applications. Section II of this Note examines the background and purpose of the ADA.<sup>27</sup> Next, Section III addresses the Department of Jus-

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<https://www.ballardspahr.com/insights/alerts-and-articles/2020/10/proposed-online-accessibility-act-aims-to-resolve-uncertainty-surrounding-ada>.

21. See, e.g., *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 902 (9th Cir. 2019).

22. Alfred Lubrano, *The World has Suffered Through Other Deadly Pandemics. But the Response to Coronavirus is Unprecedented*, PHILA. INQUIRER (Mar. 22, 2020), <https://www.inquirer.com/health/coronavirus/coronavirus-philadelphia-spanish-flu-world-war-two-civil-war-pandemic-aids-20200322.html>.

23. McGeogh et al., *supra* note 20.

24. Christina T. Haleas, Note, *Don't Ask Me What to Do, Just Let Me Sue You: Why We Need Clear Guidelines for Website Accessibility Under Title III of the Americans with Disabilities Act*, 2019 U. III. J.L. TECH. & POL'Y 465, 469 (2019).

25. *Id.* at 471.

26. *Oversight of the Americans with Disabilities Act of 1990: The Current State of Integration of People with Disabilities*, Hearing Before the H. Judiciary Subcomm. on Constitution, Civil Rights and Civil Liberties, 117th Cong. (2021) [hereinafter *Hearing*] (testimony by Karen Hamed, Executive Director, National Federation of Independent Business Small Business Legal Center) ("Compliance costs, difficulty understanding regulatory requirements, and extra paperwork are the key drivers of the regulatory burdens on small business.").

27. See *infra* Section II.

tice's failure to oversee and regulate online accessibility under Title III.<sup>28</sup> Section IV discusses the different approaches circuit courts have adopted to interpret Title III's public accommodation framework to websites.<sup>29</sup> Section V then evaluates Congress's recently failed attempt to amend the ADA by proposing the Online Accessibility Act.<sup>30</sup> Finally, Section VI of this Note argues that Congress must amend the ADA—rather than leave the courts to resolve this issue—by introducing an updated and improved Online Accessibility Act.<sup>31</sup> If Congress reintroduces of an improved version of the Online Accessibility Act, disabled Americans will not have to partake in another “Capitol Crawl” to have their rights to website accessibility—a modern necessity—acknowledged within the ADA.

## II. THE AMERICANS WITH DISABILITIES ACT

The ADA is the primary law prohibiting discrimination based on an individual's disability.<sup>32</sup> It is the most far-reaching American civil rights law and is designed to protect disabled individuals' rights to participate in society.<sup>33</sup> At the signing of the ADA, President George H. W. Bush said, “With today's signing of the landmark Americans [with] Disabilities Act, every man, woman, and child with a disability can now pass through once-closed doors into a bright new era of equality, independence, and freedom.”<sup>34</sup>

The ADA was enacted in 1990 to guarantee disabled Americans equality and access to the same opportunities as their able-bodied counterparts.<sup>35</sup> Through the ADA, Congress intended to improve the lives of disabled Americans by providing a “clear and comprehensive” standard for eliminating discrimination against them.<sup>36</sup> Congress intended to overcome discrimination, both socially and vocationally, by removing the tangible and intangible barriers that hinder the disabled community's public participation.<sup>37</sup> To

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28. See *infra* Section III.

29. See *infra* Section IV.

30. See *infra* Section V.

31. See *infra* Section VI.

32. *What is the Americans with Disabilities Act?*, ADA NAT'L NETWORK, <https://adata.org/learn-about-ada> (last visited Mar. 8, 2022).

33. Kelby Carlson, Comment, *From Storefront to Dashboard: The Use of the Americans with Disabilities Act to Govern Websites*, 67 CATH. U. L. REV. 521, 523 (2018).

34. Statement on Signing the Americans with Disabilities Act of 1990, 2 PUB. PAPERS 1010 (July 26, 1990).

35. ADA NAT'L NETWORK, *supra* note 32.

36. 42 U.S.C. § 12101(b) (1990).

37. *Id.* § 12101.

that end, the 1990 version of the ADA broadly defines a disability as a mental or physical impairment that hinders a major life activity.<sup>38</sup>

However, Congress's expectation for the ADA to provide broad protection to those with impairments went unfulfilled.<sup>39</sup> Specifically, Congress anticipated that courts would interpret disabilities under the ADA in accordance with how courts had interpreted previous laws concerning impairments that hinder daily life activities.<sup>40</sup> Nevertheless, judicial opinions incorrectly interpreted the disabilities covered under the ADA,<sup>41</sup> and courts found that people with a range of significantly restrictive impairments did not qualify as persons with disabilities such that no protection under the ADA was applicable.<sup>42</sup>

Congress responded by passing the ADA Amendments Act of 2008.<sup>43</sup> The goal of passing the amendments was to restore the intent of the ADA and make it easier for individuals to legally prove a disability and receive the accommodations promised to them in 1990.<sup>44</sup> Therefore, the amendments overturned the case law that interpreted disabilities too narrowly and restored a broad understanding of what is considered a disability.<sup>45</sup>

#### A. Title III of the ADA

The ADA has five sections, or titles, which prevent discrimination in various areas of public life.<sup>46</sup> Title III prohibits discriminatory acts of private entities that are considered places of public accommodation by the ADA.<sup>47</sup> Specifically, Title III protects people with disabilities from discrimination and guarantees them “the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.”<sup>48</sup>

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38. *Id.* § 12102(1). To illustrate the extent of disabilities that Congress expected to protect, a major life activity is considered anything and everything an individual does throughout the twenty-four-hour day, including cell growth and self-care. *Id.* § 12102(2).

39. See ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, 3553–59.

40. *Id.* at 3553 (explaining that Congress intended for courts to interpret “disability” consistently with how courts interpreted “handicapped” in the Rehabilitation Act of 1973).

41. *Id.* at 3553–54.

42. See *Sutton v. United Air Lines*, 527 U.S. 471, 482 (1999) (narrowing the broad scope of protections Congress intended to afford to persons with disabilities); see also *Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 197 (2002) (interpreting disabilities to require a greater degree of limitation than Congress had intended).

43. See 122 Stat. at 3553–59.

44. *Id.* at 3555.

45. *Id.* at 3553–54.

46. ADA NAT'L NETWORK, *supra* note 32.

47. 42 U.S.C. § 12182.

48. *Id.*

The public accommodations listed in the statute include a variety of business categories, but each category has a catch-all provision, signaling that this is not an exhaustive list.<sup>49</sup> To that end, Title III does not consider all private businesses to be places of public accommodation.<sup>50</sup> A non-governmental business is only a public accommodation if it falls into one of the categories listed (or the catch-all provision), is open to the public, has more than fifteen employees, and its operations affect commerce.<sup>51</sup> Moreover, even if a business meets the public accommodation requirements, it can justify non-compliance on the premise that compliance would cause an undue burden; therefore, it should be exempt from providing the accommodations mandated by Title III.<sup>52</sup>

Thus, when a private business meets the public accommodation requirements and does not claim the undue burden defense, it must provide the accommodations mandated by the ADA. Nevertheless, since a physical clothing store must comply with the ADA,<sup>53</sup> it follows that the ADA would require any means the store uses to sell clothing outside of its physical location to comply with the standards guiding accessibility. However, the ADA does not expressly afford the same protection to a consumer shopping online

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49. The places of public accommodation listed within the ADA include:

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

*Id.* § 12181(7).

50. *Id.*

51. *Id.*

52. The ADA defines an undue burden as a “significant difficulty or expense” and evaluates whether an undue burden is present on a case-by-case basis by considering several factors regarding the expense, disruption, and changes to the operation of the business. *Id.* § 12182(b)(2)(A)(iii).

53. 42 U.S.C. § 12181(7)(E).



as a consumer shopping physically in the store—even though they are engaging in the same activity.<sup>54</sup>

Whether the ADA's protections should extend to the online marketplace is a point of contention. For example, in *Winegard v. Newsday*, the district court reasoned that Congress would have explicitly included websites within the meaning of Title III when it amended the ADA in 2008.<sup>55</sup> This argument, however, is unpersuasive as the ADA's 2008 amendments were enacted pre-COVID-19.<sup>56</sup> Now, in a post-COVID-19 world, the obstacles that disabled individuals face when engaging in daily life activities are unprecedented.<sup>57</sup> Many such activities occur almost exclusively online—a trend that is here to stay.<sup>58</sup>

Since society has transitioned almost exclusively online, persons with certain disabilities require adaptive technology to engage in everyday online activities.<sup>59</sup> Accordingly, a disabled individual suffers discrimination when the requisite auxiliary aids and services to ensure equal opportunity—guaranteed by the ADA itself—are absent.<sup>60</sup> The Department of Justice (DOJ) defines these auxiliary aids and services as “accessible electronic information technology” that makes materials available to disabled individuals,<sup>61</sup> such as screen reader software. Post-COVID-19, interpreting Title III as not extending its protection to online spaces is virtually impossible. This is especially true since Congress intended to safeguard disabled individuals to ensure that they are not treated differently and can equally enjoy public spaces, which are now predominantly online.<sup>62</sup>

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54. In 2020, 76% of ADA claims filed in federal court concerned the retail industry's website accessibility. McGeogh et al., *supra* note 20.

55. *Winegard v. Newsday LLC*, 556 F. Supp. 3d 173, 177–78 (E.D.N.Y. 2021).

56. *Compare* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (showing the amendments enactment date as Sept. 8, 2008), *with* CDC Museum COVID-19 Timeline, CTRS. FOR DISEASE CONTROL AND PREVENTION (Aug. 16, 2022), <https://www.cdc.gov/museum/timeline/covid19.html#print> (illustrating that the Covid-19 pandemic's timeline ranges from December 2019 to July 2022).

57. Lubrano, *supra* note 22.

58. *See, e.g., COVID-19 Has Changed Online Shopping Forever, Survey Shows*, U.N. CONF. TRADE DEV. (Oct. 8, 2020), <https://unctad.org/news/covid-19-has-changed-online-shopping-forever-survey-shows> (explaining that the pandemic has significantly increased online shopping).

59. Letter from Am. Council for the Blind et al., to Hon. Kristen Clarke, U.S. Assistant Atty. Gen., U.S. Dep't of Just. (Feb. 28, 2022), <https://acb.org/accessibility-standards-joint-letter-2-28-22> (noting that “we live in a society that increasingly lives and works through digital tools and online spaces.”); *Diverse Abilities and Barriers*, W3C (May 15, 2017), <https://www.w3.org/WAI/people-use-web/abilities-barriers/> (listing numerous types of disabilities and impairments that affect computer usage, including auditory, visual, physical, and cognitive impairments).

60. 42 U.S.C. § 12182(b)(2)(A)(iii).

61. 28 C.F.R. § 36.303(b)(2) (2021).

62. 42 U.S.C. § 12101(b).



Because Title III excludes websites and mobile applications from its enumerated examples of public accommodations,<sup>63</sup> the question becomes whether regulations applicable to the listed public accommodations also apply to online spaces. Consequently, a circuit split ensued due to courts inconsistently interpreting the phrase: “place of public accommodation.”<sup>64</sup> The courts must reconcile this split because Internet access is essential for an individual to function in society.<sup>65</sup> The First, Second, and Seventh Circuits interpret the ADA’s protection of places of public accommodation to extend beyond physical barriers into the bounds of the Internet.<sup>66</sup> Alternatively, the Third, Sixth, and Ninth Circuits hold that websites alone do not qualify as places of public accommodation but rather there must be a sufficient “nexus” between the website and an actual physical structure to fall under ADA protection.<sup>67</sup>

## B. Web Content Accessibility Guidelines 2.0

Although Title III of the ADA does not require a specific technical standard for website accessibility, the Web Content Accessibility Guidelines 2.0 (WCAG 2.0) provide the internationally accepted and recommended standards for website accessibility.<sup>68</sup> The World Wide Web Consortium (“W3C”) produced the WCAG 2.0 to inform website owners on how to make their websites accessible to the disabled community.<sup>69</sup> Specifically, the guidelines’ compliance goals are that a website must be “perceivable, operable, understandable, and robust.”<sup>70</sup> Additionally, the WCAG 2.0 sets standards for website owners to use alternative text, audio controls, certain headings and labels, and specific colors to allow disabled persons access to the website.<sup>71</sup> The goal is that a website’s compliance with WCAG 2.0 would ensure compliance under Title III.<sup>72</sup>

Although the WCAG 2.0 provides an internationally accepted standard for online accessibility, the federal government does not legally enforce or mandate compliance with it.<sup>73</sup> Moreover, technology is constantly evolving.

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63. See generally *id.* § 12181.

64. Haleas, *supra* note 24, at 471.

65. See FCC, *supra* note 19.

66. See *infra* Section IV.A.

67. See *infra* Section IV.B.

68. See *infra* Section IV.

69. *Web Content Accessibility Guidelines (WCAG) 2.0*, W3C (Dec. 11, 2008), <https://www.w3.org/TR/WCAG20/>.

70. *Id.*

71. *Id.*

72. *Id.*

73. McGeogh et al., *supra* note 20.

ing,<sup>74</sup> and changing an entire online platform is expensive. Since compliance with WCAG 2.0 does not automatically shield liability, a website may still not comply *when* modern technology emerges.<sup>75</sup>

### III. THE DEPARTMENT OF JUSTICE

In addition to statutory requirements and the WCAG 2.0, the DOJ also plays a role in website accessibility. The DOJ is responsible for regulatory oversight and enforcement of the ADA,<sup>76</sup> but it has failed to issue website accessibility standards under Title III. Yet, it acknowledges that inaccessible websites present barriers for disabled individuals.<sup>77</sup>

The DOJ recognized the issue of online discrimination and attempted to amend Title III to include websites through an Advanced Notice of Proposed Rulemaking (ANPR).<sup>78</sup> As a part of this effort, it solicited public comments relating to the relevant background of website accessibility and the application of the Internet to Title III.<sup>79</sup> However, the Trump administration withdrew the DOJ's notice solicitation of comments in 2017 and rendered it "inactive,"<sup>80</sup> resulting in yet another failure to clarify the ADA. As a result of the DOJ's withdrawal of the ANPR and a massive increase in liti-

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74. Donny Lamey, *The Evolution of Technology: Past, Present, and Future*, DISCOVERTEC (Jan. 5, 2018), <https://www.discovertec.com/blog/evolution-of-technology>.

75. At any given time "there is no viable technique for making certain content accessible." eBay Inc., Comment Letter on Proposed Rulemaking to Amend Title III of the ADA to Include Websites (Jan. 24, 2011). "[A]ssistive technology support" typically "lag[s] behind the emergence of new technology," consequently, an "alternative format" of a website cannot, and will not, consistently "offer all the 'bells and whistles' of the original page." Nat'l Rest. Assoc. and Retail Indus. Leaders Assoc., Comment Letter on Proposed Rulemaking to Amend Title III of the ADA to Include Websites (Jan. 24, 2011).

76. The DOJ regulates the implementation of the ADA. See 42 U.S.C. § 12186(b) ("[T]he Attorney General shall issue regulations in an accessible format to carry out the provisions of this subchapter . . ."); *Bragdon v. Abbott*, 524 U.S. 624, 646 (1998) (stating that DOJ is "the agency directed by Congress to issue implementing regulations, to render technical assistance explaining the responsibilities of covered individuals and institutions, and to enforce Title III in court") (internal citations omitted).

77. Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460, 43461–63 (proposed July 26, 2010) (codified at 28 C.F.R. pts. 35 & 36).

78. *Id.*

79. *Id.*

80. *Senate Members Ask DOJ to Take Action as Number of Website Accessibility Lawsuits Continues to Rise*, RETAIL LAW BCLP (Aug. 13, 2019), <https://retailawbclp.com/senate-members-ask-doj-to-take-action-as-number-of-website-accessibility-lawsuits-continues-to-rise/>.

gation, even the most “strident, anti-regulatory legislators” have united on this issue.<sup>81</sup>

Congress has continually asked the DOJ to use its rulemaking power to issue concrete regulations.<sup>82</sup> In May 2018, the House of Representatives urged the DOJ to adopt online accessibility guidelines.<sup>83</sup> The Appropriations Committee approved the funding bill for the following year and included a provision for DOJ funding contingent on the DOJ clarifying website accessibility standards under the ADA.<sup>84</sup> The committee emphasized that the lack of clear standards leads to confusion and disadvantages to small businesses, but Congress’s attempt to incentivize the DOJ to offer guidance went unheeded.<sup>85</sup>

In June 2018, Congress again appealed to the DOJ, further expressing its support for guidance and clarity on website accessibility guidelines.<sup>86</sup> A bipartisan group of 103 House members sent a letter to Attorney General Jeff Sessions urging the DOJ to take a stance and issue guidelines.<sup>87</sup> The DOJ responded to the call and explained that a specific regulation’s absence does not excuse non-compliance with a statute’s requirements.<sup>88</sup> In other words, while no regulation sufficiently defines a practicable standard for online compliance, websites must still follow the ADA’s goals and requirements.<sup>89</sup> In an effort to provide more direction with regard to compliance, the DOJ pointed private website owners to the WCAG 2.0 but did not prescribe the extent of the guidelines or which websites should adhere to them.<sup>90</sup> Further, the WCAG 2.0 is only a guide and is not legally binding or mandated.<sup>91</sup>

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81. Samuel D. Levy & Martin S. Krezalek, *A Call for Regulation: The DOJ Ignored Website Accessibility Regulation and Enterprising Chaos Ensued*, N.Y. L.J. (Nov. 9, 2018), <https://www.law.com/newyorklawjournal/2018/11/09/a-call-for-regulation-the-doj-ignored-website-accessibility-regulation-and-enterprising-chaos-ensued/?slreturn=20210826171728>.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. Letter from Rep. Ted Budd et al., to Hon. Jeff Sessions, Atty. Gen., U.S. Dep’t of Just. (June 20, 2018), <https://www.adatitleiii.com/wp-content/uploads/sites/25/2018/06/ADA-Final-003.pdf>.

87. *Id.*

88. Letter from Stephen E. Boyd, Assistant Atty. Gen., U.S. Dep’t of Just., to Rep. Ted Budd (Sept. 25, 2018), <https://www.adatitleiii.com/wp-content/uploads/sites/25/2018/10/DOJ-letter-to-congress.pdf>.

89. *Id.*

90. Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. 56236, 56316 (Sept. 15, 2010) (codified at 28 C.F.R. pt. 36).

91. McGeogh et al., *supra* note 20.

Evidencing Congress's consistent confusion, six senators sent another letter to the DOJ asking for clarification on website accessibility in September 2018.<sup>92</sup> The DOJ responded and said it was still evaluating the issue of whether standards were appropriate and necessary.<sup>93</sup> It emphasized that public accommodations are "flexible" in order to comply with the ADA's general goals of nondiscrimination.<sup>94</sup> This response leaves even more ambiguity about how "flexible" these standards are because the root of the problem is whether websites are considered public accommodations.

After over a year of pleas to the DOJ, in July 2019, members of Congress again expressed their frustration not only with the lack of guidelines<sup>95</sup> but also with the now "flexible" standards.<sup>96</sup> Seven members of Congress sent a letter to the Attorney General, William Barr, claiming that the DOJ's new flexibility standard was ambiguous and failed to provide practical guidance.<sup>97</sup> Attorney General Barr addressed these concerns in his confirmation hearing and stated that he was studying the issue and would consult Congress.<sup>98</sup> However, the DOJ's pattern of inaction continued once again. Almost five years following Congress's first call for action from the DOJ, the organization has still not provided clarification, guidance, or binding rules on website accessibility, leaving lawmakers confused, small businesses vulnerable, and disabled individuals forgotten.

#### IV. CIRCUIT COURTS INCONSISTENTLY INTERPRET WHETHER WEBSITES ARE PUBLIC ACCOMMODATIONS UNDER TITLE III

The DOJ's inaction and Congress's lack of clear textual guidance regarding the ADA's role in online spaces have forced courts to weigh in on this issue, leading to judicial interpretation of public policy.<sup>99</sup> The courts have found that "full and equal enjoyment of the goods, services, facilities,

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92. Letter from Sen. Charles E. Grassley et al., to Hon. Jeff Sessions, Atty. Gen., U.S. Dep't of Just. (Sept. 4, 2018), <https://www.judiciary.senate.gov/imo/media/doc/2018-10-04%20Grassley,%20Rounds,%20Tillis,%20Crapo,%20Cornyn,%20Ernst%20to%20Justice%20Dept.%20-%20ADA%20Website%20Accessibility.pdf>.

93. Letter from Stephen E. Boyd, Assistant Atty. Gen., U.S. Dep't of Just. to Sen. Charles E. Grassley (Oct. 11, 2018), <https://www.judiciary.senate.gov/imo/media/doc/2018-10-11%20Justice%20Dept.%20to%20CEG%20-%20Website%20Accessibility%20Under%20ADA.pdf>

94. *Id.*

95. RETAIL LAW BCLP, *supra* note 80.

96. Letter from Sen Charles E. Grassley et al., to Hon. William P. Barr, Atty. Gen., U.S. Dep't of Just. (July 30, 2019), <https://www.grassley.senate.gov/imo/media/doc/2019-07-30%20Grassley%20et%20al%20to%20DOJ%20-%20ADA%20Website%20Accessibility.pdf>.

97. *Id.*

98. RETAIL LAW BCLP, *supra* note 80.

99. *Hearing, supra* note 26.

privileges, advantages, or accommodations of any place of public accommodation” in the ADA generally applies to websites.<sup>100</sup> However, courts disagree on what types of websites are required to comply and what compliance consists of when it is required.<sup>101</sup>

A. The First, Second, and Seventh Circuits Follow a Broad Interpretation of Title III

The First, Second, and Seventh Circuits interpret the ADA to apply to all privately owned websites that fall into one of Title III’s enumerated categories.<sup>102</sup> In *Carparts Distribution Center v. Automotive Wholesaler’s Ass’n of New England*, the First Circuit explained that the businesses enumerated in Title III, including travel services, insurance agencies, accounting firms, legal offices, and healthcare services, all conduct business over the telephone; therefore, an individual does not need to enter a physical location to obtain services.<sup>103</sup> The First Circuit stated, “It would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone are not.”<sup>104</sup> To that end, in 1994, *Carparts* was the first circuit court case to reason that places of public accommodation may extend past physical structures.<sup>105</sup>

*Carparts*’s pre-Internet reasoning laid the foundation for the broad approach to interpreting websites as places of public accommodation. The broad approach recognizes that, if an online-only e-commerce service falls into one of the enumerated places of public accommodation, it must follow accessibility standards under the ADA.<sup>106</sup> This approach benefits business owners because it is predictable; they will know if their website must comply with the ADA. Moreover, this approach fulfills Congress’s intent for the ADA to provide disabled individuals with equal access to places of public accommodations.

As a result, the First, Second, and Seventh Circuits reason that the ADA is adaptable to improve disabled individuals’ online access using Title

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100. *Id.*

101. *Id.*

102. *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New England*, 37 F.3d 12, 19 (1st Cir. 1994); *Pallozzi v. Allstate Life Ins.*, 198 F.3d 28, 32 (2d Cir. 1999); *Morgan v. Joint Admin. Bd.*, 268 F.3d 456, 459 (7th Cir. 2001).

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

104. *Id.*

105. *Id.*

106. *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 393–94 (E.D.N.Y. 2017).

III's public accommodation framework.<sup>107</sup> Because the ADA's legislative goal was to supply equal access to disabled individuals—and given the realities of the twenty-first century—the broad approach holds that websites have become places of public accommodation.<sup>108</sup> Thus, for the ADA to serve its drafters' intended purpose, the ADA must apply to websites.<sup>109</sup> For example, in *Pallozzi v. Allstate Life Insurance Co.*, the plaintiffs alleged that Allstate violated Title III when Allstate denied their life insurance policy because they had mental disabilities.<sup>110</sup> The Second Circuit confirmed that public accommodations were not limited to physical spaces and that where a retailer sold goods or offered services did not matter.<sup>111</sup>

The Second Circuit went on to explain that many of the entities enumerated in Title III, including insurance offices, offer goods and services outside of a physical location.<sup>112</sup> In addition to stressing the ADA's purpose, the court used the text of the ADA to reason that Title III applies to services *of* a place of public accommodation, rather than *in* a place of public accommodation.<sup>113</sup> Specifically, the Second Circuit emphasized that it is the sale of goods and services alone, not where and how they are sold, that is crucial to determining whether the protections of the ADA apply.<sup>114</sup>

#### B. The Third, Sixth, and Ninth Circuits Use a Nexus Test to Determine Whether a Website is Considered a Public Accommodation

In determining whether a website qualifies as a place of public accommodation within the meaning of Title III, the Third, Sixth, and Ninth Circuits adhere to a nexus test.<sup>115</sup> This nexus test looks for a pragmatic connection between a website and a physical storefront.<sup>116</sup> For example, Domino's satisfies this nexus because a customer can order a pizza physically in the store and online via the website or mobile application.<sup>117</sup>

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107. Craig Dashiell & David Leit, *Proactive Planning for Website Accessibility Today Can Avoid Disruption Later*, BLOOMBERG LAW (Aug. 26, 2021), <https://www.jdsupra.com/legalnews/proactive-planning-for-website-8405987/>.

108. *Id.*

109. *Id.*

110. *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 29 (2d Cir. 1999).

111. *Id.* at 32.

112. *Id.* at 33.

113. *Id.* (emphasis in original).

114. *Id.*

115. See *Ford v. Schering-Plough Corp.* 145 F.3d 601, 613 (3rd Cir. 1998); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1011 (6th Cir. 1997); *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 905 (9th Cir. 2019).

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

117. *Id.*

Under this approach, a court must first determine whether a website independently fulfills one of the categories listed in Title III.<sup>118</sup> If so, the court then looks for a literal nexus resulting from the independent fulfillment of Title III, which exists when a website serves as a conduit to the goods and services offered by the physical location of one of Title III's enumerated places of public accommodation.<sup>119</sup> If the court then determines that the website has a sufficient nexus to a physical location, the court will bring the website into the realm of the ADA.<sup>120</sup> Accordingly, this narrower nexus approach distinguishes websites from places of public accommodation because it requires that the website has a sufficient nexus to the entity's physical location for Title III to require ADA compliance.<sup>121</sup>

Consequently, if the website independently falls within one of the categories listed in Title III but does not have the requisite nexus to a physical location, the narrower nexus approach does not mandate compliance with the ADA.<sup>122</sup> This approach leads to the following result: if a website is inaccessible due to incompatibility with auxiliary aids, an able-bodied individual may enjoy a website's added convenience from the comfort of their own home; however, a disabled individual may not, continuing the cycle of website discrimination.<sup>123</sup>

If the nexus approach were widely accepted, many websites that independently fulfill one of Title III's categories would be exempt from the ADA's requirements and be allowed to discriminate against disabled individuals simply because their business does not have a physical storefront.<sup>124</sup> For example, this narrower interpretation would find that online video streaming, online shopping, and online educational courses are not required to comply with the ADA unless the website has the necessary connection to a physical location.<sup>125</sup> These and similar platforms have millions of users, and the impact on the disabled community would be far-reaching. Moreover, brick-and-mortar stores are becoming scarce as businesses are shutting their doors to operate exclusively online.<sup>126</sup> The Third, Sixth, and Ninth Cir-

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118. *Id.*

119. *Id.* at 905–06.

120. Dashiell & Leit, *supra* note 107.

121. *Id.*

122. *Id.*

123. *See generally* Cullen v. Netflix, Inc., 880 F. Supp. 2d 1017 (N.D. Cal. 2012) (describing that a business operating only in cyberspace is not a place of public accommodation; therefore, the ADA does not mandate the website's compliance and a disabled individual may not access that good or service online).

124. *Id.* at 1024.

125. *Id.*

126. Phil Wahba, *UBS Sees Another 80,000 U.S. Stores Closing by 2026*, FORTUNE (Aug. 5, 2021, 2:07 PM), <https://fortune.com/2021/04/05/retail-real-estate-brick-and-mortar-stores->



cuits, however, do not consider online platforms public accommodations because such platforms lack the requisite connection of a physical storefront to an enumerated category in Title III.<sup>127</sup> Hence, the circuits adhering to the nexus test have failed to embrace society's transition away from physical structures in recent years.<sup>128</sup>

Due to the shift from brick-and-mortar storefronts to online and remote businesses, courts have expressed concern about how the nexus test may affect accessibility.<sup>129</sup> The district court in *National Ass'n of the Deaf v. Netflix, Inc.* noted that if courts enforce website accessibility only against organizations that offer services online *and* at a physical location, many businesses that provide services to a consumer's home—such as food and grocery delivery services—would be exempt from the ADA unless they also operate a physical grocery store or restaurant.<sup>130</sup> Nevertheless, even after online accessibility became a basic necessity due to the COVID-19 pandemic, courts continued to maintain that websites do not need to provide accommodations.<sup>131</sup> As a result disabled individuals continue to suffer discrimination because online-only streaming, shopping, and education would continue to escape accountability.

In 2021, although subsequently rendered moot due to expiration on the underlying injunction, the Eleventh Circuit endorsed the narrower nexus approach.<sup>132</sup> In *Gil v. Winn-Dixie Stores, Inc.*, a visually impaired plaintiff brought suit against the grocery store chain, alleging that Winn-Dixie's website violated Title III because the auxiliary aids necessary to ensure access were absent.<sup>133</sup> The plaintiff alleged that he could not use the website to fulfill his prescription or link online coupons to his store card because it was

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online-shopping-malls-store-closures-ubs/ (explaining that businesses are closing their storefronts and stores are transitioning to e-commerce).

127. William Goren, *Nexus, Doe, or 42 USC §12181(7): When Must an Internet Site be Accessible to Persons with Disabilities?*, UNDERSTANDING THE ADA (June 29, 2020), <https://www.understandingtheada.com/blog/2020/06/29/nexus-doe-42-usc-§121817-internet-site-accessibility/>.

128. *Id.*; see *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 200 (D. Mass. 2012).

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

130. *Id.* at 201.

131. See, e.g., *Winegard v. Newsday LLC*, 556 F. Supp. 3d 173, 180 (E.D.N.Y. 2021).

132. See *Gil v. Winn-Dixie Stores, Inc.*, 993 F.3d 1266 (11th Cir.), *vacated as moot*, 21 F. 4th 775 (11th Cir. 2021); *but see* Letter from Am. Council for the Blind et al., to Hon. Kristen Clarke, U.S. Assistant Atty. Gen., U.S. Dep't of Just. (Feb. 28, 2022), <https://acb.org/accessibility-standards-joint-letter-2-28-22> ("The 181 undersigned disability organizations believe that there is an urgent need for digital accessibility regulations. We urge the Department of Justice to maintain this rulemaking process as a priority and finalize a rule by the end of the current administration.").

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

incompatible with his screen reader software.<sup>134</sup> The Eleventh Circuit applied the nexus test to Winn-Dixie's website and found the required nexus.<sup>135</sup> However, the court took the nexus test one step further, stating that a website must have a sufficient connection to a storefront and that it also cannot be a "limited use" website.<sup>136</sup> Specifically, a "limited use" website does not operate as a point of sale but only provides information.<sup>137</sup> The court ultimately found that Winn-Dixie operated a "limited use" website because customers could only locate information about the stores, products, refilling prescriptions, and obtaining digital coupons.<sup>138</sup> Thus, the website did not function as a point of sale for the grocery store, but the Eleventh Circuit did not explain its expansion of the nexus test after creating the new "limited use" prong.<sup>139</sup>

It determined that Winn-Dixie's website did not present an "intangible barrier" that would block disabled individuals from receiving the goods or services physically located in the store.<sup>140</sup> Although the website offered useful information, it was not an "intangible barrier" because abled *and* disabled individuals would have to physically visit the store to purchase its goods or services as Winn-Dixie's website did not offer an option to shop online.<sup>141</sup> Consequently, the Eleventh Circuit determined that disabled customers were not receiving unequal treatment.<sup>142</sup> The court ultimately held that patrons could fully and equally enjoy the grocery store's goods and services regardless of whether they could access the website.<sup>143</sup> Therefore, in applying the nexus test, this court required a website to not only have a sufficient nexus to a physical location but for that physical location to offer the *exact same* goods or services offered online in order to fall within the ADA's coverage—narrowing the scope of the ADA's protection.<sup>144</sup>

As a result, this expansion of the nexus test continued the trend of discrimination. Without a physical location offering the exact same goods or services online, some websites that fall into one of the enumerated categories will continue to escape the ADA's mandatory compliance for places of public accommodation because they are online-only stores without a physical location operating as the point of sale.<sup>145</sup> And further, even if there is a

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134. *Id.* at 1270–71.

135. *Id.* at 1279.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Gil*, 993 F.3d at 1279.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 200 (D. Mass. 2012).

physical location operating as a point of sale, the website must be the functionality equivalent to that of the physical location.<sup>146</sup>

C. The Circuits Can Apply Their Interpretations to the Same Online Platform but Achieve Different Outcomes

Under the broad approach followed by the First, Second, and Seventh Circuits, Domino's and Netflix are likely subject to liability under the ADA if they operated an inaccessible website.<sup>147</sup> Particularly, both entities fall into an enumerated category of public accommodation in Title III.<sup>148</sup> Domino's would fall into the category of a "restaurant, bar, or other establishment serving food or drink,"<sup>149</sup> and Netflix would fall into the category of "a motion picture house."<sup>150</sup> Thus, both must adhere to the ADA's accessibility guidelines and are potentially liable for an inaccessible website because a listed example represents both entities.<sup>151</sup>

Alternatively, under the narrower nexus approach followed by the Third, Sixth, and Ninth Circuits, Domino's could face liability for operating an inaccessible website as it falls into an enumerated category<sup>152</sup> and satisfies the required nexus: a consumer can order pizza from both its physical location and website. On the contrary, the ADA would not apply to Netflix because, although it falls into an enumerated category,<sup>153</sup> it does not have a nexus to a physical storefront that offers its services. Nevertheless, the district court in *National Ass'n of the Deaf v. Netflix, Inc.* noted that it would be unreasonable to assume that the ADA protects persons who enter an office to purchase services but does not protect persons who purchase the same services over the telephone or by mail.<sup>154</sup>

V. THE ONLINE ACCESSIBILITY ACT: CONGRESS'S RECENT ATTEMPT TO ESTABLISH ONLINE ACCESSIBILITY COMPLIANCE STANDARDS

The United States recognizes that online accessibility presents hardships for many Americans. Yet, none of the branches of federal government has offered a workable solution to ensure that disabled persons have equal

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146. See *id.* at 200–01.

147. Dashiell & Leit, *supra* note 107.

148. See 42 U.S.C. § 12181(7)(B)–(C).

149. *Id.* § 12181(7)(B).

150. *Id.* § 12181(7)(C).

151. *Id.* § 12181(7)(B)–(C).

152. *Id.* § 12181(7)(B).

153. *Id.* § 12181(7)(C).

154. *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 200 (D. Mass. 2012) (quoting *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England*, 37 F.3d 12, 19 (1st Cir. 1994)).

access to online spaces.<sup>155</sup> Congress recently attempted to rectify online accessibility by introducing the Online Accessibility Act.<sup>156</sup> However, Congress has twice introduced this bill in the bill's current form, and the bill has failed both times<sup>157</sup> because the bill offered inadequate procedures to achieve online accessibility. Nevertheless, Congress should reintroduce the Online Accessibility Act but must make significant changes so that the act is a workable solution.<sup>158</sup>

The 116th Congress first introduced the Online Accessibility Act to clarify whether websites and mobile applications must comply with the ADA, but it failed to pass.<sup>159</sup> Disregarding the bill's initial failure, Congressmen Lou Correa and Ted Budd of the 117th Congress reintroduced the Online Accessibility Act in response to the unrelenting flood of litigation.<sup>160</sup> However, the disabled community strongly opposed the passage of the Online Accessibility Act in its proposed form because it limited the rights of people with disabilities to enforce the ADA against inaccessible websites, and it did not present a workable solution for the implementation or regulation of online accessibility.<sup>161</sup> Fittingly, the widespread condemnation of the bill resulted in no further action before the end of the legislative session.<sup>162</sup> Despite its intent to overcome online discrimination, the bill ultimately died in committee before reaching the House floor.<sup>163</sup>

The Online Accessibility Act proposed to amend the ADA by creating Title VI. Title VI sought to provide accessibility compliance regulations that would only apply to websites and mobile applications owned or operated by private entities.<sup>164</sup> Due to the current lack of clear guidelines about which

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155. *See generally* Robles v. Domino's Pizza, LLC, 913 F.3d 898, 902 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 122 (2019) (illustrating the judiciary branch's failure resolve the circuit split); Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions, 82 Fed. Reg. 60932 (Dec. 26, 2017) (to be codified at 28 C.F.R. pts. 35 & 36) (illustrating the executive branch's failure to offer guidance); Online Accessibility Act, H.R. 1100, 117th Cong. (2021) (illustrating the legislature's failure to provide a solution).

156. H.R. 1100.

157. *See* Online Accessibility Act, H.R. 8478, 116th Cong. (2020); *see also id.*

158. *See infra* Section VI.C.

159. Online Accessibility Act, H.R. 8478, 116th Cong. (2020).

160. The House referred the bill to the Committee on Energy and Commerce. Subsequently, the Committee referred the bill to the Subcommittee on Consumer Protection and Commerce. H.R. 1100.

161. *See generally* H.R. 1100; *see also infra* Section VI.C.

162. *See id.*

163. *See Committees*, U.S. CAPITOL VISITOR CTR., [https://www.visitthecapitol.gov/sites/default/files/documents/resources-and-activities/CVC\\_HS\\_ActivitySheets\\_Committees.pdf](https://www.visitthecapitol.gov/sites/default/files/documents/resources-and-activities/CVC_HS_ActivitySheets_Committees.pdf) (last visited Dec. 26, 2022) (explaining that if Congress has not passed a bill out of committee by the end of the legislative session, it is effectively a failed bill); *see also* H.R. 1100.

164. H.R. 1100.

websites Title III governs, a claim may be filed against a website before the website owner even knows whether it is required to comply with accessibility guidelines.<sup>165</sup> In fact, due to the circuit courts' conflicting interpretations and the DOJ's silence, there is currently no clear answer regarding the applicability of Title III; thus, website owners lack notice whether compliance is mandated even after a lawsuit has been filed.<sup>166</sup> This is why Congress endeavored to regulate online accessibility.<sup>167</sup> Specifically, instead of continuing the debate over whether websites are places of public accommodation under Title III, the Online Accessibility Act proposed adding Title VI to the ADA, and officially broadening the ADA's scope to websites and mobile applications by providing the necessary online accessibility guidelines.<sup>168</sup>

The Online Accessibility Act set out accessibility requirements for privately owned or operated websites and mobile applications to comply with Title VI.<sup>169</sup> Specifically, it provided the requisite guidelines to implement compliance standards and subsequently create a website that disabled individuals can access using their essential auxiliary aids.<sup>170</sup> It went on to mandate that an online platform would comply with Title VI if it were in accordance with the WCAG 2.0.<sup>171</sup> Otherwise, a platform that could not comply with the WCAG 2.0 standards must offer alternate and equivalent means for accessing the website.<sup>172</sup>

In addition to providing a framework for online accessibility compliance standards, the Online Accessibility Act relieved the DOJ from its rule making responsibilities related to Title III of the ADA.<sup>173</sup> Specifically, it placed the Architectural and Transportation Barriers Compliance Board ("Access Board")—rather than the DOJ—in charge of issuing and amending the standards to keep up with the evolution of technology.<sup>174</sup>

However, Title VI would have charged the DOJ with the initial enforcement of online accessibility during the proposed notice and cure period.<sup>175</sup> First, a disabled individual would notify the operator of a website—not the DOJ—if the website did not comply with the standards outlined in Title VI, and allow the website operator ninety days to cure the violation.<sup>176</sup>

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165. Dashiell & Leit, *supra* note 107.

166. *Id.*

167. H.R. 1100.

168. *Id.*

169. H.R. 1100.

170. *See id.*

171. *Id.*

172. *Id.*

173. David Gibson, *Online Accessibility Act 2021 - Take Two*, ACCESSIBILITY WORKS (Apr. 2, 2021), <https://www.accessibility.works/blog/congress-online-disability-act-2021/>.

174. H.R. 1100.

175. *Id.*

176. *Id.*

Next, if the website owner did not correct the non-compliance within the ninety-day cure period, the individual could file a formal complaint with the DOJ.<sup>177</sup> The DOJ would then have 180 days to investigate the allegations to decide whether a violation exists.<sup>178</sup> If the DOJ dismissed the complaint after an investigation or the 180-day period expired before the investigation was completed, the individual could then file suit against the website.<sup>179</sup> However, if the investigation gave the DOJ reason to believe that the website engaged in discrimination and the discrimination raised “an issue of general public importance,” the DOJ *may* pursue civil action against the operator of the website.<sup>180</sup> Despite Title VI’s lacking procedural requirements, the Online Accessibility Act evidenced Congress’s intent to rectify online accessibility.

Through this bill, Congress finally accepted responsibility and took the initiative to address the inequality endured by disabled individuals in online spaces. Specifically, Title VI directly addressed digital accessibility by prohibiting discrimination against disabled individuals by privately owned websites and applications available for general public use.<sup>181</sup> Moreover, Congress sought to decrease the outstanding number of lawsuits regarding online accessibility under Title III because plaintiffs were required to exhaust all of Title VI’s administrative requirements before filing suit.<sup>182</sup> Although the proposed regulations would have set legally binding standards for businesses to ensure compliance,<sup>183</sup> the regulation’s impractical procedures would have continued to deprive disabled individuals of the rights promised to them in the ADA.

## VI. CONGRESS MUST AMEND THE ADA

Congress should resolve the issue of online accessibility by passing an improved version of the Online Accessibility Act. Congress acting to resolve this matter is explicitly within its enumerated Article I power because this issue has a detrimental effect on interstate commerce.<sup>184</sup> This issue of online accessibility implicitly approves discrimination against disabled individuals by neglecting to enforce the protections Congress promised to them

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177. *Id.*

178. *Id.*

179. *Id.*

180. H.R. 1100.

181. Gibson, *supra* note 173.

182. Dashiell & Leit, *supra* note 107.

183. H.R. 1100.

184. U.S. CONST. art. I, § 8, cl. 3 (giving Congress its commerce power); *see also* 42 U.S.C. § 12101(b)(4) (stating that Congress used its commerce power “to address the major areas of discrimination faced day-to-day by people with disabilities”).

in the ADA.<sup>185</sup> Moreover, the lack of compliance regulations subjects small business owners to tremendous and disproportionate liability.<sup>186</sup>

#### A. Lawsuits are Rising Exponentially

Although most business owners want their websites to functionally deliver information to consumers, they often do not consider whether a disabled individual may access that information.<sup>187</sup> This failure leads to a loss in revenue and an increase in potential liability under the ADA.<sup>188</sup> Currently, the primary and perhaps only method of enforcing Title III website compliance is for a plaintiff to sue an entity whose website is incompatible.<sup>189</sup> Since the other branches of the federal government have not resolved this issue, enforcement through the judicial branch is the only means for disabled individuals to receive the rights promised to them in the ADA.<sup>190</sup> Notably, 2021 charted a record high for this type of litigation.<sup>191</sup> However, no statute, mandate, or regulation clarifies whether a website is considered a place of public accommodation and, if so, what a website must do to comply with the ADA's regulations.<sup>192</sup>

##### 1. *Small Business Owners Face Uncertain Regulation*

This absence of clear regulations and government action particularly victimizes small businesses.<sup>193</sup> The National Federation of Independent Business (NFIB) acts as the voice for small and independent businesses in the United States.<sup>194</sup> It addressed Congress in October 2021 about the issues that small businesses face when it comes to online accessibility.<sup>195</sup> The NFIB maintained its support for “the integration of people with disabilities into our society and condemns bad actors [sic] getting a free pass when it comes to ADA compliance.”<sup>196</sup> Regardless, small businesses struggle to practice this support because clear standards for website accessibility are absent, and, as a result, litigants target small businesses.<sup>197</sup> Because small

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185. 42 U.S.C. § 12101(b).

186. *Hearing*, *supra* note 26.

187. Dashiell & Leit, *supra* note 107.

188. *Id.*

189. *Hearing*, *supra* note 26.

190. 42 U.S.C. § 12101(b).

191. *Hearing*, *supra* note 26.

192. Dashiell & Leit, *supra* note 107.

193. *Hearing*, *supra* note 26.

194. *About NFIB*, NFIB, <https://www.nfib.com/about-nfib/> (last visited Mar. 9, 2022).

195. *Hearing*, *supra* note 26.

196. *Id.*

197. *Id.*



businesses are easy targets, some plaintiffs' initiate this litigation motivated by financial gain instead of accessibility for the disabled community.<sup>198</sup> NFIB members have spent millions of dollars constructing and renovating their websites to supply accessible platforms for disabled Americans.<sup>199</sup> However, small business owners typically do not possess the necessary statutory interpretation skills to decode legalese.<sup>200</sup>

## 2. *The Pace of Technological Change Crushes Small Business Owners*

Likewise, small business owners often struggle to understand how to comply with the static ADA in an age of advancement.<sup>201</sup> Specifically, they do not know what online changes are required and when to implement changes due to ADA's highly technical nature.<sup>202</sup> Congress created Title III of the ADA to regulate accessibility standards of brick-and-mortar stores,<sup>203</sup> not online spaces. Title III's compliance standards do not clearly translate to the everchanging realm of cyberspace.

Additionally, a website's compliance with the WCAG 2.0 is a costly and a reoccurring expense for business owners. For example, Winn-Dixie stated that it would cost \$250,000 to bring its online presence into compliance under the WCAG 2.0.<sup>204</sup> Moreover, a regulatory impact analysis found that the cost of upgrading air travel websites and kiosks to conform with the WCAG 2.0 ranged from \$31,200 to \$225,000.<sup>205</sup> The study found that in order for a website to remain compliant, it must perform regular maintenance ranging from \$4,800 to \$23,000 per year.<sup>206</sup> Although large corporations, like those in the air travel industry, would likely have sufficient resources to ensure compliance,<sup>207</sup> a small business that lacks a compliance

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198. *Id.*

199. *Id.*

200. *Id.*

201. *Hearing, supra* note 26.

202. *Id.*

203. *See* Chris B. Murphy, *Brick-and-Mortar*, INVESTOPEDIA (Sept. 18, 2022), <https://www.investopedia.com/terms/b/brickandmortar.asp> ("The term 'brick-and-mortar' refers to a traditional street-side business that offers products and services to its customers face-to-face in an office or store that the business owns or rents.").

204. *Gil v. Winn-Dixie Stores, Inc.*, 933 F.3d 1266, 1273 (11th Cir.), *vacated as moot*, 21 F.4th 775 (11th Cir. 2021).

205. Thomas B. Alleman, *Bank Websites Attract ADA Claims: A Survey of the Issues*, BLOOMBERG (Nov. 30, 2016), <https://www.bna.com/bank-websites-attract-n73014447888/>.

206. *Id.*

207. *Id.*

department would likely have to consult an ADA expert due to the highly technical nature of the ADA.<sup>208</sup>

Unfortunately, the cost of compliance would likely be detrimental to small businesses as the cost would not translate well to smaller business models that cannot bear large upfront and reoccurring costs. Because compliance is such a steep cost, business owners may choose to maintain an inaccessible website and gamble with the threat of a lawsuit. On the other hand, small business owners may avoid internet services in general, giving big businesses a monopoly over a now “ubiquitous” part of our economy.<sup>209</sup> Therefore, small business owners face “significant headwinds” when complying with this “regulatory regime.”<sup>210</sup>

### 3. *Small Business Owners Unfairly Shoulder the Compliance Burden*

Moreover, small business owners disproportionally bear the regulatory burden as opposed to large companies.<sup>211</sup> Small businesses do not have compliance teams or various departments to ensure conformity with the ADA.<sup>212</sup> Instead, the small business owner is responsible for tracking court decisions to decipher if a Title III ruling may affect his or her business.<sup>213</sup> The hours an owner may spend attempting to understand and comply with absentee federal regulations is less time for the owner to grow the business and serve the customers.<sup>214</sup> For a small business owner to avoid potential liability, the owner would ultimately have to hire an ADA consultant,<sup>215</sup> and unlikely expense.<sup>216</sup> Due to the disproportionate burden on small businesses, large corporations continue to escape liability for operating inaccessible websites.<sup>217</sup>

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208. Kristen Bachmeier, *How Much Does ADA Compliance Cost*, ATILUS (May 1, 2019), <https://www.atilus.com/ada-website-compliance-cost/>.

209. Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460, 43461 (proposed July 26, 2010) (to be codified at 28 C.F.R. pts. 35 & 36).

210. *Hearing*, *supra* note 26.

211. *Id.* (“Compliance costs, difficulty understanding regulatory requirements, and extra paperwork are the key drivers of the regulatory burdens on small business.”).

212. *Id.*

213. *Id.*

214. *Id.* (“In a Small Business Poll on regulations, NFIB found that almost half of small businesses surveyed viewed regulation as a ‘very serious’ (25 percent) or ‘somewhat serious’ (24 percent) problem.”).

215. *Id.*

216. Bachmeier, *supra* note 208 (hiring a consultant to analyze website compliance begins at a few thousand dollars and will vary depending on the individual website).

217. See Dashiell & Leit, *supra* note 107; see also Izai Elizur, *How to Make Your Website ADA Compliant and Avoid Accessibility Lawsuits*, SMALL BUS. TRENDS (Aug. 20, 2019), <https://smallbiztrends.com/2019/08/make-your-website-ada-compliant.html> (“When websites

#### 4. *Forum Shopping in the Online Marketplace*

Absent clear guidelines from the DOJ and Congress, forum shopping has become a popular technique for national corporations to escape liability.<sup>218</sup> Websites can operate beyond jurisdictional lines allowing plaintiffs to file in a jurisdiction that is favorable to the facts of their case.<sup>219</sup> However, any national corporation targeted is unlikely to defend in a jurisdiction that follows the broad approach; instead, it would likely remove the case to a jurisdiction that follows the narrower nexus approach that offers more protection to business owners and less to disabled individuals.<sup>220</sup> Small business owners do have the same means to shop the forum to favorable grounds risk defending a lawsuit in a state hundreds of miles away due to its online presence.<sup>221</sup> Consequently, small businesses will continue to disproportionately bear the burden of the “surf-by” movement until a uniform standard of accessibility is adopted.<sup>222</sup>

#### B. Congress’s Power to Amend the ADA

The Constitution gives Congress the power “[t]o regulate commerce . . . among the several States.”<sup>223</sup> If Congress passed an improved Online Accessibility Act, it would be acting under its commerce power because discrimination against disabled individuals certainly affects interstate commerce.<sup>224</sup> This is especially true when inaccessible websites could prohibit one in every five Americans from participating in e-commerce.<sup>225</sup>

The economy will noticeably remain disturbed as millions of disabled Americans cannot access the goods and services offered.<sup>226</sup> The Internet is an instrumentality of commerce, a channel of commerce, and the aggregation of discrimination claims against websites prohibiting businesses from actively participating in e-commerce substantially affects commerce be-

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aren’t compliant, big corporations may even be able to shrug off the huge fines and attorney fees. The average small business [cannot].”).

218. *Id.*

219. *Id.*

220. See 28 U.S.C. § 41 (listing the states included in each circuit).

221. Levy & Krezalek, *supra* note 81.

222. *Id.*

223. U.S. CONST. art. I, § 8, cl. 3.

224. See *Katzenbach v. McClung*, 379 U.S. 294, 304–05 (1964) (holding that Congress may regulate discriminatory policies if those policies have a substantial effect on interstate commerce); see also U.S. CONST. art. I, § 8, cl. 3.

225. *Nearly 1 in 5 People Have a Disability in the U.S.*, Census Bureau Reports, U.S. CENSUS BUREAU (July 25, 2012), <https://www.census.gov/newsroom/releases/archives/miscellaneous/cb12-134.html>.

226. Dashiell & Leit, *supra* note 107.

tween the states.<sup>227</sup> More and more businesses across the country participate in e-commerce—a trend that skyrocketed during the COVID-19 pandemic.<sup>228</sup>

Nevertheless, with more businesses participating in e-commerce, no uniform legal standards exist regarding whether the ADA requires websites to comply with Title III to ensure accessibility.<sup>229</sup> If the ADA extends Title III to online spaces, website owners are still left to question what websites would be mandated to comply, what compliance looks like, and how to achieve compliance.<sup>230</sup> Neither Congress nor the DOJ has successfully stepped in to resolve the issue.<sup>231</sup> The DOJ has not proposed (much less supplied) regulations interpreting, implementing, and enforcing the ADA, even though this power (and responsibility) is vested in the Attorney General.<sup>232</sup> While Congress has the authority to amend the ADA through the Commerce Clause to provide clarity to business owners,<sup>233</sup> it has failed to do so by introducing inadequate solutions to online accessibility, not once but twice.<sup>234</sup>

Despite the Online Accessibility Act's past shortcomings, Congress should amend the ADA to moot the Title III disagreement between the circuit courts and add Title VI to the ADA because this disagreement over accommodations in online spaces prevents many members of the disabled community—one-fifth of the U.S. population<sup>235</sup>—from participating in e-commerce. Amending the ADA would ensure that website owners do not further discriminate against a fifth of the population by barring this group from participating in interstate commerce.

### C. Recommendation: Congress Should Introduce an Improved Version of The Online Accessibility Act

Without substantial alterations, Congress cannot introduce the Online Accessibility Act for a third time and expect it to pass.<sup>236</sup> First, the WCAG 2.0's "success criteria" is vague at best; thus, an improved version of the

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227. See U.S. CONST. art. I, § 8, cl. 3; see also *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257–58 (1964) (holding that Congress may enact regulations that prevent discriminatory policies in hotel accommodations because of the negative effects those policies have on interstate commerce).

228. *Hearing*, *supra* note 26.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. U.S. CONST. art. I, § 8, cl. 3.

234. Compare Online Accessibility Act, H.R. 8478, 116th Cong. (2020), with Online Accessibility Act, H.R. 1100, 117th Cong. (2021).

235. U.S. CENSUS BUREAU, *supra* note 225.

236. See H.R. 8478; see also H.R. 1100.

Online Accessibility Act must offer concrete guidelines and mandate compliance techniques.<sup>237</sup> Second, the Act offered a lower compliance threshold without any explanation on what the lower standard is or how to comply with that threshold; thus, an improved Act must clearly define compliance standards for this lower threshold.<sup>238</sup> Third, while the Online Accessibility Act suggested the Access Board administer Title VI rulemaking and implementation, it must give the Access Board guidelines to implement and amend the regulations.<sup>239</sup> Fourth, during the notice and cure period, a website had no regulatory oversight or support in correcting its non-compliance; therefore, an updated Act must require the Access Board to provide website owners with support and oversee website owners' compliance efforts.<sup>240</sup> Finally, the Online Accessibility Act gave the DOJ more responsibilities than it currently has; however, if an updated version goes forward with an improved oversight and support procedure during the notice and cure period, the number of online accessibility civil rights complaints the DOJ receives will significantly decrease.<sup>241</sup>

### 1. *The "Success Criteria" Guidelines*

The Online Accessibility Act mandated website compliance with the WCAG 2.0.<sup>242</sup> The WCAG 2.0's "success criteria" is less than mediocre. In order to meet the "success criteria," a website must be "perceivable, operable, understandable, and robust."<sup>243</sup> First, for a website to be perceivable, the information must be visible to all senses.<sup>244</sup> Second, the website must be operable in that it cannot require actions that fewer than all users can perform.<sup>245</sup> Third, the website must be understandable, meaning that "content or operation cannot be beyond [the user's] understanding."<sup>246</sup> Finally, the website must be robust in that the content must evolve with technology and accessibility software.<sup>247</sup> In sum, the criteria offers nothing more than indefinite ambitions for business owners to incorporate into their websites' mission statements.

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237. *See infra* Section VI.C.1.

238. *See infra* Section VI.C.2.

239. *See infra* Section VI.C.3.

240. *See infra* Section VI.C.4.

241. *See infra* Section VI.C.5.

242. Online Accessibility Act, H.R. 1100, 117th Cong. (2021).

243. *WCAG 2 Overview*, W3C, <https://www.w3.org/WAI/standards-guidelines/wcag/> (Nov. 1, 2022).

244. *Introduction to Understanding WCAG 2.0*, W3C, <https://www.w3.org/TR/UNDERSTANDING-WCAG20/intro.html> (last visited Oct. 23, 2022).

245. *Id.*

246. *Id.*

247. *Id.*

In addition to the vague compliance standards incorporated in the WCAG 2.0, the creator of the WCAG 2.0, W3C, offers techniques to comply with the “success criteria.”<sup>248</sup> However, W3C stated that the offered techniques are “informative and not required.”<sup>249</sup> W3C produced these techniques as a resource to create an accessible website rather than a method of creating an ADA-compliant website as implementing the techniques cannot ensure compliance with the WCAG 2.0.<sup>250</sup> The only requirement for compliance with the WCAG 2.0 is conforming with the so-called “success criteria,” which is simply coding preferences.<sup>251</sup> As a result, the WCAG 2.0’s “success criteria” is the equivalent of the DOJ’s “flexible” standard.<sup>252</sup> Therefore, an improved version of the Online Accessibility Act would require more concrete guidelines and mandated techniques to ensure compliance as opposed to setting forth the WCAG 2.0’s superfluous ambitions.<sup>253</sup>

Moreover, the Online Accessibility Act would have considered a website in compliance with Title VI if it is in “substantial compliance” with the WCAG 2.0.<sup>254</sup> Yet, the Online Accessibility Act did not provide any clarification about what qualifies compliance as “substantial.”<sup>255</sup> The WCAG 2.0’s criteria is already the bare minimum recommended for compliance,<sup>256</sup> and Congress sought to lower that threshold with the recent Online Accessibility Act.<sup>257</sup> Thus, an improved version should mandate complete compliance with accessibility regulations rather than substantial compliance.

## 2. *The Lower Accessibility Threshold*

Additionally, if “substantial compliance” with the WCAG 2.0 were not possible, the Online Accessibility Act offered a lower threshold for websites to comply with Title VI.<sup>258</sup> Under this lower standard, Title VI required websites to offer an “alternative means of access” that would be “equivalent” to the services received by one who does not require an accommodation.<sup>259</sup> The proposed alternative means of equal access presented high hurdles. Specifically, the alternative means of access bear a striking resem-

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248. *Id.*

249. *Understanding WCAG 2.0*, W3C, <https://www.w3.org/TR/2016/NOTE-UNDERSTANDING-WCAG20-20161007/> (Oct. 7, 2016).

250. *Id.*

251. *Id.*

252. Letter from Sen Charles E. Grassley et al., *supra* note 96.

253. *Understanding WCAG 2.0*, *supra* note 249.

254. Online Accessibility Act, H.R. 1100, 117th Cong. (2021).

255. *Id.*

256. *Understanding WCAG 2.0*, *supra* note 249.

257. H.R. 1100.

258. *Id.*

259. *Id.*

blance to the separate but equal tactics used during racial segregation in the United States before the Supreme Court decided that invoking “separate but equal” policies violated the Constitution.<sup>260</sup>

Although Congress sought to create a threshold for small businesses, the lower threshold opened the door to further issues, notwithstanding its veiled intent. Specifically, Title VI left ambiguity in defining the “alternative means of access for individuals with disabilities that is equivalent to access the content available on such website or mobile application.”<sup>261</sup> How a platform would provide “alternative means” leaves many open-ended questions. For example, is a 24-hour hotline sufficient and equivalent?<sup>262</sup> If so, would business owners have to constantly staff that hotline with live operators to support individuals requesting access to the website? Would the website owner have to provide the operators with the requisite technology to assist an individual in navigating the website? Conversely, would individuals reach a recording and leave a message in the hopes of a live operator returning their calls to walk them through the website?<sup>263</sup> If so, how long would an individual have to wait for this call? Under those circumstances, would an individual who needed immediate assistance have an alternate route to access the website if the hotline’s call-back time was indefinite?

Despite the lower threshold’s ambiguity that would leave business owners without direction, most small businesses would have adhered to this lower standard because they do not have the means to implement the WCAG 2.0.<sup>264</sup> However, requiring website accessibility is not unreasonable. Rather than mandate the proposed catch-all provision and surreptitiously revert to separate but inherently unequal,<sup>265</sup> Congress should clearly define the lower threshold and provide website owners with specific guidelines to ensure compliance. However, Congress must remember that small business owners are not information technology professionals; therefore, Congress should provide website owners with resources understandable to the average American.

### 3. *The Access Board*

Next, the Online Accessibility Act gave the Access Board the responsibility of initial implementation and regulation of Title VI.<sup>266</sup> The Access

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260. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

261. H.R. 1100.

262. See *id.*

263. Gibson, *supra* note 173.

264. Bachmeier, *supra* note 208.

265. See *Brown*, 347 U.S. at 495 (holding that separate but equal education facilities are inherently unequal).

266. H.R. 1100.



Board has experience in this realm of accessibility as it established the original website accessibility standards for government websites in 2000.<sup>267</sup> Nevertheless, the Online Accessibility Act did not provide guidelines for the Access Board to follow when establishing the compliance rules and amending Title VI to evolve with technology.<sup>268</sup> Although the Access Board implemented the original accessibility standards for government websites, guidelines are necessary in an updated Online Accessibility Act because the same procedure used in 2000 before the explosion of technology would not translate to 2022, where the Internet dominates daily life.<sup>269</sup>

Due to the Access Board's limited and expired experience, the updated Online Accessibility Act would have to address that the Access Board's experience would not allow for a seamless transition from regulating government websites in 2000 to regulating privately owned websites under Title VI decades later. Therefore, the Online Accessibility Act must provide the Access Board with procedures regarding the evolution of technology. Technology is constantly progressing; thus, the Access Board would struggle to find relief from a persistently increasing workload as new technology appears daily.<sup>270</sup> Specifically, the Internet's industry leader, W3C, pointed out that the development and release of technology standards takes years.<sup>271</sup> W3C requires a significant period of time to formally publish compliance recommendations.<sup>272</sup> Once constant and reliable, W3C must then proceed through the process of formally publishing the techniques as a compliance resource due to research and testing procedures.<sup>273</sup>

W3C's timeline would not present a workable model for the Access Board. If the Access Board allotted the same working period as W3C,<sup>274</sup> the delay in the development of compliance techniques would leave website owners exposed to potential liability as their platform would violate accessibility requirements under the ADA while waiting for the law to catch up with the latest innovations. If the WCAG 2.0 were the legally mandated compliance threshold under an updated Title VI, the Access Board would have to implement procedures to ensure that it did not need the same time gap as W3C, which would require the Access Board to hire highly skilled and expensive employees.<sup>275</sup>

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267. Electronic and Information Technology Accessibility Standards, 36 C.F.R. pt. 1194 app. D § D1194.1 (2021).

268. H.R. 1100.

269. See 36 C.F.R. pt. 1194 app. D § D1194.1.

270. See Lamey, *supra* note 74.

271. *WCAG 2 FAQ*, W3C, <https://www.w3.org/WAI/standards-guidelines/wcag/faq/#techsnot> (Aug. 2, 2022).

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

To that end, the Access Board would require a colossal budget to employ highly educated professionals that are skilled in programming and information technology to eliminate the time gap.<sup>276</sup> Those professionals would have to be employed by the masses to stay ahead of precipitously developing technology<sup>277</sup> in order to amend the online accessibility regulations quickly and competently to ensure compatibility with auxiliary aids. Therefore, if Congress introduces an improved version of the Online Accessibility Act, it must allocate the Access Board an extreme budget to employ the required critical mass of information technology professionals necessary to ensure the law is continually up to date with technology.<sup>278</sup>

Moreover, the information technology professionals would have to be versed in the nuances of the ADA to ensure that the technology is compatible with the required auxiliary aids and that Title VI remains updated to reflect the advancements. If not, the only other viable option Congress could provide is to offer a grace period where Title VI would shield website owners from liability for non-compliance during the period between the release of technology and the publication of techniques. Nevertheless, if Congress implemented the latter, it would once again compromise the protections promised by the ADA to the disabled community while waiting for government regulations to match technological advancements.

#### 4. *The Notice and Cure Period*

The proposed notice and cure period of Title VI would have allowed an individual to notify the website of non-compliance and allotted the platform ninety days to cure the issue.<sup>279</sup> In addition to Title VI's other shortcomings, the proposed cure period would have significantly and disproportionately impacted small business owners.<sup>280</sup> Specifically, the Online Accessibility Act only gave business owners ninety days to fund the cost of compliance and implement the accessibility regulations.<sup>281</sup> Thus, an updated Online Accessibility Act would have to mandate that the agency provide resources and support for business owners to ensure that creating and maintaining an accessible website is economically feasible. Specifically, the Access Board should provide small business owners with educational materials and assistance on how to implement compliance on smaller budgets and limited cash-flows; therefore, compliance would be a reasonable requirement as it would be achievable and curable in ninety days.

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276. Bachmeier, *supra* note 208.

277. See Lamey, *supra* note 74.

278. Bachmeier, *supra* note 208.

279. Gibson, *supra* note 173; Dashiell & Leit, *supra* note 107.

280. Gibson, *supra* note 173.

281. Online Accessibility Act, H.R. 1100, 117th Cong. (2021).

Not only would the Online Accessibility Act's notice and cure period have negatively impacted business owners but also it would have placed a significant amount of responsibility on disabled individuals. The notification process provided that if an individual determined that a website was inaccessible, the individual must inform the website owner of non-compliance.<sup>282</sup> After a website was on notice of non-compliance, the website then had ninety days to cure the issue and conform with Title VI's compliance regulations.<sup>283</sup> However, the notifying individual was responsible for holding the website accountable during the cure period, not the regulatory agency.<sup>284</sup> Thus, an updated Online Accessibility Act must correct the notification process to mandate agency oversight during the cure period.<sup>285</sup>

If an updated Online Accessibility Act went forward with the current notice and cure period, many businesses might be dismissive and unresponsive to consumer complaints due to the lack of regulatory oversight. This leads to the issue of whether the website actually received notice of non-compliance in the first place. Consequently, the improved Online Accessibility Act should require the individual to notify the agency as well as the website of non-compliance. Hence, the ninety-day period would begin once the individual gives the agency and website initial notice, and both have confirmed receipt of notice.

After both the agency and website acknowledge the notice of non-compliance, the website owner would then work with the agency to cure the issue, and the agency would oversee and aid in the website's efforts to guarantee accessibility. During this cure period, the agency would provide the website owner with supplemental resources to assist in the transition to accessibility. In the event that the website still has not cured the issue within the ninety-day period, the individual who complained of non-compliance could then file a formal complaint with the DOJ.

### 5. *The DOJ's Role*

Finally, although the Online Accessibility Act relieved the DOJ of rulemaking and implementation of online accessibility, its workload would have increased enormously.<sup>286</sup> Title VI provided that, if a website's non-compliance continued past the 90-day cure period where the website received no regulatory support, an individual could file a complaint with the DOJ to investigate and respond to the issue within 180 days.<sup>287</sup> However, if

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282. Online Accessibility Act, H.R. 1100, 117th Cong. (2021).

283. *Id.*

284. *Id.*

285. *Id.*

286. Gibson, *supra* note 173.

287. H.R. 1100.

the DOJ failed to respond to or investigate the allegation of discrimination, an individual could file a civil lawsuit.<sup>288</sup> Moreover, the Online Accessibility Act imposed “duty to investigate” claims under Title VI and mandated periodic compliance reviews of consumer-facing websites by the DOJ.<sup>289</sup> Congress cannot have expected the DOJ to successfully assume more responsibilities by adding Title VI to its current workload as this increase in responsibility would not have decreased the “surf-by” movement.<sup>290</sup>

Due to the DOJ’s neglect of online accessibility,<sup>291</sup> an improved Online Accessibility Act should allocate initial enforcement of online accessibility to the Access Board.<sup>292</sup> The Access Board’s oversight and support of a website’s efforts to cure non-compliance would filter and decrease the number of online accessibility complaints that the DOJ receives rather than force the DOJ to investigate a website’s compliance efforts *in addition to* investigating the discrimination claim.

Importantly, the DOJ would continue its responsibility of investigating civil rights complaints under the ADA, but only after the updated version’s notice and cure period procedures are satisfied.<sup>293</sup> If a website does not correct the non-compliance during the initial 90-day period, the individual would then file a formal civil rights complaint with the DOJ to investigate and respond to the issue within 180 days.<sup>294</sup> Since the Access Board would filter the initial complaints and support the website’s efforts to create an accessible website, it would significantly reduce the number of online accessibility discrimination complaints the DOJ receives. Moreover, during the 180-day investigative period, the DOJ would not have to consider whether the website has taken measures to cure and, if so, whether those measures were adequate; thus, it could focus its resources on the discrimination complaint at hand. Therefore, the DOJ would be able to conduct a competent and efficient investigation.

Nevertheless, if a website’s non-compliance continues after the notice and cure period as well as the DOJ’s investigative period, an individual would still have the opportunity to file a civil lawsuit.<sup>295</sup> However, it is unlikely that the discrimination would continue after an individual has exhausted all of Title VI’s remedies; thus, an individual would rarely reach the last resort of filing an online accessibility lawsuit.

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288. *Id.*

289. *Id.*

290. Haleas, *supra* note 24, at 469.

291. *See supra* Section III.

292. *See supra* Section VII.C.3.

293. *See supra* Section VII.C.4.

294. H.R. 1100.

295. *Id.*

In conclusion, an improved version of the Online Accessibility Act must relieve the DOJ of Title VI compliance enforcement and only charge it with Title VI investigation and civil rights enforcement after the notice and cure period procedures have been exhausted. As a result, the number of online accessibility civil lawsuits would decrease significantly; therefore, Congress would accomplish its goal of eliminating the “surf-by” movement.

## VII. CONCLUSION

Over ten years ago, the DOJ stated, “When the ADA was enacted in 1990, the Internet as we know it today—the ubiquitous infrastructure for information and commerce—did not exist.”<sup>296</sup> Yet, the ADA continues to lie dormant in the age of advancement. The DOJ has openly recognized that the web “plays a critical role in the daily personal, professional, civic, and business life of Americans.”<sup>297</sup> Yet, the DOJ has remained impervious to the cries of disabled individuals and Congress to implement meaningful regulations.

Congress must introduce an improved version of the Online Accessibility Act that amends the ADA to include Title VI. If Congress passes an updated bill, Title VI will apply solely to online spaces while Title III will continue to apply to physical structures through a strict application of the enumerated examples that define a place of public accommodation.<sup>298</sup> If Congress acts in this manner, it will finally fulfill the ADA’s purpose and ensure that all Americans receive equal access and opportunities to participate in society, regardless of their abilities.<sup>299</sup>

Specifically, an improved Online Accessibility Act will resolve the inconsistency that continues to make its way through the justice system.<sup>300</sup> Coupled with eliminating the circuit split, Title VI will afford disabled Americans the rights promised to them under the ADA. Likewise, an improved Online Accessibility Act will afford small business owners a chance to be free from the “significant headwinds” they face when complying with this “regulatory regime” created by the ADA.<sup>301</sup>

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296. Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460, 43461 (proposed July 26, 2010) (to be codified at 28 C.F.R. pts. 35 & 36).

297. *Id.*

298. 42 U.S.C. § 12181(7).

299. *See supra* Section II.

300. *See supra* Section VI.

301. *Hearing, supra* note 26.

Congress must amend the ADA to include Title VI so that “every man, woman, and child with a disability can now pass through once-closed doors into a bright new era of equality, independence, and freedom.”<sup>302</sup>

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302. Statement on Signing the Americans with Disabilities Act of 1990, 2 PUB. PAPERS 1010 (July 26, 1990).

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