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The Future of the ADA: Understanding Title III's Application to Websites

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THE FUTURE OF THE ADA: UNDERSTANDING TITLE III'S APPLICATION TO WEBSITES

ABSTRACT

In recent years, the Americans with Disabilities Act has become a significant source of confusing and controversial litigation over website accessibility. This confusion and controversy stems from the fact that the Americans with Disabilities Act and its accompanying regulations offer zero explanation as to how the Act applies to websites. Faced with a circuit split, due process concerns, and a lack of any meaningful technical guidance from administrative agencies, defendant website operators are desperate for clear guidelines for how to comply with the Americans with Disabilities Act. Adding to this desperation is a barrage of opportunistic lawsuits, dubbed "surf-by lawsuits," being filed nationwide against thousands of businesses whose websites are not entirely accessible. Because courts are unwilling to declare a measurable level of accessibility that satisfies the Americans with Disabilities Act as a matter of law, these defendants are forced to either spend the tens of thousands of dollars required to litigate their cases all the way, or settle.

On the surface, it may seem like a good thing that these lawsuits are making the internet more accessible. However, the practical result of the current legal landscape is that almost every defendant will settle, regardless of how accessible its website is and regardless of whether any individual with a disability has actually been denied equal access. Most of the settlement agreements contain only a vague promise by the defendant to make the website more accessible. Furthermore, the disabled individual is unable to recover damages; only attorney's fees are recoverable under the Act. This has led many to believe that the involvement of the disabled plaintiff is often pretextual. Rather than accept this flawed system, this author believes there are legal solutions to the confusion surrounding the Americans with Disabilities Act, which could be fairer to both defendants and individuals with disabilities.

Part I of this Note begins by providing some background on the Americans with Disabilities Act and the standards used for measuring website accessibility. Part II describes the current state of the law, including a discussion of the circuit split, due process concerns, and judicial articulations of what the ADA requires from a technical standpoint. Finally, Part III advocates how to move forward with resolving the circuit split and creating clear technical standards for website accessibility.

INTRODUCTION

The Americans with Disabilities Act of 1990 ("ADA") is a civil rights law that prohibits discrimination based on disability. When the ADA was enacted in 1990, the internet was still in its infancy. At the time, discrimination based on disability primarily occurred in person; most ADA lawsuits dealt with physical issues such as wheelchair accessibility. The ADA clearly recognized the physical nature of disability discrimination as it provided specific standards required for businesses' physical locations to properly accommodate disabled individuals. The ADA did not, however, seriously contemplate the internet. Therefore, the ADA did not provide regulatory guidance for websites like it did for physical spaces. Yet, as the internet became a widespread means by which many businesses interacted with customers, online standards under the ADA became the subject of debate.[1]

In recent years, websites have increasingly become a major target of litigation filed under the ADA. Currently, there is an astonishing lack of clarity as to what is actually required for a business's website to comply with the ADA. No legislative body, court, or administrative agency has yet declared what specific technical standards satisfy the ADA.[2]

Furthermore, it is unclear whether smaller businesses face the same burden as large corporations. Most people can probably agree that Walmart's website should be extremely accessible for the deaf and blind. However, does a local hardware store or a small law firm need to make every page of its website screen-readable? These accessibility measures can be extremely costly and may pose an undue burden to small businesses.[3]

Although Title III of the ADA does not allow plaintiffs to recover monetary damages, it does allow the recovery of attorney's fees.[4] Therefore, some plaintiffs' lawyers are taking advantage of the confusion surrounding the ADA by filing lawsuits on behalf of disabled plaintiffs. In what has been termed "surf-by lawsuits," these lawyers will systematically search through the internet to find websites that aren't particularly accessible.[5] The lawyers will then threaten to sue the business under Title III. The defense counsel will quickly realize how

1. *Is Your Website ADA Compliant?*, PRAC. LAW LEGAL UPDATE w-014-5000 (Prac. Law Com. Transactions), May 09, 2018, at 2.

2. Lauren Stuy, Comment, *No Regulations and Inconsistent Standards: How Website Accessibility Lawsuits Under Title III Unduly Burden Private Businesses*, 69 CASE W. RSRV. L. REV. 1079, 1091–94 (2019).

3. *Id.* at 1102.

4. 42 U.S.C. §§ 12188(a), 12205, 2000a-3(b) (2018).

5. *See* Michael S. Byrd, *Surf's Up on Website Inaccessibility Lawsuits*, BYRDADATTO BLOG (Nov. 26, 2019), https://www.byrdadatto.com/banter/surfs-up-on-website-inaccessibility-lawsuits/; *see also* Suzanne Bogdan, *The Surf-By Lawsuit Has Officially Found Its Way To The School Industry*, FISHER PHILLIPS LLP (Nov. 30, 2018), https://www.fisherphillips.com/resources-newsletters-article-the-surf-by-lawsuit-has-officially-found.

murky this area of the law is and fear the uncertainty of potential litigation. At this point, the plaintiffs' lawyer will suggest a settlement in exchange for the defendants agreeing to improve their websites. The defendant will almost always take the settlement because it would be far more expensive to litigate the case. With these "surf-by" lawsuits happening all over the United States, defendants desperately want clarity as to how the ADA actually applies to websites and what standard is required to comply with it.

This Note seeks to (1) provide some background about the ADA and how it applies to websites; (2) analyze the current legal concerns surrounding the ADA; and (3) advocate for how the issues surrounding the ADA should be resolved going forward.

I. BACKGROUND ON THE ADA & WCAG

A. ADA Background & General Requirements

Under Title III of the ADA, no individual shall be discriminated against on the basis of disability in the "full and equal enjoyment" of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.[6]

1. What is Discrimination under the ADA?

Discrimination under Title III of the ADA includes the "failure to take such steps" to ensure that no individual with a disability is "excluded, denied services, segregated, or otherwise treated differently" than other individuals "because of the absence of auxiliary aids and services."[7] Discrimination under Title III also includes the failure to make "reasonable modifications" in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities.[8]

In the context of providing accessible services for blind and deaf individuals, the DOJ has explained that the provisions above require public accommodations to provide whatever "auxiliary aids" necessary to ensure "effective communication" with disabled individuals.[9] Examples of "auxiliary aids" include physical devices, like hearing aids or physical features like brailed displays, as well as assistive technology, such as computer-aided transcription services or screen reader software.[10] The effective communication inquiry then concerns whether the available auxiliary aids are sufficient to ensure that

6. 42 U.S.C. § 12182(a).
7. *Id.* § 12182(b)(2)(A)(iii).
8. *Id.* § 12182(b)(2)(A)(ii).
9. 28 C.F.R. § 36.303 (2018).
10. *Id.*

disabled individuals are afforded a level of communication about relevant information substantially equal to that afforded to non-disabled individuals.[11]

A business is only exempt from compliance if it can demonstrate that taking these steps would either "fundamentally alter" the nature of the "goods, service, facility, privilege, advantage, or accommodation" or result in an "undue burden."[12] Undue burden means "significant difficulty or expense."[13] In determining whether an action would result in an undue burden, factors such as the cost of compliance and the financial resources of the defendant should be considered.[14]

2. What is a Public Accommodation under the ADA?

Title III of the ADA applies to government entities and most businesses that: (1) employ fifteen or more persons in the preceding calendar year; (2) are open to the public; and (3) fall into one of the twelve broad categories of public accommodations listed in the ADA.[15] "Place of public accommodation" means "a facility operated by a private entity whose operations affect commerce" that falls within one of the following categories:

> (1) Place of lodging . . . ; (2) A restaurant, bar, or other establishment serving food or drink; (3) A motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment; (4) An auditorium, convention center, lecture hall, or other place of public gathering; (5) A bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment; (6) 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; (7) A terminal, depot, or other station used for specified public transportation; (8) A museum, library, gallery, or other place of public display or collection; (9) A park, zoo, amusement park, or other place of recreation; (10) A nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education; (11) A day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and (12) A gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.[16]

As the above paragraphs demonstrate, the vast majority of businesses are subject to the ADA. Furthermore, the ADA's legislative history suggests that

11. *See* Silva v. Baptist Health S. Fla., Inc., 856 F.3d 824, 834 (11th Cir. 2017).
12. 42 U.S.C. § 12182(b)(2)(A)(iii).
13. 28 C.F.R. § 36.104.
14. *Id.*
15. 42 U.S.C. §§ 12111, 12181.
16. 28 C.F.R. § 36.104.

the above list may be illustrative, rather than exclusive; so the categories may be even broader than they appear.[17]

B. ADA's Application to Websites

The consensus at this point is that the ADA applies to some websites; however, there is much debate as to *which* websites. The DOJ has affirmed the application of Title III to websites of public accommodations.[18] Most circuit courts have agreed and directly held that the ADA can apply to websites.[19] However, the courts disagree about when and how the ADA applies to websites. Some circuits have held that the ADA only applies to websites that have a connection to one of the physical places of public accommodation listed in the regulations, while other circuits believe that a website can itself be a place of public accommodation regardless of any physical presence.[20] Other circuits have yet to even rule on the issue. This circuit split will be explained further in Sections II and III. Nevertheless, given that the DOJ and the majority of circuit courts have decided that the ADA requires, at least, the websites of places of public accommodation to be accessible, the next subsection will discuss what standards are being used to measure accessibility.

C. WCAG 2.0

The World Wide Web Consortium ("W3C") is an international organization that develops open standards to ensure the long term growth and accessibility of the internet.[21] W3C publishes Web Content Accessibility Guidelines ("WCAG"), which are a set of recommendations for making web content more accessible, primarily for people with disabilities.[22] In 2008, the W3C officially adopted WCAG 2.0 as an international standard for web accessibility.[23]

17. *See e.g.*, S. Rep. No. 101-116, at 54 (1989) ("[W]ithin each of these categories, the legislation only lists a few examples and then, in most cases, adds the phrase 'other similar' entities. The Committee intends that the 'other similar' terminology should be construed liberally consistent with the intent of the legislation.").

18. Letter from Stephen Boyd, Assistant Att'y Gen., Dep't of Just., to Tedd Budd, U.S. H.R. (Sept. 25, 2018) (on file at https://www.adatitleiii.com/wp-content/uploads/sites/121/2018/10/DOJ-letter-to-congress.pdf).

19. Gil v. Winn-Dixie Stores, Inc., 242 F. Supp. 3d 1315, 1318–19 (S.D. Fla. 2017).

20. *Id.*

21. W3C WEBSITE, https://www.w3.org/ (last visited Nov. 9, 2021).

22. W3C RECOMMENDATION 11 DECEMBER 2008, WEB CONTENT ACCESSIBILITY GUIDELINES (WCAG) 2.0, https://www.w3.org/TR/WCAG20/ [hereinafter WCAG 2.0].

23. WCAG 2.1 is an updated version of the guidelines that supplements WCAG 2.0 with additional success criteria. WCAG 2.1 is currently recommended by the W3C, but it is not yet an international standard. WCAG 2.1 may become the standard in the near future. *See* W3C RECOMMENDATION 05 JUNE 2018, WEB CONTENT ACCESSIBILITY GUIDELINES (WCAG) 2.1, https://www.w3.org/TR/WCAG21/.

WCAG 2.0 outlines four principles of accessible design.[24] Websites must be: (1) perceivable; (2) operable; (3) understandable; and (4) robust.[25] For each of these principles, there are specific guidelines and success criteria to determine if a website is conforming to the respective principle.[26] Based on these success criteria, WCAG 2.0 is split into three levels of conformance, A, AA, and AAA, with A being the minimum level and AAA being the maximum level.[27] Each tier contains different success criteria, and compliance with each tier requires a website to meet all of the success criteria of that level and the level below it (i.e. full compliance with AA requires a website to meet each criteria of A and AA).[28] The growing prevalence of Title III lawsuits has created a huge industry for companies that can conduct WCAG compliance audits.[29] Using the success criteria contained in WCAG 2.0, audits can be performed to determine a website's accessibility.[30] Based on how many of the success criteria are met, an audit can determine different levels of accessibility.[31]

Here lies a major area of confusion surrounding ADA compliance. The DOJ and most courts seem to agree that WCAG 2.0 is an appropriate, though maybe not exclusive, standard for measuring the accessibility of websites covered under the ADA.[32] Proponents have noted that WCAG 2.0 is the industry standard for measuring website accessibility, and courts seem to accept that.[33] In fact, after reading dozens of cases on website accessibility, this author has never seen any other standard discussed. However, as the previous paragraph explains, there are three tiers of WCAG 2.0 compliance, and there is a lack of clear guidance as to which level of compliance, if any, is required by the ADA. To make matters more confusing, there are varying degrees of compliance with each level. For example, most audits do not only say that a website is A, AA, or AAA. Rather, audits will often either count the instances of non-compliance or assign a

24. *See* WCAG 2.0, *supra* note 22.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. Searching for "ADA compliance" or "WCAG compliance" on Google will undoubtedly result in numerous advertisements and other results for online WCAG audits. *See e.g.*, *Everything on Accessibility Compliance and Legislation*, ACCESSIBE, https://accessibe.com/compliance (last visited Nov. 9, 2021); BUREAU OF INTERNET ACCESSIBILITY, https://www.boia.org/ (last visited Nov. 9, 2021); *Digital Accessibility Compliance Certification*, ONLINEADA, https://onlineada.com/ (last visited Nov. 9, 2021); *Accessibility Compliance Audits & Remediation Company*, NEW POSSIBILITIES GROUP LLC, https://www.npgroup.net/accessibility-ada-compliance/ (last visited Nov. 9, 2021).

30. *Supra* note 29.

31. *Supra* note 29.

32. *See infra* notes 59, 62.

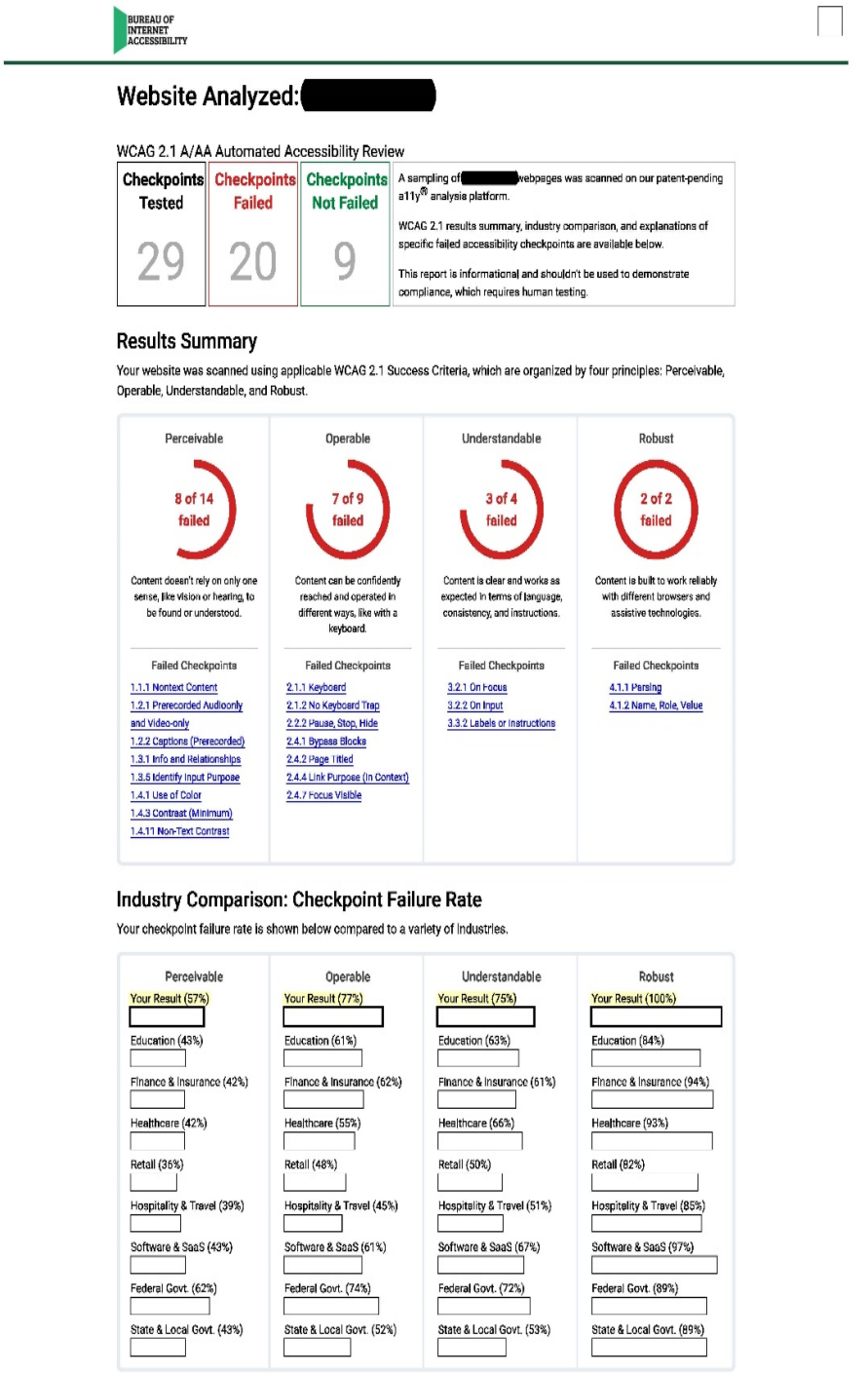
33. Gil v. Winn-Dixie Stores, Inc., 257 F. Supp. 3d 1340, 1346 (S.D. Fla. 2017), *vacated*, 993 F.3d 1266 (11th Cir. 2021).

percentage of compliance with each WCAG 2.0 level. For example, a website could be fully compliant with A, but only fifty percent compliant with AA, or seventy percent compliant with AAA (making it extremely accessible), but only ninety percent compliant with AA.

To add to the confusion discussed above, many audits use differing methodologies for calculating a website's compliance with WCAG. Some audits will assign a percentage score for compliance with each tier of WCAG 2.0, others might list a score for each of the dozens of criteria. Some audits might simply say AA "compliant" or "non-compliant." The following page contains an example of a free WCAG 2.1 AA audit that measures compliance based on multiple checkpoints within each principle of accessible design.[34] This example represents a relatively simple free scan; more advanced audits can be much more detailed, outlining every problem in each individual line of code and even suggesting solutions.

Thus, businesses with websites face many decisions in figuring out how to be "accessible." Businesses must decide whether to aim for compliance with WCAG 2.0 or 2.1. They must decide whether to comply with A, AA, or AAA, and even then there are varying levels of compliance with each, and varying methodologies for calculating that compliance. Then, they have to continue to maintain that compliance every time they update the content of the site. All things considered, even if WCAG is accepted as the proper measure of website accessibility, it can still be extraordinarily confusing for businesses to figure out what is actually required of them.

34. Free audit provided by the Bureau of Internet Accessibility, see ACCESSIBILITY AUDITS, BUREAU OF INTERNET ACCESSIBILITY, https://www.boia.org/ (last visited Nov. 10, 2021).



BUREAU OF INTERNET ACCESSIBILITY

Website Analyzed: [redacted]

WCAG 2.1 A/AA Automated Accessibility Review

Checkpoints Tested	Checkpoints Failed	Checkpoints Not Failed
29	20	9

A sampling of [redacted] webpages was scanned on our patent-pending a11y® analysis platform.

WCAG 2.1 results summary, industry comparison, and explanations of specific failed accessibility checkpoints are available below.

This report is informational and shouldn't be used to demonstrate compliance, which requires human testing.

Results Summary

Your website was scanned using applicable WCAG 2.1 Success Criteria, which are organized by four principles: Perceivable, Operable, Understandable, and Robust.

Perceivable	Operable	Understandable	Robust
8 of 14 failed	7 of 9 failed	3 of 4 failed	2 of 2 failed
Content doesn't rely on only one sense, like vision or hearing, to be found or understood.	Content can be confidently reached and operated in different ways, like with a keyboard.	Content is clear and works as expected in terms of language, consistency, and instructions.	Content is built to work reliably with different browsers and assistive technologies.
Failed Checkpoints	Failed Checkpoints	Failed Checkpoints	Failed Checkpoints
1.1.1 Nontext Content	2.1.1 Keyboard	3.2.1 On Focus	4.1.1 Parsing
1.2.1 Prerecorded Audioonly and Video-only	2.1.2 No Keyboard Trap	3.2.2 On Input	4.1.2 Name, Role, Value
1.2.2 Captions (Prerecorded)	2.2.2 Pause, Stop, Hide	3.3.2 Labels or Instructions	
1.3.1 Info and Relationships	2.4.1 Bypass Blocks		
1.3.5 Identify Input Purpose	2.4.2 Page Titled		
1.4.1 Use of Color	2.4.4 Link Purpose (In Context)		
1.4.3 Contrast (Minimum)	2.4.7 Focus Visible		
1.4.11 Non-Text Contrast			

Industry Comparison: Checkpoint Failure Rate

Your checkpoint failure rate is shown below compared to a variety of industries.

Perceivable	Operable	Understandable	Robust
Your Result (57%)	Your Result (77%)	Your Result (75%)	Your Result (100%)
Education (43%)	Education (61%)	Education (63%)	Education (84%)
Finance & Insurance (42%)	Finance & Insurance (62%)	Finance & Insurance (61%)	Finance & Insurance (94%)
Healthcare (42%)	Healthcare (55%)	Healthcare (66%)	Healthcare (93%)
Retail (36%)	Retail (48%)	Retail (50%)	Retail (82%)
Hospitality & Travel (39%)	Hospitality & Travel (45%)	Hospitality & Travel (51%)	Hospitality & Travel (85%)
Software & SaaS (43%)	Software & SaaS (61%)	Software & SaaS (67%)	Software & SaaS (97%)
Federal Govt. (62%)	Federal Govt. (74%)	Federal Govt. (72%)	Federal Govt. (89%)
State & Local Govt. (43%)	State & Local Govt. (52%)	State & Local Govt. (53%)	State & Local Govt. (89%)

II. CURRENT STATE OF THE LAW

A. Circuit Split on Physical Nexus Requirement

One of the first issues that must be addressed regarding the current interpretation of the ADA is the circuit split on when Title III applies to websites. The Third, Sixth, and Ninth Circuits have concluded that places of public accommodation must be physical spaces, but that websites may fall within the ADA if they have a sufficient nexus to a physical place.[35] Conversely, the First, Second, and Seventh Circuits have found that a website can be a place of public accommodation independent of any connection to a physical space.[36] Shortly after the completion of this Note, the Eleventh Circuit also considered this issue when it heard the appeal in *Gil v. Winn-Dixie Stores, Inc*.[37] For the purposes of this Note, the Eleventh Circuit will be considered a part of the physical nexus side of the circuit split.[38] The remaining circuits have not directly addressed this issue, but most federal district courts in those circuits seem to be in agreement that the ADA requires, at least, the websites of places of public accommodation to be accessible.[39]

Courts that have taken the physical nexus approach first explain that the ADA explicitly states that it applies to places of public accommodation, and that the statute then goes on to specifically enumerate twelve categories of public accommodations.[40] Within each category of public accommodation, the statute lists specific examples.[41] These courts note that there is one commonality between every example listed in the statute; each one is an actual, physical

35. *Gil*, 242 F. Supp. 3d at 1319 (citing Earll v. eBay, Inc., 599 Fed. Appx. 695, 696 (9th Cir. 2015) (the term "place of public accommodation" requires some connection between the good or service alleged to be discriminatory and a physical place)); *see also* Ford v. Schering-Plough Corp., 145 F.3d 601, 614 (3d Cir. 1998) (finding that the term public accommodation does not refer to non-physical access); Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1010–11 (6th Cir. 1997) (stating that a public accommodation is a physical place).

36. *Gil*, 242 F. Supp. 3d at 1318–19 (citing Morgan v. Joint Admin. Bd., 268 F.3d 456, 459 (7th Cir. 2001); Nat'l Fed'n of the Blind v. Scribd Inc., 97 F. Supp. 3d 565, 575–76 (D. Vt. 2015); Nat'l Ass'n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 202 (D. Mass. 2012); Andrews v. Blick Art Materials, LLC, 268 F. Supp. 3d 381, 393 (E.D.N.Y. 2017)); *see also* 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. Co., 198 F.3d 28, 31 (2d Cir. 2000); Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 558–59 (7th Cir. 1999).

37. 993 F.3d 1266, 1274 (11th Cir. 2021).

38. The Eleventh Circuit construed the language of Title III narrowly and held that a website is not itself a place of public accommodation. Furthermore, although the Eleventh Circuit did not use the term "physical nexus" in its discussion, it analyzed whether the deficiencies with the website posed a barrier to access at Winn-Dixie's physical locations, suggesting an approach similar to the physical nexus approach. *Id.* at 1276–78.

39. *See Gil*, 242 F. Supp. 3d at 1318–19.

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

41. *Id.*

place.[42] The text, thus, implies that all places of public accommodation must be physical places.[43] Because the ADA applies to services of a place of public accommodation, websites can only be subject to the ADA when they are considered a service of the public accommodation.[44] Considering the forgoing propositions together, courts adopting the physical nexus approach argue that a website cannot be subject to the ADA unless it is sufficiently connected to one of the physical places of public accommodation described in the statute.[45]

The opposing circuits have interpreted the ADA differently, focusing instead on Congress's intent. Courts in these circuits have typically stated that Congress's primary intent was for individuals with disabilities to "fully enjoy the goods, services, privileges, and advantages available indiscriminately to other members of the public."[46] Therefore, these courts argue, the spirit of the ADA dictates that individuals with disabilities have a right to enjoy the goods, services, privileges, and advantages available on the internet, just as they do with physical accommodations.[47] These courts have also argued that the legislative history of the ADA indicates that Congress intended the ADA to adapt to changes in technology.[48] The Court in *Nat'l Ass'n of the Deaf v. Netflix* explained the legislative history argument:

> First, while such web-based services did not exist when the ADA was passed in 1990 and, thus, could not have been explicitly included in the Act, the legislative history of the ADA makes clear that Congress intended the ADA to adapt to changes in technology. *See, e.g.*, H.R. Rep. 101-485(II), at 108 (1990), 1990 U.S.C.C.A.N. 303, 391 ("[T]he Committee intends that the types of accommodation and services provided to individuals with disabilities, under all of the titles of this bill, should keep pace with the rapidly changing technology of the times."). Second, and more importantly, Congress did not intend to limit the ADA to the specific examples listed in each category of public accommodations. Plaintiffs must show only that the web site falls within a general category listed under the ADA. *See, e.g.*, S. Rep. No. 116, at 59 (1990) ("[W]ithin each of these categories, the legislation only lists a few examples and then, in most cases, adds the phrase 'other similar' entities. The Committee intends that the 'other similar' terminology should be construed liberally

42. *Id.*

43. *Id.* ("The principle of *noscitur a sociis* requires that the term, 'place of public accommodation,' be interpreted within the context of the accompanying words, and this context suggests that some connection between the good or service complained of and an actual physical place is required.")

44. Robles v. Domino's Pizza, LLC, 913 F.3d 898, 905 (9th Cir. 2019) ("The statute applies to the services *of* a place of public accommodation, not services *in* a place of public accommodation.") (quoting another source).

45. *Weyer*, 198 F.3d at 1114.

46. Gil v. Winn-Dixie Stores, Inc., 242 F. Supp. 3d 1315, 1319 (S.D. Fla. 2017).

47. *See id.*

48. *Id.*

> consistent with the intent of the legislation . . .."); H.R. Rep. No. 485 (III), at 54 (1990), 1990 U.S.C.C.A.N. 445, 477 ("A person alleging discrimination does not have to prove that the entity being charged with discrimination is similar to the examples listed in the definition. Rather, the person must show that the entity falls within the overall category.").[49]

Thus, the current circuit split on the ADA reflects a difference in statutory interpretation between the circuits. Unfortunately, as courts argue over whether to look at the text of the statute or the intent of the legislation, it remains unclear as to when the ADA actually applies. Meanwhile, the Supreme Court has neglected to take up the issue on certiorari, and Congress has not shown a commitment to clarifying the issue. This author's preferred resolution of the circuit split will be discussed in Section III.

B. Due Process Concerns in ADA Cases

One of the primary issues that becomes clear from the case law is that much of the debate in this area revolves around due process concerns. In particular, there are two related arguments that defendants make regarding due process: (1) defendants lack sufficient notice of what the ADA actually requires for a website to be accessible; and (2) because of this lack of guidance, it would violate due process to impose liability based on failure to comply with a private technical standard.[50] The way that courts have responded to these arguments demonstrates why many courts are hesitant to get specific with accessibility requirements.

First, the DOJ has never explicitly stated that the ADA requires compliance with WCAG 2.0 or any other set of guidelines. Therefore, in practically every case dealing with this issue, the defendant business argues that its due process rights have been violated because the business lacked sufficient notice of what website compliance with the ADA actually requires.[51] These defendants seek specific technical standards for what is required of them.[52] Essentially, they want someone to tell them something along the lines of "*blank* percent compliance with WCAG 2.0 Level *blank* complies with the ADA as a matter of law." Courts, however, are largely unsympathetic to this argument and have typically held that the lack of specific technical regulations does not eliminate the defendant's obligation to comply with the ADA.[53] Rather, courts have held that, although

49. 869 F. Supp. 2d 196, 200–01 (D. Mass. 2012).

50. Robles v. Domino's Pizza, LLC, 913 F.3d 898, 907 (9th Cir. 2019); *see also* Haynes v. Kohl's Dep't Stores, Inc., 391 F. Supp. 3d 1128, 1135 (S.D. Fla. 2018).

51. *Haynes*, 391 F. Supp. 3d at 1135.

52. *Id.*

53. *See id.* at 1135–36; *see also* Access Now, Inc. v. Blue Apron, LLC, No. 17-CV-116-JL, 2017 WL 5186354, at *6 (D.N.H. Nov. 8, 2017); Gorecki v. Dave & Buster's, Inc., No. 17–cv–1138–PSG, slip op. at 3–4 (C.D. Cal. Oct. 10, 2017) (concluding that the defendant was under notice that it was obligated to comply with Title III despite absence of clear guidelines).

there are no specific guidelines for how websites must comply with the ADA, the requirements of the ADA itself are sufficiently clear to give defendants fair notice of what is required.[54] In other words, defendants know that they must take steps to provide disabled individuals with the full and equal enjoyment of their services; therefore, their due process rights have not been violated.

Second, defendant businesses argue that it would violate due process for a court to impose liability directly based on a business's failure to comply with WCAG 2.0 because the businesses have not been provided fair notice of an obligation to comply with these private guidelines.[55] Courts sidestep this argument by emphasizing that plaintiffs are not seeking to require defendants to comply with private standards (specifically WCAG 2.0); rather, the courts claim that plaintiffs are simply trying to require defendants to comply with the ADA itself and suggesting WCAG 2.0 as an equitable remedy.[56] The rationale behind these courts' decisions seems to be that compliance with WCAG 2.0 and compliance with the ADA are not mutually exclusive; it may be possible to comply with the ADA without complying with WCAG 2.0 and vice versa. What the ADA clearly requires is for public accommodations to take the necessary steps to provide disabled individuals with full and equal enjoyment of their services.[57] Therefore, many courts appear to think that compliance with WCAG 2.0 may often be a sufficient, but not a necessary condition of ADA compliance.

Additionally, many courts, in denying defendants' pleas for specific technical standards, have actually argued that the lack of specific guidelines might be purposeful because it gives businesses flexibility in how they comply. In *Robles*, the court noted:

> The DOJ's position that the ADA applies to websites being clear, it is no matter that the ADA and the DOJ fail to describe exactly how any given website must be made accessible to people with visual impairments. Indeed, this is often the case with the ADA's requirements, because the ADA and its implementing regulations are intended to give public accommodations maximum flexibility in meeting the statute's requirements. This flexibility is a feature, not a bug, and certainly not a violation of due process.[58]

Similarly, many courts have said that the guidelines should be flexible because the determination of ADA compliance is a fact-intensive analysis that depends

54. *See Robles*, 913 F.3d at 908 (holding the Constitution only requires that Domino's receive fair notice of its legal duties, not a blueprint for compliance with its statutory obligations).

55. *Id.* at 907.

56. *Id.*

57. *Id.* at 909.

58. *Id.* at 908 (quoting Reed v. CVS Pharmacy, Inc., No. CV 17-3877-MWF (SKX), 2017 WL 4457508, at *5 (C.D. Cal. Oct. 3, 2017)).

on the particular circumstances.[59] With the foregoing reasoning in mind, no federal court has been willing to get specific as to what technical standard is actually required as a matter of law.

C. What Have Courts Considered to be the Appropriate Standard?

Although courts are reluctant to declare what standards satisfy the ADA, some courts have been willing to discuss what might be required of public accommodations in the context of remedying non-compliance. There is reason to believe federal courts prefer WCAG 2.0 AA as the appropriate standard to measure accessibility under the ADA; however, for the reasons discussed previously, most courts are unwilling to be explicit and specific about what satisfies the ADA as a matter of law. Nevertheless, some court opinions and many appellate briefs have noted that WCAG 2.0 AA appears to be the preferred standard of (1) Federal Government agencies; (2) DOJ consent decrees; (3) disability affinity groups; and (4) ADA settlement agreements.

1. The Federal Government uses WCAG 2.0 AA

In January 2017, in accordance with Section 508 of the Rehabilitation Act, the United States Access Board (also known as the Architectural and Transportation Barriers Compliance Board) adopted final rules to make WCAG 2.0 Level AA the accessibility standard that the federal government uses to provide accessible web services.[60] Furthermore, the U.S. Department of Transportation has established WCAG 2.0 Level AA as the standard for accessibility for private airline websites and kiosks.[61] Thus, these factors suggest that the federal government views WCAG 2.0 AA as the best available standard for determining website accessibility. Furthermore, because the Federal Government generally requires its services to be extremely accessible, the fact that it uses WCAG 2.0 AA as its preferred benchmark for compliance is highly persuasive that AA should satisfy the ADA.

59. *See* Silva v. Baptist Health S. Fla., Inc., 856 F.3d 824, 836 (11th Cir. 2017) (holding that the determination of whether a business has provided adequate auxiliary aids is a fact-intensive inquiry that often precludes summary judgement).

60. DIGITAL.GOV, EIGHT PINCIPLES OF MOBILE-FRIENDLINESS: DON'T FORGET ACCESSIBILITY!, https://digital.gov/guides/mobile-principles/accessibility/ (last visisted Nov. 10, 2021); SECTION508.GOV, DESIGN & DEVELOP: APPLICABILITY & CONFORMANCE REQUIREMENTS, https://www.section508.gov/create/applicability-conformance (last visited Nov. 10, 2021).

61. 14 C.F.R. §§ 382, 399; 49 C.F.R. § 27; *see* Blane A. Workie, Deputy Assistant Gen. Counsel, Off. of Aviation Enf't & Proc., Dep't of Transp., Fact Sheet: Web Site and Kiosk Accessibility, https://www.transportation.gov/sites/dot.gov/files/docs/11-04-13%20Accessible%20Kiosks%20Fact%20Sheet_0_0.pdf.

2. In consent decrees, the DOJ has typically required AA

In more than twenty-five consent decrees and settlement agreements in which the United States has been a party, the DOJ has required covered entities to adhere to WCAG 2.0 level AA to ensure compliance with the ADA.[62] This suggests that the DOJ itself views AA as ADA compliant.

3. Disability Affinity Groups approve of WCAG 2.0 AA

The National Federation of the Blind uses WCAG 2.0 AA as its standard for the accessibility of its own website: "We seek to ensure that all the pages on our website are designed to meet W3C Web Content Accessibility Guidelines (WCAG) 2.0, Level AA conformance."[63] Given that the federal regulations state that "[a] public accommodation should consult with individuals with disabilities whenever possible" when determining how to make its services accessible,[64] the fact that America's leading blind affinity group advocates for WCAG 2.0 Level AA is highly persuasive that (1) WCAG 2.0 is an appropriate standard for measuring accessibility; and (2) compliance with WCAG 2.0 AA is an appropriate method of ensuring that disabled individuals are not being discriminated against.

4. Settlement agreements typically use AA

The vast majority of settlement agreements in this area of the law require the defendant to bring its website into "substantial conformance" with WCAG 2.0 Level AA. This suggests that litigants view AA as a fair and feasible accessibility standard. Additionally, because courts must approve of these settlements as being "fair and reasonable," it demonstrates that many courts likely view "substantial conformance" with AA as adequate for purposes of complying with the ADA. *Andrews v. Blick Art Materials, LLC* provides a typical example of such a settlement agreement.[65] There, a federal court in the Eastern District of New York approved of a settlement agreement between Defendant Blick and a visually impaired plaintiff regarding an ADA website compliance lawsuit.[66] Helpfully, the court discussed the evidence that the parties relied on in determining that WCAG 2.0 Level AA was the appropriate

62. *See e.g.*, United States & Palm Beach County Supervisor of Elections, DJ Nos. 204-18-218 & 166-18-43 (Jan. 19, 2017) (settlement agreement), https://www.ada.gov/palm_beach_sa.html; Dudley v. Miami Univ., No. 1:14-cv-38 (S.D. Ohio Dec. 14, 2016) (consent decree), https://www.ada.gov/miami_university_cd.html; United States v. Humboldt County, No. 1:16-cv-05139 NJV (N.D. Cal. Sept. 13, 2016) (consent decree), https://www.ada.gov/humboldt_pca/humboldt_ca_cd.html.

63. NFB ACCESSIBILITY POLICY (revised Oct. 2017), https://www.nfb.org/accessibility-policy.

64. 28 C.F.R. § 36.303.

65. 286 F. Supp. 3d 365 (E.D.N.Y. 2017).

66. *Id.* at 369.

standard.[67] There, the parties found it persuasive that both blind affinity groups and the federal government have adopted AA as an appropriate standard for website accessibility.[68] In further explaining why AA was the most reasonable standard, an expert witness for Blick opined:

> It is not recommended that Level AAA conformance be required as a general policy for entire sites because it is not possible to satisfy all Level AAA Success Criteria for some content. In practice, level AAA compliance is almost never attempted or reached, except in rare circumstances, as it is extremely difficult to achieve, and does not substantially benefit most disabled users—particularly users who are blind. The general consensus of experts is that Level AA is the appropriate level for the vast majority of organizations to pursue, and all laws which I am aware of require this level as well, including the refreshed Section 508 agency guidelines.[69]

Thus, because the consensus among the federal government, the DOJ, affinity groups, and industry experts seems to be that WCAG 2.0 AA is the most practical standard for website accessibility, many courts have approved of compliance with AA, or at least substantial conformance with AA, as an appropriate remedy for ADA compliance.

a. The Substantial Conformance Standard

While some courts approve of "substantial conformance" with AA as an appropriate standard for remedying inaccessibility, it is important to reiterate that most courts are unwilling to say that any level of compliance necessarily satisfies the ADA. In *Diaz v. Lobel's of New York, LLC*, the defendant had previously contracted with an auditing service and web developers to bring its website into substantial conformance with WCAG 2.0 AA.[70] However, a few exceptions remained, such that the visually impaired plaintiff was unable to access a search bar and unable to see the price of certain items.[71] In denying the defendant's motion for summary judgment, the court held that even though the defendant had upgraded its website to be largely compliant with AA, whether the remaining barriers to accessibility violated the ADA was a question of fact for a jury.[72] Thus, not only is it unclear exactly what substantial conformance means, but whether substantial conformance with AA actually satisfies ADA might depend on the nature of the non-compliance and be a question of fact for a jury. This ruling is especially unsettling. The fact that a business could pay thousands of dollars to bring its website into substantial conformance with

67. *Id.* at 381–83.
68. *Id.* at 380–81.
69. *Id.* at 382–83.
70. No. 16-CV-6349 (NGG) (SMG), 2019 WL 3429774, at *2 (E.D.N.Y. July 30, 2019).
71. *Id.* at *6.
72. *Id.* at *9.

WCAG 2.0 AA, only to be sued and forced to litigate an entire case to a jury perfectly underscores the need for clearer standards.

Perhaps the closest that a court has come to ruling on what percentage of compliance satisfies the ADA is *Gomez v. Gen. Nutrition Corp*.[73] There, in determining whether a website had remedied a previous ADA violation, the court noted, "the remaining evidence in the record suggests that the Website is inaccessible. Michael McCaffrey—Gomez's expert—tested the Website and found it had 77 percent and 64 percent compliance on success levels AA and A, respectively."[74] It appears that this is the only case where a court actually addressed the business's percentage compliance with WCAG 2.0 levels in determining whether a website is accessible under the ADA. This is important because the court granted summary judgement for the plaintiff in regards to liability, holding that the website's seventy-seven percent compliance with WCAG 2.0 AA did not suggest accessibility under the ADA.[75] With that being said, although the *Gomez* court found that the evidence suggested liability for violating the ADA, the court also noted that it was unclear what level of success was required to remedy the violation.[76] The fact that seventy-seven percent AA compliance did not preclude summary judgement on liability indicates that courts are very hesitant to declare than any level of accessibility necessarily satisfies the ADA, leaving defendants uncertain as to what the ADA actually requires from a technical standpoint.

D. The Undue Burden Defense

It is important to note that the undue burden defense, briefly discussed in Section I, might be useful to smaller businesses who cannot afford to make their website fully accessible. However, there is little caselaw describing the undue burden analysis in the context of websites, and many of the small businesses that might utilize it never get that far into litigation because it is cheaper for them to just accept the plaintiff's settlement demand. Therefore, this Note will not thoroughly explore the undue burden defense.

E. Conclusion on the State of the Law

Thus, as of early 2022, a thorough examination of the caselaw and secondary sources can give businesses and their lawyers a decent idea of how courts might

73. 323 F. Supp. 3d 1368 (S.D. Fla. 2018).

74. *Id.* at 1379. The court's explanation here does not make a lot of sense. A website likely would not be seventy-seven percent with WCAG 2.0 AA, but only sixty-four percent compliant with A. That is usually not how the guidelines work. However, regardless of whether this error was the result of confusion by the court, or possibly a typo, it is significant that the Gomez court acknowledge that the specific level of compliance likely is relevant to determining whether the ADA has been violated.

75. *Id.*

76. *Id.*

apply the ADA. Websites under the jurisdiction of the Third, Sixth, and Ninth Circuits must comply with the ADA if the website has a sufficient nexus to a physical place.[77] Websites in the Tenth Circuit likely fit into this category as well.[78] In contrast, websites under the jurisdiction of the First, Second, and Seventh Circuits most likely must comply with the ADA if the website is connected to any business, regardless of whether there is any nexus to a physical place.[79] However, because these circuits are looking beyond the text of the statutes, it can be difficult for websites in these jurisdictions to know whether or not they are actually subject to the ADA. These differences in statutory interpretation and the ambiguities that lie therein highlight the need for resolution of the circuit split on the physical nexus requirement—whether through Supreme Court intervention, legislation, or administrative rulemaking.

Furthermore, even when a website knows that it is subject to the ADA, there is little guidance on what level of accessibility is required. Spending hours reading court orders and settlement agreements suggests that substantial conformance with WCAG 2.0 AA might satisfy the ADA, but no court has actually held that any level of accessibility necessarily satisfies the ADA. Right now, the only measure that businesses can really take is try to make sure that they are in full compliance with WCAG 2.0 AA at all times, and hope they do not get sued. Defendants deserve some semblance of clarity about what technical standards are expected for compliance.

III. WHERE DO WE GO FROM HERE

A. Circuit Split on the Public Accommodation Test

If the courts are serious about making the ADA clearer and fairer, the first step is to resolve the circuit split. As described in Section II, the Third, Sixth, and Ninth Circuits have concluded that websites only fall within the ADA if they have a sufficient nexus to a physical place of public accommodation.[80] However, the First, Second, and Seventh Circuits have ruled that the ADA can apply to websites independent of any connection to a physical space.[81] This Note advocates for the approach taken by the First, Second, and Seventh Circuits.

The most obvious problem with the physical nexus approach is that, although it has support in the text, it seems irrational when the rest of the context is considered. Some courts began to realize this issue over twenty-five years ago. In *Carparts Distrib. Ctr. v. Auto. Wholesaler's Assoc.*, the First Circuit explained "[i]t would be irrational to conclude that persons who enter an office

77. Gil v. Winn-Dixie Stores, Inc., 242 F. Supp. 3d 1315, 1319 (S.D. Fla. 2017).
78. Gil v. Winn-Dixie Stores, Inc., 993 F.3d 1266, 1277 (11th Cir. 2021).
79. *Gil*, 242 F. Supp. 3d at 1318.
80. *Id*. at 1319.
81. *Id*.

to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result."[82] More recently, this same rationale has been used to argue that the ADA should apply to websites, regardless of any physical location.[83] The plaintiffs from *Netflix* argued that there is no legitimate reason why an internet-based video subscription service like Netflix should be treated differently than a brick-and-mortar video rental store for accessibility purposes—and the court agreed.[84]

In the modern context, the physical nexus requirement becomes even less practicable. A practical consequence of the physical nexus approach, which further adds to its irrationality, is that it allows a large number of businesses to escape liability for discrimination just because they operate primarily online. Every year, more and more of the U.S. economy shifts to e-commerce.[85] Increasingly, particularly during the Covid-19 pandemic, websites have become a larger part of many peoples' search for goods and services than traditional brick-and-mortar stores. The internet arguably has become just as important to participation in modern society as any physical institution. Therefore, an approach that exempts entirely online business from the accessibility standards that it imposes on the websites of physical stores is completely counterintuitive. The predominantly online businesses are those that you would most expect to have accessible websites because that is the only way to access their services. It makes little sense to say that a local bookstore needs a screen readable website if it wants an online presence, but the website of an e-commerce giant like Amazon could be wholly exempt from compliance with the ADA.[86] Similarly, imagine holding Blockbuster's website to a higher standard than Netflix's website.[87] Thus, the physical nexus requirement creates absurd results and leads to entirely impractical consequences that go against the spirit and purpose of the ADA.

With the foregoing in mind, the current circuit split on the physical nexus requirement should be resolved—whether through Supreme Court intervention, legislation, or administrative rulemaking—in favor of the view that the ADA can apply to websites independent of any connection to a physical place.

82. 37 F.3d 12, 19 (1st Cir. 1994).

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

84. *Id.*

85. *See* Fareeha Ali & Jessica Young, *US Ecommerce Grows 44.0% in 2020*, DIGIT. COM. 360 (Jan. 29, 2021), https://www.digitalcommerce360.com/article/us-ecommerce-sales/.

86. In recent years, Amazon has opened physical stores in some markets. This could allow Amazon to fall under the physical nexus test. However, the example is still illustrative of the problems with the physical nexus test.

87. As of early 2022, there is one Blockbuster still open in America. Nonetheless, even if it closes, the proposition still stands that to hold the website of a physical video rental store to a higher standard than Netflix violates notions of common-sense.

B. Solving the Accessibility Standard Problem

1. Businesses Deserve Technical Guidelines

The primary problem addressed by this Note is that businesses face immense uncertainty when designing and operating their websites as to what is required of them under the ADA. In almost every ADA case involving websites, defendants lament that they have no idea what is actually required for compliance, and that it violates due process to punish them without providing any clear technical guidelines.[88] Courts circumvent this argument by saying that the mandate of the ADA—to provide disabled individuals with full and equal enjoyment of goods, services, privileges, and advantages available to non-disabled individuals—is sufficiently clear to give defendants fair notice of their responsibilities and not violate due process.[89]

However, if the call of the ADA is sufficiently clear, then one wonders why the DOJ has felt it necessary to provide a myriad of specific technical standards for physical accommodations. The DOJ provides governments and private businesses with specific requirements for nearly any imaginable circumstances regarding accessibility at physical locations.[90] For example, the DOJ provides diagrams describing the maximum slope and minimum width for wheelchair ramps.[91] It provides specifications for the finish and contrast of the pictograms and brail on bathroom signs.[92] It provides tables that specify the minimum number of handicapped spots based on the total capacity of a parking lot.[93] There are tables with the minimums for the number of handicap accessible rooms based on the size of a hotel.[94] There are tables that indicate the minimum number of boat slips that must be accessible in a marina.[95] The DOJ even provides specifications for the maximum thickness of carpet pile, so as to reduce the roll resistance to wheelchairs.[96] These represent only a small number of the specific standards that the DOJ makes readily available to inform businesses of how to comply with the physical requirements of the ADA. The figures on the following page show some examples of how the DOJ provides businesses with both tables

88. Robles v. Domino's Pizza, LLC, 913 F.3d 898, 907 (9th Cir. 2019).

89. *Id.* at 908 (holding the Constitution only requires that Domino's receive fair notice of its legal duties, not a blueprint for compliance with its statutory obligations).

90. DEP'T OF JUST., 2010 ADA STANDARDS, https://www.ada.gov/regs2010/2010ADA Standards/2010ADAstandards.htm [hereinafter 2010 ADA STANDARDS].

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. 2010 ADA STANDARDS, *supra* note 90.

96. *Id.*

and diagrams describing the required specifications for accessible doorway maneuverability.[97]

404.2.4.1 Swinging Doors and Gates

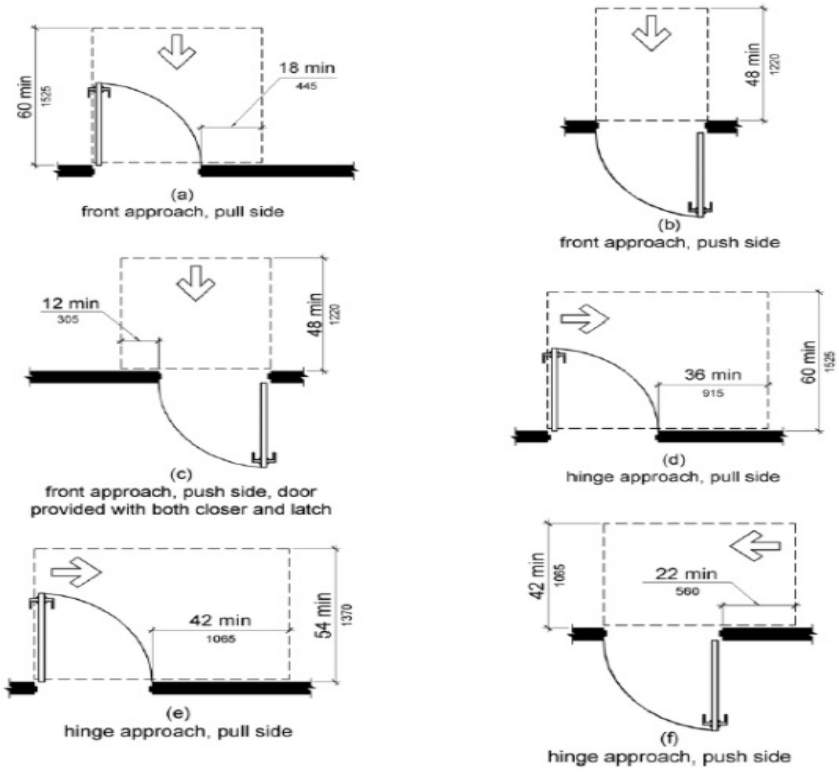
Swinging doors and gates shall have maneuvering clearances complying with Table 404.2.4.1.

Table 404.2.4.1 Maneuvering Clearances at Manual Swinging Doors and Gates

Type of Use		Minimum Maneuvering Clearance	
Approach Direction	**Door or Gate Side**	**Perpendicular to Doorway**	**Parallel to Doorway (beyond latch side unless noted)**
From front	Pull	60 inches (1525 mm)	18 inches (455 mm)
From front	Push	48 inches (1220 mm)	0 inches (0 mm) [1]
From hinge side	Pull	60 inches (1525 mm)	36 inches (915 mm)
From hinge side	Pull	54 inches (1370 mm)	42 inches (1065 mm)
From hinge side	Push	42 inches (1065 mm) [2]	22 inches (560 mm) [3]
From latch side	Pull	48 inches (1220 mm) [4]	24 inches (610 mm)
From latch side	Push	42 inches (1065 mm) [4]	24 inches (610 mm)

1. Add 12 inches (305 mm) if closer and latch are provide
2. Add 6 inches (150 mm) if closer and latch are provided.
3. Beyond hinge side.
4. Add 6 inches (150 mm) if closer is provided.

Figure 404.2.4.1 Maneuvering Clearances at Manual Swinging Doors and Gates



97. *Id.*

If the goal of the ADA is to create an efficient means of ensuring that disabled individuals have an equal opportunity to participate in American society, then it makes sense to provide businesses with detailed guidelines for what is required of them. This makes compliance relatively simple. The above figures demonstrate that the DOJ has done exactly that for all kinds of physical factors. Nevertheless, when it comes to the internet, no government entity is willing to tell businesses what is required of them, and the courts enable this behavior. If the mandate that places of public accommodation provide disabled individuals with "full and equal enjoyment" of the "goods, services, facilities, privileges, advantages, or accommodations" was truly a sufficient guideline, then why would the DOJ provide such detailed specifications for physical factors? Why does the DOJ provide guidelines for the maximum thickness of carpet pile, but refuses to set any standard whatsoever for website accessibility?

The caselaw provides no answer to these questions. Setting clear standards for website accessibility would allow both businesses and disabled individuals to know what to expect in websites. There is no good reason for denying such clear standards.

2. A Sliding Scale of Accessibility

If the government does decide to set clearer accessibility standards, there is, of course, a question of how to set those standards. For now, courts struggle not only with how to set standards, but how those standards would apply and change depending on the type of entity. Most people would probably agree that not every entity should be treated exactly the same for accessibility purposes. Essentially, a local small business's website should not necessarily be held to the same standard as Walmart's website. However, both businesses deserve a better idea as to what they need to do to satisfy the ADA.

There are a number of ways to approach this issue. Frankly, the government is better equipped than this author to create the solution, but this Note will nevertheless suggest a potential system. One idea is to establish a minimum floor for all websites to comply with the ADA, and then above that, there is a sliding scale of required accessibility based on an easily measurable factor, like web traffic. The law could require every website falling under the ADA to fully comply with WCAG 2.0 A as an absolute floor. However, based on web traffic, a website might be required to be more accessible. That way, a local hardware store with only a handful of daily visits to the website does not have to pay thousands of dollars for a perfectly compliant WCAG 2.0 AA website. However, a huge company like Walmart, with millions of daily visitors to its website, would have to make the site extremely accessible. Furthermore, WCAG 2.0 AA should be ADA compliant as a matter of law. As discussed in Section II, there is already reason to believe that the Federal Government and the DOJ believe that WCAG 2.0 AA satisfies the ADA, given that the DOJ typically requires AA in consent decrees, and the federal government requires its websites to be AA

compliant.[98] Under this system, businesses could then know with certainty that if they achieve this high level of accessibility, they satisfy the ADA. It may be expensive, but they will be able to rest easy, knowing they are protected from liability.

This is just one possible solution that would provide some much needed clarity to businesses. The scale does not have to be based on web traffic; it could alternatively be based on number of employees, total revenue in the preceding year, or a combination of factors. The point is that businesses need some form of guidance to tell them how accessible they must be, and the government has a responsibility to provide that guidance.

C. Who Should Decide How the ADA Operates?

One final problem with interpreting the ADA is that no branch of government is willing to take responsibility for explaining it. Congress drafted the original legislation, but gave the DOJ authority to draft and enforce specific regulations. Nevertheless, Congress has refused requests to amend Title III to clarify the ADA's application to websites. Although the DOJ seriously considered drafting additional regulations for website accessibility, it ultimately gave up on that proposed rulemaking and has since neglected to give any meaningful guidance on the issue.[99] Meanwhile, the Supreme Court has rejected certiorari on cases that might have clarified some of these issues.[100] Thus, while each branch "punts" on these issues—whether it be because they actually think the current system is sufficient, or because they hope that another entity will handle fixing it—disabled plaintiffs are left in a state of uncertainty about their rights, while defendant businesses are left in a similar state of uncertainty about their duties and potential liability. Therefore, it is important to determine who is responsible for clarifying the various aspects of the ADA.

1. The Supreme Court

While the Supreme Court likely has a part to play in clarifying the ADA, the judicial branch is probably not the ultimate solution to these issues. A major disadvantage is that courts are often the least equipped to understand the technical aspects of these cases. It is no secret that judges are generally not the

98. *See e.g.*, *supra* Section II.C.1–2.

99. Nondiscrimination on the Basis of Disability: Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43,460 (proposed July 26, 2010) (to be codified at 28 C.F.R. pts. 35 & 36); Notice of Withdrawal of Four Previously Announced Rulemaking Actions, 82 Fed. Reg. 60,932 (proposed Dec. 26, 2017) (to be codified at 28 C.F.R. pts. 35 & 36).

100. *See e.g.*, Domino's Pizza, LLC v. Robles, 140 S. Ct. 122, 205 L. Ed. 2d 41 (2019), *cert. denied*.

most technologically savvy people.[101] This is entirely understandable; it can be difficult, within the confines of a courtroom, to fully appreciate the complexity of some of the technical concepts involved in issues like website accessibility. Unlike legislative or administrative action on this issue, which could benefit from many months of commissioned studies, hearings with industry experts, and meetings with competing lobbyists, the judiciary typically must decide issues based primarily on what has been presented in the courtroom. Thus, the technical complexities inherent to determining website accessibility might make the courts ill-suited to resolve some of the issues surrounding the ADA. However, even if the Supreme Court does not resolve the technical uncertainty of the ADA, it may be equipped to resolve the circuit split on the physical nexus requirement. That issue is largely a result of differences in statutory interpretation. Disputes like this over interpretation are entirely routine for the Supreme Court. Furthermore, if Congress or the DOJ chooses to enact standards that remain somewhat ambiguous, then the Court might be in a position to create a sort of balancing test to apply to hard cases. Thus, the Supreme Court likely will have a role to play in updating the ADA; however, the thrust of the change should come from the DOJ or Congress.

2. Department of Justice

The DOJ has been responsible for enforcing the ADA since its inception. As discussed in prior sections, the DOJ already sets specific regulations for physical accommodations. It seems like it would be fairly easy for the DOJ to declare minimum levels of accessibility for websites—whether measured by WCAG 2.0 or other standards. Furthermore, even if Congress were responsible for revising parts of the ADA, the DOJ would likely still be responsible for crafting the specific technical standards. The DOJ could create tables with specific standards based on web traffic, revenue, or any other factor. The DOJ already creates tables, diagrams, and other resources for a myriad of physical factors. Below is an example, albeit an oversimplified example, of how the DOJ could set much clearer technical standards for website compliance.

AVERAGE DAILY WEB TRAFFIC	REQUIRED ACCESSIBILITY (MEASURED BY WCAG 2.0)
0–99	Full A Compliance
100–999	50% AA Compliance
1,000–99,999	75% AA Compliance
100,000+	Full AA Compliance

101. John G. Browning, *Should Judges Have a Duty of Tech Competence?*, 10 ST. MARY J. LEGAL MALPRACTICE & ETHICS 176, 177–78 (2020).

3. Congress

Congress is clearly the best equipped to balance all of the relevant considerations that would go into updating the ADA. Acts of Congress typically have the benefit of lobbying, hearings, and open debate. There would be disability rights advocates lobbying and arguing for expansive protections; while business owners would be afforded the same opportunity to have their voices heard. Experts could speak and debate about the costs and benefits associated with varying standards of accessibility. Perhaps this puts too much faith in Congress, but this country's chief legislative body should certainly be the best equipped to fully flesh out how the ADA should apply in the twenty-first century. Furthermore, an act of Congress would have more democratic legitimacy than the DOJ or the judiciary deciding how the ADA should apply. Congress does not need to make every decision about how the ADA applies, but it likely needs to be the main impetus of any change. The two prior subsections describe how the courts and the DOJ likely will play a part in shaping the future of the ADA. Nevertheless, Congress is the best equipped to reshape this law and has a responsibility to do its job and legislate.

CONCLUSION

In conclusion, there is no excuse for the current lack of clear regulation surrounding the ADA. The federal government has a responsibility to act soon and set standards that give websites fair notice of what, with reasonable technical specificity, they must do to comply with Title III of the ADA. Ultimately, updating the ADA to be compatible with twenty-first century society will likely require participation from all three branches of the federal government. It may be complicated, but disabled individuals and businesses alike have a right to know what the ADA requires.

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