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Note

Virtual Spaces as Places of Public Accommodation: Has Technology Outpaced the Americans with Disabilities Act?

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Introduction

The year is 1990. Cheers is the number one show on television,[[2]](#footnote-2) the average price of retail gasoline is $1.15 per gallon,[[3]](#footnote-3) New Kids on the Block top the Billboard Hot 100 Charts,[[4]](#footnote-4) and the Internet is in its infancy with less than one percent of the world’s population online.[[5]](#footnote-5)

That summer, Congress passed the Americans with Disabilities Act (ADA) to eliminate discrimination against people with disabilities.[[6]](#footnote-6) In enacting the federal civil rights legislation, Congress found that—despite an estimated 43 million Americans having one or more disabilities—society tended to isolate them to such a degree that discrimination against the entire demographic had become pervasive.[[7]](#footnote-7) At the time of enactment, individuals with disabilities experienced discrimination in housing, education, employment, access to public accommodations, and other areas of daily life.[[8]](#footnote-8)

The ADA tasks state and local governments, employers, private businesses that are open to the public, public transportation providers, and telecommunications companies with adhering to standards that facilitate access and “assure equality of opportunity, full participation, independent living, and economic self-sufficiency” to people with disabilities.[[9]](#footnote-9) Comprised of four sections, each title of the Act focuses on a different area. Title I deals with discriminatory employment practices.[[10]](#footnote-10) Title II sets out requirements for state and local governments, prohibiting discrimination on the basis of disability by such entities.[[11]](#footnote-11) Title IV requires telecommunications service providers to ensure access to people with disabilities.[[12]](#footnote-12)

Title III of the ADA, the focus of this Note, prohibits discrimination against individuals with disabilities in the full and equal enjoyment of the goods, services, and other benefits of any place of public accommodation owned or operated by a private entity.[[13]](#footnote-13) Under this title, the term “public accommodation” is defined by an enumerated list of twelve categories with each one almost exclusively pointing to a physical location.[[14]](#footnote-14) This seemingly places virtual spaces, like websites and software applications, beyond the scope of the statute.

In the thirty years since 1990, the world has changed. The Internet––perhaps one of the most significant agents of that change––is now inextricably woven into daily American life.[[15]](#footnote-15) Today, cars can drive themselves or simply assist the driver with parallel parking through sensors and video cameras.[[16]](#footnote-16) Personal cell phones that function as miniature computers, cameras, word processors, calculators, GPS devices, and much more are consistently within reach of hundreds of millions of Americans. People can buy groceries, visit the doctor, attend a meeting, or learn a new skill from the comfort of their homes using the Internet and a mobile device. Social media connects billions of users across the world on platforms like TikTok, Facebook, and Instagram.[[17]](#footnote-17) Most recently, the COVID-19 pandemic brought many areas of daily life more prominently online.[[18]](#footnote-18) Businesses shifted to work-from-home models, schools turned to virtual learning, religious institutions congregated online, and large gatherings like conferences, concerts, and ceremonies were offered virtually.[[19]](#footnote-19)

Throughout this time, however, the enduring need to protect individuals with disabilities from discrimination that isolates them from society through barriers to access has not changed. Congress amended the ADA in 2008, and the Department of Justice (DOJ) has updated the rules regulating the Act multiple times.[[20]](#footnote-20) But words like “Internet” or “website” are nowhere to be found in the language of the statute or its corresponding regulations. Despite a broad mandate “to bring individuals with disabilities into the economic and social mainstream of American life,”[[21]](#footnote-21) both the statute’s text and a lack of formal standards contribute to a divide on whether the ADA applies to websites and mobile applications.[[22]](#footnote-22) Without congressional action or the promulgation of regulations that recognize websites as places of public accommodation, the ADA will either become a relic of the past surpassed by technology or a fountain of confusion and inconsistency.

This Note surveys the legal landscape surrounding Title III of the ADA by unfurling the Act’s broad-sweeping banner and its requirements for websites and software applications—or lack thereof—as it relates to accessibility for people with disabilities. Part I explores how the Attorney General, and in turn, the DOJ, has left a gap in regulations regarding web and mobile application accessibility under the ADA. Part II surveys the circuit split among and within the courts on the issue. Part III concludes by laying out how Congress has responded to the pressing need for website and software application accessibility amid the growing confusion on what role the ADA has in the matter, if any.

Part One – The DOJ Leaves a Gap in its Formal and Informal Action Regarding the ADA and Web Accessibility

Led by the Attorney General, the Department of Justice (DOJ) is one of the agencies tasked with, *inter alia*, enforcing and administering the ADA.[[23]](#footnote-23) As such, the DOJ takes legislative and non-legislative action related to carrying out the Act.[[24]](#footnote-24) The latter can entail the DOJ sharing guidance and other explanatory materials on its website.[[25]](#footnote-25) But this type of action, akin to interpretive rules or policy statements, does not receive the force of the law.[[26]](#footnote-26) On the other hand, as an administrative agency, the DOJ often takes legislative action by the notice and comment process and by publishing the proposed rules in the Federal Register.[[27]](#footnote-27) More specifically, the DOJ promulgates regulations setting out the rights and obligations under Title III of the ADA as codified in section 36 of the Code of Federal Regulations (C.F.R.).[[28]](#footnote-28)

Over the last decade, the DOJ has issued numerous rules updating and expanding its interpretation of the ADA. One such update was the development and adoption of the 2010 ADA Standards for Accessible Design (2010 Standards).[[29]](#footnote-29) On January 26, 1991, one year after the ADA was signed into law, the DOJ issued regulations implementing Title III of the Act that included the ADA Standards for Accessible Design (1991 Standards).[[30]](#footnote-30) The Architectural and Transportation Barriers Compliance Board (Access Board) is comprised of the heads of twelve federal departments and thirteen public members, appointed by the President, the majority of whom are required to be individuals with disabilities.[[31]](#footnote-31) Under the ADA, the Access Board is tasked with issuing guidelines to supplement the existing minimum requirements for Title II and Title III of the Act.[[32]](#footnote-32) On the same day that the 1991 Standards were released, the Access Board published the Americans with Disabilities Act Accessibility Guidelines (1991 ADAAG).[[33]](#footnote-33) At the time, the ADA required places of public accommodation and commercial facilities to comply with the 1991 Standards, which the DOJ had based upon the 1991 ADAAG.[[34]](#footnote-34) In 2004, the Access Board released the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities; Architectural Barriers Act Accessibility Guidelines (2004 ADA/ABA Guidelines).[[35]](#footnote-35) These guidelines were the result of a decade-long effort to update the 1991 ADAAG by improving its usability, reconciling differences between the guidelines and national standards, and ensuring that the requirements continued to meet the needs of people with disabilities.[[36]](#footnote-36) Among the extensive revisions, the 2004 ADA/ABA Guidelines included updated technical specifications for building structures and facilities, descriptions of the scope of the guidelines’ application to requirements across facility types, and revised definitions.[[37]](#footnote-37)

Essentially, the 2010 Standards for Title III are made up of a provision of the C.F.R. and the 2004 ADA/ABA Guidelines.[[38]](#footnote-38) Through its 2010 regulation, the DOJ codified its 2010 Standards. The standards officially adopted ADA Chapters 1 and 2 and Chapters 3-10 of the Access Board’s 2004 ADA/ABA Guidelines, as well as all of the amendments to the 1991 ADAAG since 1998.[[39]](#footnote-39) The 2010 Standards also revised numerous defined terms, including “place of public accommodation,” to which the DOJ added a revised sub-category: place of lodging.[[40]](#footnote-40) While the rule was being developed, the DOJ published an advance notice of proposed rulemaking as well as a notice of proposed rulemaking and held a public hearing, during which time the DOJ received over 5,000 comments that it considered in issuing the final rule.[[41]](#footnote-41) Among them, commenters expressed disappointment that the proposed rule did not include requirements for covered entities to make their websites accessible to people with disabilities.[[42]](#footnote-42) In response, the DOJ stated that “[a]lthough the language of the ADA does not explicitly mention the Internet, the Department has taken the position that title III covers access to Web sites of public accommodations.”[[43]](#footnote-43) Notwithstanding this proclamation, the agency declined to issue proposed regulations on the matter, stating that it expected to engage in rulemaking regarding website accessibility in the near future.[[44]](#footnote-44)

In 2012, the DOJ issued a regulation that extended the date by which recreational facilities with existing pools and spas had to comply with certain sections of the 2010 ADA Standards for Accessible Design.[[45]](#footnote-45) In 2016, it issued regulations requiring movie theaters to provide closed captioning and audio descriptions when showing digital movies. It also revised its interpretation and definition of the term “disability” in Titles II and III of the Act to reflect a broad construction of the term.[[46]](#footnote-46) Despite the updates and revisions of the last ten years, the DOJ has declined to promulgate rules that adopt standards or definitions that would clarify the ADA’s requirements for website and mobile application accessibility. Indeed, since its 2010 announcement that it would pursue rulemaking on the topic, the DOJ has not issued any regulations regarding web or mobile application accessibility. Ultimately, in 2017, the DOJ withdrew its plans to pursue rulemaking on the matter altogether.[[47]](#footnote-47) In doing so, the DOJ stated that it was evaluating whether promulgating rules on web accessibility and similar services was “necessary and appropriate to assist covered entities with complying with the ADA.”[[48]](#footnote-48)

Currently, the DOJ’s rules on Title III don’t regulate websites or mobile applications at all.[[49]](#footnote-49) Yet, the DOJ asserts that its stance on the ADA’s application to web accessibility is clear: “the ADA’s requirements apply to all [of] the goods, services, privileges, or activities [that a] public accommodation[] [offers], including those [that are] offered on the web.”[[50]](#footnote-50) In lieu of regulated standards and codified rules, the DOJ currently provides *Guidance on Web Accessibility and the ADA*, a digital resource of suggested ways that a covered entity might comply with the Act.[[51]](#footnote-51) The guide describes why web accessibility matters, common barriers to website accessibility, and examples of actions that the DOJ has taken to prioritize online accessibility for people with disabilities.[[52]](#footnote-52)

Another section of the guide purports to clarify when the ADA requires web content to be accessible.[[53]](#footnote-53) It suggests that public accommodations—otherwise known as businesses that are open to the public—are subject to Title III of the Act, such that the business’s goods, services, privileges, or other activities that are offered on the web are subject to the ADA’s requirements.[[54]](#footnote-54) But where the guide claims to clarify when the ADA applies, it leads to more questions than answers. The section seems to suggest that for a website to fall within the ambit of the ADA, it must be associated with public accommodation.[[55]](#footnote-55) In other words, it allows readers to infer that a website itself is not a public accommodation. Whether or not this is what the DOJ intended to express, the guidance leaves web-based companies that lack a physical presence, like Netflix, without much direction—regulated or otherwise. By failing to mention them at all, the guidance is similarly unclear as to mobile applications and where such an offering falls within the ADA requirements.[[56]](#footnote-56)

Though lacking regulated standards, the DOJ’s guidance includes suggested technical standards that businesses can use to ensure the accessibility of website features.[[57]](#footnote-57) First, it includes the Web Content Accessibility Guidelines (WCAG), a set of accessibility standards and technical specifications distributed by the World Wide Web Consortium (W3C).[[58]](#footnote-58)

W3C is an unincorporated organization led by CEO Dr. Jeffrey Jaffe and Director Tim Berners-Lee, the inventor of the World Wide Web.[[59]](#footnote-59) The consortium is administered by a joint agreement among its “Host Institutions” made up of the Massachusetts Institute of Technology, the European Consortium for Informatics and Mathematics, Keio University in Japan, and Beihang University in China.[[60]](#footnote-60) Together, W3C—along with its 465 member organizations and the public at large—collaborate to develop web standards, also known as “W3C Recommendations.”[[61]](#footnote-61) The WCAG, in its multiple iterations, is one such W3C Recommendation.[[62]](#footnote-62) Currently, there is WCAG 2.0, published in December 2008; WCAG 2.1, published in June 2018; and WCAG Draft 2.2, scheduled to be finalized in 2023.[[63]](#footnote-63) Even in its more informal guidance, the DOJ does not point to a particular iteration of the WCAG with which covered businesses should comply.[[64]](#footnote-64) W3C describes its standards as “backwards compatible” meaning that any content that conforms to WCAG 2.2 also satisfies 2.1 and 2.0.[[65]](#footnote-65) So, an entity can comply with WCAG 2.1 and simultaneously meet the standards set out in 2.0 without having to reference the latter.[[66]](#footnote-66) W3C states that the WCAG is intended for various groups, including those who want or need a standard for web or mobile accessibility.[[67]](#footnote-67)

WCAG standards are comprised of thirteen guidelines, except for WCAG 2.0, which only has twelve.[[68]](#footnote-68) These guidelines fall within four broad principles: perceivable, operable, understandable, and robust.[[69]](#footnote-69) The driving goal of the guidelines is to “ensure that content is directly accessible to as many people as possible, and capable of being re-presented in different forms to match different peoples’ sensory, physical and cognitive abilities.”[[70]](#footnote-70) These guidelines include recommendations and technical specifications for incorporating features such as using text alternatives for images and other non-text content, creating content that can be displayed in different ways that are compatible with assistive technologies, avoiding content that causes seizures or other physical reactions, making text readable, and maximizing compatibility with existing and future user tools for engaging content.[[71]](#footnote-71)

The varying WCAG standards provide entities with instructions on how to comply with any one of its available versions.[[72]](#footnote-72) For example, each guideline within every standard iteration has testable success criteria.[[73]](#footnote-73) These criteria are indicia of levels of conformance with the corresponding WCAG standard.[[74]](#footnote-74) Broken into three levels, the success criteria allow entities to conform to—that is, to satisfy—the requirements of a particular standard at level A, AA, or AAA.[[75]](#footnote-75) Level A conformance—the minimum level of conformance—indicates that the web page meets all of the Level A success criteria for the corresponding standard.[[76]](#footnote-76) Level AA conformance shows that the web page satisfies all of the Level A and Level AA success criteria for the operative standard.[[77]](#footnote-77) Similarly, Level AAA conformance signals that the web page satisfies all of the preceding levels as well as the Level AAA success criteria for the selected standard.[[78]](#footnote-78) In keeping with its lack of guidance as to which standard a covered business should conform to, the DOJ’s *Guidance on Web Accessibility and the ADA* also fails to describe what level of compliance a covered business should meet within its selected WCAG standard.[[79]](#footnote-79)

Next, the DOJ suggests that covered businesses can look to the standards set out in Section 508 of the Rehabilitation Act as another resource to help them ensure that their websites meet the ADA requirements.[[80]](#footnote-80) A precursor to the ADA, the Rehabilitation Act of 1973, protects qualified individuals from discrimination on the basis of their disability by prohibiting employers and organizations that receive federal funding from engaging in discriminating conduct or programming.[[81]](#footnote-81) The Rehabilitation Act also created the Access Board, with one of its responsibilities being promulgating rules that provide standards for Section 508 as codified at 29 U.S.C. § 794d.[[82]](#footnote-82) Section 508 requires federal departments and agencies to maintain their electronic and information technology in such a way that it is accessible to individuals with disabilities in a manner that is sufficiently comparable to individuals who do not have disabilities.[[83]](#footnote-83) The Access Board periodically distributes standards addressing information and communication technology by which covered entities must abide pursuant to Section 508.[[84]](#footnote-84)

The standards include criteria for ensuring that a covered entity’s information and communication technology is accessible to individuals with disabilities directly or through compatibility with assistive technology.[[85]](#footnote-85) Covering software as well as hardware, the standards require equipment like computers, telecommunication devices, printers, and kiosks to be accessible to people with physical, sensory, or cognitive disabilities.[[86]](#footnote-86) Section 508 Standards also require application, platform, electronic content, and user interface components to satisfy the Level A and Level AA success criteria and conformance requirements within WCAG 2.0.[[87]](#footnote-87)

Public accommodations that do not receive federal funding are not required to adhere to the 508 Standards or the WCAG standards. According to the DOJ, businesses get to choose how they will achieve accessibility in delivering their programs, goods, and services online.[[88]](#footnote-88) Indeed, in a 2018 response to a letter from 103 members of Congress requesting for the DOJ to provide more clarity and guidance to website accessibility standards under the ADA, the Assistant Attorney General stated that the DOJ’s position is that “the absence of a specific regulation does not serve as a basis for noncompliance with a statute’s requirements.”[[89]](#footnote-89) Instead, businesses have flexibility in how they choose to comply with the ADA’s general accessibility requirements.[[90]](#footnote-90) Ultimately, though, the Assistant Attorney General identified one of the problems with such flexibility when there are no required standards or guidelines: “noncompliance with a voluntary technical standard for website accessibility does not necessarily indicate noncompliance with the ADA.”[[91]](#footnote-91)

Part Two – Clear as Mud: The Split Among and Within the Circuits on Applying the ADA to Websites and Mobile Applications

To state a claim under Title III, a plaintiff must show that she has a disability within the meaning of the ADA; that the defendant owns, leases, or operates a place of public accommodation; and that the defendant discriminated against her by denying her the full and equal opportunity to enjoy the goods or services the defendant provides.[[92]](#footnote-92) To be sure, the ADA is a broad-sweeping statute with clear remedial goals.[[93]](#footnote-93) The Supreme Court has recognized that one of the Act’s most impressive strengths is its comprehensive nature, stating that the statute “‘should be construed liberally’ to afford people with disabilities ‘equal access’ to the wide variety of establishments available to the nondisabled.”[[94]](#footnote-94) For courts, the issue of whether the statute is broad-sweeping or comprehensive enough to extend its reach to the World Wide Web turns on an exercise in statutory construction.[[95]](#footnote-95)

Among the circuit courts that have addressed the issue of whether the ADA applies to websites and mobile applications—as well as *within* two circuits—there is a divide in the interpretation of what constitutes a “public accommodation.”[[96]](#footnote-96)

On one end of the spectrum, the First and Seventh Circuits have used a broad interpretation of the term to find that places of public accommodation are not limited to physical spaces and can include commercial websites that offer goods and services.[[97]](#footnote-97) Though the Fourth Circuit has not yet had occasion to address whether a website can be a place of public accommodation under the ADA, a district court in that circuit has held as such by embracing the First Circuit’s reasoning on the matter.[[98]](#footnote-98) Conversely, the Sixth, Ninth, and Eleventh Circuits are on the opposite end of the spectrum with a narrower interpretation that limits public accommodations to physical spaces.[[99]](#footnote-99) For these circuits, standalone websites that lack a sufficient nexus with, or fail to act as an intangible barrier to, the goods and services offered at a physical location—like eBay and Facebook—are not subject to the ADA’s accessibility requirements.[[100]](#footnote-100) Adding to this divide, district courts within the Second and Third Circuits have ruled on both ends of the spectrum, with some courts finding that commercial websites are places of public accommodation and still others restricting the term’s meaning to brick-and-mortar establishments.[[101]](#footnote-101)

*A. The Broad Interpretation: A commercial website, on its own, can be a place of public accommodation under the ADA*

In *Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler’s Ass’n of New England*,[[102]](#footnote-102) the First Circuit considered plaintiffs’ claim that a health benefit plan which they participated in engaged in illegal discrimination on the basis of a disability by instituting a lifetime cap on health benefits for individuals with AIDS.[[103]](#footnote-103) The plaintiffs brought an action under the ADA’s Title I and III.[[104]](#footnote-104) In 1994, when the court considered the Title III claim, the First Circuit encountered an issue of first impression: whether a place of “public accommodation” is limited to a physical structure.[[105]](#footnote-105)

The circuit’s analysis began with a review of the statutory text, in which it found ambiguity in the statute’s definition of “public accommodations.”[[106]](#footnote-106) Defined by an illustrative list of entity types, the court found that the plain meaning of listed terms like “travel service,” “shoe repair service,” “office of an accountant, or lawyer,” “insurance office,” “professional office of a healthcare provider,” and the catch-all phrase “other service establishments” did not require “public accommodations” to have physical structures.[[107]](#footnote-107) Specifically, the court concluded that by including the term “travel service”—a business that was often conducted over the phone at the time—Congress clearly anticipated that the statute would cover entities that do not require a physical structure to provide their service to the public.[[108]](#footnote-108)

Upon identifying an ambiguity in the statute, the court continued its analysis by engaging traditional tools of statutory construction. First, upon considering the statute’s text, the court noted that an interpretation contrary to its own would produce an absurd result.[[109]](#footnote-109) Reasoning that Congress could not have intended such an absurdity, the court stated that “[i]t would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not.”[[110]](#footnote-110) Next, the court looked at the legislative history of the ADA.[[111]](#footnote-111) Pointing to its remedial aim, it considered the Act’s purpose of addressing the major areas of discrimination that people with disabilities face on a day-to-day basis.[[112]](#footnote-112) In finding its interpretation consistent with the statute’s legislative history, the court quoted a committee report which noted that Title III’s purpose is “to bring individuals with disabilities into the economic and social mainstream of American life . . . in a clear, balanced, and reasonable manner.”[[113]](#footnote-113) Finally, in turning to the statute’s text as well as its corresponding agency regulations, the court determined that neither mentioned a physical boundary limitation.[[114]](#footnote-114) As such, the court held that a public accommodation is not limited to an actual physical structure under Title III of the ADA.[[115]](#footnote-115)

Since the First Circuit’s decision in *Carparts*, other courts have embraced—and in some cases expanded—the court’s reasoning. For example, a district court within the First Circuit stated that “*Carparts*’s reasoning applies with equal force to services purchased over the Internet, such as video programming” when it considered whether Netflix’s “Watch Instantly” website was a place of public accommodation under the ADA.[[116]](#footnote-116) There, the court applied *Carparts* and noted a textual distinction that the ADA covers the services “of” a public accommodation, not those “at” or “in” a public accommodation. Therefore, it found that Netflix’s website is a place of public accommodation under Title III.[[117]](#footnote-117) Though the Fourth Circuit has not yet addressed whether public accommodations can be websites within the meaning of the ADA, one of its district courts recently ruled in agreement with the *Carparts* court.[[118]](#footnote-118) In doing so, the district court also pointed to the inclusion of “travel service” in the enumerated list of examples for public accommodations to reason that Congress contemplated that goods and services could be delivered to the public without a physical establishment.[[119]](#footnote-119) It also agreed with the First Circuit that “the terms [used in § 1218([1])] do not require ‘public accommodations’ to have physical structures for persons to enter.”[[120]](#footnote-120) Rounding out its analysis with an application of the absurdity doctrine and a look at the statute’s legislative history, the court held that places of public accommodation are not limited to physical, brick-and-mortar establishments and can include commercial websites under the ADA.[[121]](#footnote-121) In the Seventh Circuit, with a nod to *Carparts*, the court stated that an “insurance company can no more refuse to sell a policy to a disabled person over the Internet than a furniture store can refuse to sell furniture to a disabled person who enters the store.”[[122]](#footnote-122) The court went on to say that the sale site is irrelevant to Congress’s goal of the ADA: giving people with disabilities equal access to sellers of goods and services.[[123]](#footnote-123) Rather, it simply mattered that “the good or service be offered to the public.”[[124]](#footnote-124)

*B. The Narrow Interpretation: A commercial website must have a sufficient nexus to a physical structure that is itself a public accommodation to sustain a claim under the ADA*

Circuits with a narrower interpretation of the ADA’s application to web-based services also turned to the statute’s text and familiar canons of construction in their analysis.[[125]](#footnote-125) In *Parker v. Metropolitan Life Ins. Co.*,[[126]](#footnote-126) the Sixth Circuit considered the plaintiff’s Title I and Title III claims against Metropolitan Life Insurance Company (MetLife).[[127]](#footnote-127) The plaintiff’s claim alleged that her employer-provided benefit plan from MetLife discriminated against her through a plan provision that only offered benefits for people who were “totally disabled due to a mental or nervous disorder” for twenty-four months, while those with physical disabilities received benefits until the age of sixty-five.[[128]](#footnote-128) First, the court looked to the statute’s text, noting the extensive list of private entities that Section 12181(7) provides as examples of public accommodations under Title III.[[129]](#footnote-129) The court concluded that the “clear connotation” of the list is that a public accommodation is a physical place.[[130]](#footnote-130)

In doing so, the court also acknowledged the First Circuit’s interpretation of the enumerated list—that the terms do not require public accommodations to be physical structures—but stated that the *Carparts* court disregarded the statutory canon of construction *noscitur a sociis*.[[131]](#footnote-131) That canon provides that a term “is known from its associates,” such that the meaning of a word should be interpreted within the context of the terms surrounding it.[[132]](#footnote-132) This, the court said, is to avoid granting “unintended breadth” to the statute.[[133]](#footnote-133) For the Sixth Circuit, it was significant that it considered every term listed in Section 12181(7) to be an actual physical place that is open to the public.[[134]](#footnote-134) Further, the court stated that terms like “travel service,” “shoe repair service,” and “professional office of a healthcare provider” do not suggest otherwise.[[135]](#footnote-135) As such, the court determined that interpreting a public accommodation to include anything other than a physical place “is to ignore the text of the statute and the principle of *noscitur a sociis*.”[[136]](#footnote-136)

In addition to finding that public accommodations must be physical spaces, the Sixth Circuit held that because the plaintiff did not get her policy from a MetLife insurance office but directly from her employer, there was no “nexus” between the allegedly discriminatory employee benefit plan and the goods and services that MetLife offered to the public from its physical office.[[137]](#footnote-137) Without this nexus to a physical establishment that constitutes a public accommodation, the alleged discrimination does not come under the purview of the ADA.[[138]](#footnote-138) Embracing the court’s reasoning in *Parker*, the Ninth Circuit also adopted the nexus approach in determining whether the ADA applies to web-based goods and services.[[139]](#footnote-139) For example, in *Earll v. eBay, Inc*.,[[140]](#footnote-140) it held that because eBay’s services were not connected to any physical location, the online auction and trading company was not subject to the ADA as a free-standing website.[[141]](#footnote-141) But, in *Robles v. Domino’s Pizza, LLC*,[[142]](#footnote-142) the court found that Domino’s website and mobile application facilitated customers’ access to the goods and services of the pizza chain’s physical restaurants, which are themselves places of public accommodation.[[143]](#footnote-143) Thus, the ADA’s accessibility requirements applied to the website and mobile application.[[144]](#footnote-144)

*C. A Split within Circuits: Courts within the Second and Third Circuits vary in interpreting the ADA broadly or narrowly*

Second Circuit jurisprudence regarding when the ADA applies to a website or mobile application is varied within the circuit, and in some cases, a single district court has ruled differently at different times on the matter.[[145]](#footnote-145)

In *Nat’l Fed’n of the Blind v. Scribd Inc*.,[[146]](#footnote-146) the district court considered whether Scribd—a digital library offering subscription services to members through its website and mobile applications—was a public accommodation under Title III.[[147]](#footnote-147) Turning first to the text, the court determined that the meaning of the term “place of public accommodation” is ambiguous, noting that “reasonable jurists have reached different conclusions about how far Title III extends . . . .”[[148]](#footnote-148) Looking to a Second Circuit case, *Pallozzi v. Allstate Life Ins. Co.*,[[149]](#footnote-149)the court highlighted the holding that an entity covered by Title III of the ADA is obligated to provide access to people with disabilities, as well as prohibited from refusing to sell its goods to such individuals because of their disabilities.[[150]](#footnote-150) The *Pallozzi* court also noted that the Sixth Circuit’s reasoning in *Parker* was not at odds with the Second Circuit’s findings, stating that the Sixth Circuit’s nexus requirement was obvious in *Pallozi* because it involved an insurance office.[[151]](#footnote-151)

The district court acknowledged that the Second Circuit had not yet considered a case in which the alleged discriminating party did not operate a physical space open to the public but still delivered goods and services to the public—like Scribd.[[152]](#footnote-152) But it reasoned that *Pallozzi*’s proscription against refusing to sell merchandise to a person on the basis of their disability could be extended to include an entity refusing to sell its goods and services on the Internet due to access barriers that have the same effect.[[153]](#footnote-153) Continuing its analysis, the district court engaged tools of statutory construction by considering the structure of the text, the inclusion of the term “travel service,” and the doctrine of absurdity to find that a reasonable interpretation of the term “public accommodation” neither requires a physical structure nor a connection to a physical threshold to merit relief under Title III.[[154]](#footnote-154) Finally, the court considered the Act’s legislative history by looking at the statute’s remedial goals, reviewing multiple committee reports, and giving weight to the DOJ’s position—in contexts other than the agency’s regulations—that the ADA applies to the Internet and web-based goods.[[155]](#footnote-155) In doing so, the court held that the plaintiffs sufficiently alleged that Scribd owns, leases, or operates a place of public accommodation.[[156]](#footnote-156)

The district court in *Andrews v. Blick Art Materials, LLC*[[157]](#footnote-157) adopted the *Scribd* interpretation of the statute’s structure and text: that the term public accommodation was not meant to be limited to a physical place.[[158]](#footnote-158) The *Andrews* court similarly interpreted the *Pallozzi* decision to stand for the proposition that the ADA was meant to guarantee people with disabilities more than mere physical access, noting that the Second Circuit “emphasized that it is the sale of goods and services to the public, rather than how and where that sale is executed” that is critical to determining whether the ADA applies.[[159]](#footnote-159) Next, the district court surveyed the circuit split by contrasting the narrow interpretation of the Third, Sixth, Ninth, and the Eleventh Circuits with the broader interpretation of the First and Seventh Circuits.[[160]](#footnote-160) Closing out its analysis with an application of the absurdity doctrine and an exploration of the Act’s purpose, the court held that the plaintiff had successfully stated a claim under the ADA regarding Blick’s allegedly inaccessible website. To this end, the court said that:

Today, internet technology enables individuals to participate actively in their community and engage in commerce from the comfort and convenience of their home. It would be a cruel irony to adopt the interpretation of the ADA espoused by Blick, which would render the legislation intended to emancipate the disabled from the bonds of isolation and segregation obsolete when its objective is increasingly within reach.[[161]](#footnote-161)

Just four years later, though, the same district court—the Eastern District of New York—announced a much narrower interpretation of the ADA.[[162]](#footnote-162) In *Winegard v. Newsday LLC*,[[163]](#footnote-163) the court considered whether Newsday—a newspaper that is distributed in print and online without operating any physical retail stores—owns, leases, or operates a place of public accommodation.[[164]](#footnote-164) The plaintiff alleged that by failing to provide closed captioning on the videos provided on Newsday’s website—a place of public accommodation—the newspaper company violated Title III of the ADA.[[165]](#footnote-165) Acknowledging its departure from other district courts in the Second Circuit, the court started with the ADA’s text and history.[[166]](#footnote-166) Harkening to a century-long usage of the phrase “public accommodation” at common law, the court reasoned that the historical usage denoting a physical facility was consistent with the way in which the ADA defined the term.[[167]](#footnote-167) Listing the categories provided in Section 12181(7), the court concluded that forty-nine of the fifty examples provided were “indisputably” related to physical places.[[168]](#footnote-168) Noting the technology and methods of information distribution available at the time of drafting the ADA, such as catalogs and broadcast television, the court stated that Congress could have included such media by requiring braille catalogs and closed captioning.[[169]](#footnote-169) In declining to do so, the court reasoned that the drafters limited the ADA to its current language relating to physical spaces.[[170]](#footnote-170)

The court also looked at *Pallozzi*. For this district court, however, *Pallozzi* does not compel such a broad interpretation.[[171]](#footnote-171) The court stated that, at most, the Second Circuit case supports the conclusion that the ADA applies to a website when it offers the same goods and services as the business’s physical establishment.[[172]](#footnote-172) The court concluded that Newsday’s website—without any connection to a physical operation—was not a public accommodation. After all, the court noted, this was a matter to be resolved by Congress, which it did in 1990 upon restricting the ADA’s reach to “the operation of physical premises.”[[173]](#footnote-173)

The Third Circuit has not yet explicitly addressed whether the ADA applies to websites and mobile applications, standing alone or by its connection to a physical operation.[[174]](#footnote-174) As a result, the circuit has similarly unsettled case law with its district courts reaching opposing conclusions on the matter.[[175]](#footnote-175)

In *Ford v. Schering-Plough Corp*.,[[176]](#footnote-176) the Third Circuit considered whether an employee’s employer-sponsored benefit plan through MetLife violated the ADA through a disparity in disability benefits between mental and physical disabilities.[[177]](#footnote-177) Presented with strikingly similar facts as the Sixth Circuit’s *Parker* decision from the year before, the Third Circuit largely aligned with the former’s reasoning and interpretation of the ADA.[[178]](#footnote-178) As such, the Third Circuit concluded that because the plaintiff obtained her MetLife plan as a condition of her employment, the plan was not a public offering and therefore did not share the requisite nexus to a MetLife insurance office—the public accommodation in this case—that would bring the claim within the ambit of Title III.[[179]](#footnote-179) The court emphasized its finding, stating that “we do not find the term ‘public accommodation’ or theterms in 42 U.S.C. § 12181(7) to refer to non-physical access or even to be ambiguous as to their meaning.”[[180]](#footnote-180)

In *Peoples v. Discover Fin. Serv.’s, Inc.*,[[181]](#footnote-181) the defendant lodged a Title III claim against Discover Financial Services (Discover).[[182]](#footnote-182) The plaintiff alleged that the credit card company violated the ADA by failing to provide reasonable accommodations and adequate safeguards for visually impaired individuals after his fraud claims for thousands of dollars in an overpayment to a sex worker over a span of months were denied.[[183]](#footnote-183) The *Peoples* court noted the holding in *Ford*: that the term public accommodation is limited to physical establishments.[[184]](#footnote-184) Aligning with its precedent, the court declined to expand its interpretation of the term.[[185]](#footnote-185) As such, the court found that communication between the credit card processing terminal—that the sex worker used at her apartment—and Discover was not a public accommodation within the meaning of Title III. Agreeing with the district court’s observations below, the court highlighted that the defendant used his credit card at a third-party’s residence, and “[t]hough [DFS’s] credit services can be used by cardmembers at a merchant’s place of accommodation, DFS itself does not own, lease or operate those locations.”[[186]](#footnote-186) Without this, the court concluded that the alleged discrimination did not relate in any way to the equal enjoyment of the goods and services that Discover offers the public or the physical property that Discover owns and operates, thus failing as a Title III claim.

In *Gniewkowski v. Lettuce Entertain You Enter., Inc.*,[[187]](#footnote-187) a district court in the Third Circuit faced the issue of whether the ADA covers a company’s website as a place of public accommodation.[[188]](#footnote-188) There, the plaintiffs alleged that the defendant operated a website that featured accessibility barriers for visually impaired and blind users.[[189]](#footnote-189) While considering these facts, the court recognized that it was “bound by . . . precedent” with regard to expanding the meaning of “public accommodation” beyond physical places.[[190]](#footnote-190) As such, the court was bound to the nexus approach broached in the Third Circuit’s *Ford* and *Peoples* decisions, requiring a sufficient connection between the website and a physical location that was owned by the defendant.[[191]](#footnote-191) However, the court distinguished these facts from *Ford* and *Peoples* by noting that unlike the defendants who did not own, operate, or control the employers—the point where the discrimination took place—the defendant in *Gniewkowski* owned, operated, and controlled the disputed property: its website.[[192]](#footnote-192) Thus, the court skirted the issue of precedent in holding that the plaintiffs’ claim was legally cognizable under Title III through this distinction, thereby ushering non-physical spaces like websites that are owned or operated by the alleged discriminating defendant into the fold of Title III public accommodations.[[193]](#footnote-193)

Rejecting this line of reasoning, the court in *Mahoney v. Herr Foods Inc*.[[194]](#footnote-194) continued the Eastern District of Pennsylvania line of cases that have interpreted Third Circuit precedent to instruct that Title III public accommodations are limited to physical places.[[195]](#footnote-195) Thus, a business’s website on its own, with no nexus to the goods and services of a physical establishment, is not a public accommodation within the meaning of the ADA.[[196]](#footnote-196) In *Mahoney*, the court found that the plaintiff failed to state a claim under Title III by failing to allege a nexus between the defendant’s website and a physical place of public accommodation.[[197]](#footnote-197)

*D. A Split from the Nexus Approach: A website can be an intangible barrier, but it must prevent the claimant from enjoying the goods and services of an actual public accommodation*

In *Gil v. Winn-Dixie*,[[198]](#footnote-198) the Eleventh Circuit considered whether a grocery store’s website was a place of public accommodation under Title III.[[199]](#footnote-199) Finding that the statute’s language was “unambiguous and clear,” the court concluded that public accommodations are limited to physical places, thus foreclosing the proposition that a website could be a public accommodation.[[200]](#footnote-200)

The Eleventh Circuit looked to its decision in *Rendon v. Valleycrest Prod., Ltd.*[[201]](#footnote-201) There, it ruled that an allegation that the telephonic process a production company used to select contestants on the television show, *Who Wants To Be A Millionaire*, deprived individuals with disabilities of the opportunity to participate in the contestant-selection process was a viable claim under Title III.[[202]](#footnote-202) In *Gil*, the court noted that in *Rendon* it stated in dicta that “an intangible barrier may result as a consequence of a defendant entity’s failure to act, that is when it refuses to provide a reasonable auxiliary service that would permit the disabled to gain access to or use its goods and services,” thus violating Title III.[[203]](#footnote-203) According to the *Gil* court, to be an intangible barrier, the barrier must impede the Title III plaintiff’s ability to access and fully and equally enjoy “‘the goods, services, facilities, privileges, advantages, or accommodations’ of a place of public accommodation,” which must be a physical place.[[204]](#footnote-204) *Gil* seemed to settle the matter within the Eleventh Circuit for a short while. But by year’s end, the court vacated the opinion for mootness upon the expiration of the injunction that was in place while the case was pending on appeal.

Despite *Gil* no longer being the law, the Eleventh Circuit still has binding precedent that recognizes a website’s potential to violate the ADA by presenting as an intangible barrier to the goods and services offered by public accommodation, even if those goods and services are themselves intangible.[[205]](#footnote-205)

Part Three—Congress Introduces New Legislation Regarding Web and Mobile Application Accessibility Under the ADA

In 2008, Congress amended the ADA with the ADA Amendments Act of 2008.[[206]](#footnote-206) Congress partly acted in response to Supreme Court cases—and the resulting lower court jurisprudence—that narrowed the broad scope of protections the ADA intended to afford.[[207]](#footnote-207) However, none of the 2008 amendments addressed the uncertainty of whether the ADA applied to websites or mobile applications as public accommodations or by some other path, such as through a nexus or an intangible barrier. Most recently, however, Congress has proposed a variety of legislation on the issue of website and mobile application accessibility; these attempts have been met with varying levels of public acceptance.

*A. Online Accessibility Act: Twice introduced but never embraced*

Initially introduced to the U.S. House of Representatives by Congressmen Ted Budd and Lou Correa on October 1, 2020, the Online Accessibility Act was not received without critique.[[208]](#footnote-208) The National Disability Rights Network (NDRN) strongly opposed the bill in a letter it sent to the Congressmen just thirteen days after the legislation was introduced.[[209]](#footnote-209) The bill, which never made it out of committee, would have required a potential plaintiff to exhaust various levels of administrative remedies before she could assert a private right of action regarding entities with inaccessible websites.[[210]](#footnote-210) The NDRN took issue with what it categorized as an “ADA notification bill” that would strip people with disabilities of their immediate opportunity to enforce their rights for the “timely removal of the barrier that impedes access” already recognized by the ADA.[[211]](#footnote-211) An additional challenge to the proposed legislation was its mandate that websites comply with WCAG 2.0, a standard that critics considered outdated with the advent of WCAG 2.1 in 2018.[[212]](#footnote-212) Introduced to the U.S. House of Representatives again on February 18, 2021, the bill continued to require the exhaustion of administrative remedies, including a 90-day period in which a notified entity could remedy the complaint.[[213]](#footnote-213) After this period, the DOJ would have an additional 180-day period to investigate the complaint.[[214]](#footnote-214) It is only then that the plaintiff could pursue her complaint in court. The bill’s status continues to remain at “Introduced.”[[215]](#footnote-215)

*B. Websites and Software Applications Accessibility Act: A promising start*

Conversely, the Websites and Software Applications Accessibility Act—introduced to both the U.S. Senate and the House of Representatives on September 28, 2022—has already garnered more support from various national disability and civil rights advocacy groups than the preceding Online Accessibility Act.[[216]](#footnote-216) The bill recognizes the current circuit split and notes that “[s]ome courts have misconstrued the ADA, saying the ADA does not cover websites.”[[217]](#footnote-217) Among its various purposes, the proposed legislation sets out to affirm that the ADA requires websites and software applications that a covered entity uses to “communicate or interact with applicants, employees, participants, customers, or other members of the public” to be useable and accessible to people with disabilities, regardless of whether the entity has a physical location.[[218]](#footnote-218) The bill also clarifies the definition of “public accommodation” to include “a private entity described in paragraph (7) of section 301 of the ADA (42 U.S.C. 12181) who owns, operates, or utilizes a website or application for covered use.”[[219]](#footnote-219) Additionally, it calls for the Attorney General to issue a notice of proposed rulemaking regarding website and application accessibility by covered entities within twelve months of the legislation’s enactment date, with final rules to be distributed within twenty-four months of enactment.[[220]](#footnote-220) Importantly, while the bill provides certain administrative remedies, it does not require a claimant to exhaust such remedies, preserving the immediate opportunity for a private right of action in the appropriate state or federal court that the ADA already provides.[[221]](#footnote-221) The status of the bill, in both the House and the Senate, continues to remain as “Introduced.”[[222]](#footnote-222)

Conclusion

Without the means to access and navigate the web spaces and software applications that private entities maintain for public use, millions of people with disabilities would be shut out of this significant part of daily life. It is inconceivable that the ADA, in all of its breadth and resilience, would tolerate such a result, let alone require it. With a third of the U.S. population living with a disability, there are potentially millions of people who could go unprotected and without support as society becomes more integrated with the Internet and various software applications continue to emerge.[[223]](#footnote-223) The fact that barriers to access online and in applications continue to persist is evinced by the sharp increase in Title III litigation in recent years.[[224]](#footnote-224) For example, in 2013, more than 2,700 Title III lawsuits were filed.[[225]](#footnote-225) By 2021, that number more than quadrupled, with 11,452 Title III lawsuits filed.[[226]](#footnote-226) But even in litigation, with the current circuit split, the absence of a regulated national framework for website accessibility, and a statute that does not even use the words website or Internet, there is no predictability as to the relief a claimant can expect or when a business might be subject to litigation regarding web and software accessibility.

Indeed, with so much left unsaid by the DOJ’s regulations, the ADA’s goals are going unmet as it relates to web accessibility.[[227]](#footnote-227) Consequently, there is not a clear or uniform national mandate on when entities are covered by Title III, how covered entities should comply with the ADA, or what kind of relief protected individuals might receive—if any.

It is due, in part, to this lack of clarity that courts across the U.S. have produced the current split among and within the circuits.[[228]](#footnote-228) And though the Supreme Court has remained silent on the circuit split, in refusing to consider *Robles*,[[229]](#footnote-229) it is Congress—rather than the courts—that is in the best position to make a positive change.

With the introduction of the Websites and Software Applications Accessibility Act, Congress should continue to move this legislation forward so that its enactment can come to fruition. Already receiving the support of many of the organizations and groups who represent and advocate for the disability community, this legislation has the opportunity to further the ADA’s goal of welcoming people “with disabilities into the economic and social mainstream of American life . . . in a clear, balanced, and reasonable manner.”[[230]](#footnote-230) It is this type of definitive action—producing a clear and uniform national mandate for website and software application accessibility—that the disability community needs, and which it should be entitled to under the ADA, if the statute and its goals are to withstand the test of time.

1. \* Juris Doctor Candidate, Oklahoma City University School of Law, May 2023. With deep gratitude, this Note is dedicated to my family and friends, without whom law school would not have been possible. I would especially like to thank Professor Marc Blitz for his kind guidance, expertise, and encouragement as the supervising professor for this work. Additionally, I thank Ziggie, JoEtta, and the Yamps for their daily support and love that particularly carried me through the development of this Note. Finally, thank you to the members of the Oklahoma City University Law Review for their diligent work in producing this publication. [↑](#footnote-ref-1)
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97. . *See* Carparts Distrib. Ctr., 37 F.3d at 19; Morgan v. Joint Admin. Bd., Ret. Plan of Pillsbury Co. & Am. Fed’n of Grain Millers, AFL-CIO-CLC, 268 F.3d 456, 459 (7th Cir. 2001). [↑](#footnote-ref-97)
98. . Mejico v. Alba Web Designs, LLC, 515 F. Supp. 3d 424, 435 (W.D. Va. 2021). [↑](#footnote-ref-98)
99. . *See* Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1014 (6th Cir. 1997); Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114 (9th Cir. 2000); Ariza v. Walters & Mason Retail, Inc., No. 20-CV-25047, 2021 WL 354187 (S.D. Fla. Feb. 1, 2021). [↑](#footnote-ref-99)
100. . *See* Earll v. eBay, Inc., 599 F. App’x 695, 696 (9th Cir. 2015); Haynes v. Dunkin’ Donuts LLC, 741 F. App’x 752, 754 (11th Cir. 2018); *Parker*, 121 F.3d at 1014. [↑](#footnote-ref-100)
101. . *See Murphy*, No. 1:19-CV-00239, 2020 WL 6731130 at \*8; *Romero*, 580 F. Supp. 3d at 18. [↑](#footnote-ref-101)
102. . Carparts Distrib. Ctr., Inc., 37 F.3d 12 (1st Cir. 1994). [↑](#footnote-ref-102)
103. . *Id.* at 14-15. [↑](#footnote-ref-103)
104. . *Id.* at 15. [↑](#footnote-ref-104)
105. . *Id.* at 19. [↑](#footnote-ref-105)
106. . *Id.* [↑](#footnote-ref-106)
107. . *Id.* [↑](#footnote-ref-107)
108. . *Id.* [↑](#footnote-ref-108)
109. . *Id.* [↑](#footnote-ref-109)
110. . *Id.* [↑](#footnote-ref-110)
111. . *Id.* [↑](#footnote-ref-111)
112. . *Id.* [↑](#footnote-ref-112)
113. . *Id.* at 19. (quoting H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 99 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 382). [↑](#footnote-ref-113)
114. . *Id.* at 20. [↑](#footnote-ref-114)
115. . *Id.* at 19. [↑](#footnote-ref-115)
116. . Nat’l Ass’n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 200 (D. Mass. 2012). [↑](#footnote-ref-116)
117. . *Nat’l Ass’n of the Deaf*, 869 F. Supp. 2d at 200-202. [↑](#footnote-ref-117)
118. . *Mejico*, 515 F. Supp. 3d at 433. [↑](#footnote-ref-118)
119. . *Id.* at 434. [↑](#footnote-ref-119)
120. . *Id.* at 434 (quoting *Carparts*, 37 F.3d at 19). [↑](#footnote-ref-120)
121. . *Id.* at 434-35. [↑](#footnote-ref-121)
122. . *Morgan*, 268 F.3d at 459. [↑](#footnote-ref-122)
123. . *Id.* [↑](#footnote-ref-123)
124. . *Id.* [↑](#footnote-ref-124)
125. . *See* *Parker*, 121 F.3d at 1014; *Weyer*, 198 F.3d at 1114; Ford v. Schering-Plough Corp., 145 F.3d 601, 614 (3d Cir. 1998). [↑](#footnote-ref-125)
126. . *Parker*, 121 F.3d at 1006. [↑](#footnote-ref-126)
127. . *Id.* at 1008. [↑](#footnote-ref-127)
128. . *Id.* [↑](#footnote-ref-128)
129. . *Id.* at 1010. [↑](#footnote-ref-129)
130. . *Id.* at 1014. [↑](#footnote-ref-130)
131. . *Parker*, 121 F.3d at 1013-14. [↑](#footnote-ref-131)
132. . William N. Eskridge Jr. et al., Cases and Materials on Legislation and Regulation Statutes and the Creation of Public Policy 595-96 (6th ed. 2020). [↑](#footnote-ref-132)
133. . *Parker*, 121 F.3d at 1014. [↑](#footnote-ref-133)
134. . *Id.* [↑](#footnote-ref-134)
135. . *Id.* [↑](#footnote-ref-135)
136. . *Id.* [↑](#footnote-ref-136)
137. . *Id.* at 1011. [↑](#footnote-ref-137)
138. . *Id.* at 1011, 1011 n.3. [↑](#footnote-ref-138)
139. . *See* *Earll*, 599 F. App’x at 696; Robles v. Domino’s Pizza, LLC, 913 F.3d 898 (9th Cir. 2019). [↑](#footnote-ref-139)
140. . *Earll*, 599 F. App’x 695. [↑](#footnote-ref-140)
141. . *Id.* at 696. [↑](#footnote-ref-141)
142. . *Robles*, 913 F.3d at 905. [↑](#footnote-ref-142)
143. . *Id.* at 905-06. [↑](#footnote-ref-143)
144. . *Id.* [↑](#footnote-ref-144)
145. . *Romero*, 580 F. Supp. 3d at 18; *Cf.* *Andrews*, 268 F. Supp. 3d at 397 *with* Winegard v. Newsday LLC, 556 F. Supp. 3d 173, 179-80 (E.D.N.Y. 2021). [↑](#footnote-ref-145)
146. . Nat’l Fed’n of the Blind v. Scribd Inc., 97 F. Supp. 3d 565 (D. Vt. 2015). [↑](#footnote-ref-146)
147. . *Id.* at 567. [↑](#footnote-ref-147)
148. . *Id.* at 568. [↑](#footnote-ref-148)
149. . Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28 (2d Cir. 1999), opinion amended on denial of reh’g, 204 F.3d 392 (2d Cir. 2000). [↑](#footnote-ref-149)
150. . *Scribd*, 97 F. Supp. 3d at 570. [↑](#footnote-ref-150)
151. . *Id.* at 571. [↑](#footnote-ref-151)
152. . *Id.* [↑](#footnote-ref-152)
153. . *Id.* [↑](#footnote-ref-153)
154. . *Id.* at 572-73. [↑](#footnote-ref-154)
155. . *Id.* at 574. [↑](#footnote-ref-155)
156. . *Id.* at 576. [↑](#footnote-ref-156)
157. . *Andrews*, 268 F. Supp. 3d 381. [↑](#footnote-ref-157)
158. . *Id.* at 393-95. [↑](#footnote-ref-158)
159. . *Id.* at 392. [↑](#footnote-ref-159)
160. . *Id.* at 388-91. [↑](#footnote-ref-160)
161. . *Id.* at 398. [↑](#footnote-ref-161)
162. . *Winegard*, 556 F. Supp. 3d at 174, 180-82. [↑](#footnote-ref-162)
163. . *Winegard*, 556 F. Supp. 3d 173. [↑](#footnote-ref-163)
164. . *Id.* at 174-75. [↑](#footnote-ref-164)
165. . *Id.* [↑](#footnote-ref-165)
166. . *Id.* [↑](#footnote-ref-166)
167. . *Id.* at 176. [↑](#footnote-ref-167)
168. . *Id.* at 176-77. [↑](#footnote-ref-168)
169. . *Id.* at 177-78. [↑](#footnote-ref-169)
170. . *Id.* [↑](#footnote-ref-170)
171. . *Id.* at 180. [↑](#footnote-ref-171)
172. . *Id.* at 181-82. [↑](#footnote-ref-172)
173. . *Id.* at 183. [↑](#footnote-ref-173)
174. . *Murphy*, No. 1:19-CV-00239, 2020 WL 6731130, at \*7. [↑](#footnote-ref-174)
175. . *Id.* at \*8. [↑](#footnote-ref-175)
176. . *Ford*, 145 F.3d 601. [↑](#footnote-ref-176)
177. . *Id*. at 603. [↑](#footnote-ref-177)
178. . *Id*. at 613-14; *See also Parker*, 121 F.3d at 1008. [↑](#footnote-ref-178)
179. . *Ford*, 145 F.3d at 613. [↑](#footnote-ref-179)
180. . *Id*. at 614. [↑](#footnote-ref-180)
181. . Peoples v. Discover Fin. Serv.’s, Inc., 387 F. App’x 179 (3d Cir. 2010). [↑](#footnote-ref-181)
182. . *Id*. at 181. [↑](#footnote-ref-182)
183. . *Id*. at 181-82. [↑](#footnote-ref-183)
184. . *Id.* at 183. [↑](#footnote-ref-184)
185. . *Id.*  [↑](#footnote-ref-185)
186. . *Id.* at 184. [↑](#footnote-ref-186)
187. . Gniewkowski v. Lettuce Entertain You Enter., Inc., 251 F. Supp. 3d 908, 918 (W.D. Pa. 2017). [↑](#footnote-ref-187)
188. . *Id*. at 911-12. [↑](#footnote-ref-188)
189. . *Id*. at 911. [↑](#footnote-ref-189)
190. . *Id*. at 917. [↑](#footnote-ref-190)
191. . *Id*. [↑](#footnote-ref-191)
192. . *Id*. at 918. [↑](#footnote-ref-192)
193. . *Id*. [↑](#footnote-ref-193)
194. . Mahoney v. Herr Foods Inc., No. 19-CV-5759, 2020 WL 1979153 (E.D. Pa. Apr. 24, 2020). [↑](#footnote-ref-194)
195. . *Id.* at \*3. [↑](#footnote-ref-195)
196. . *Id*. [↑](#footnote-ref-196)
197. . *Id.* at \*3-4. [↑](#footnote-ref-197)
198. . Gil v. Winn-Dixie Stores, Inc., 993 F.3d 1266, 1270 (11th Cir. 2021), opinion vacated on reh’g, 21 F.4th 775 (11th Cir. 2021). [↑](#footnote-ref-198)
199. . *Id*. at 1274. [↑](#footnote-ref-199)
200. . *Id*. 1276-77. [↑](#footnote-ref-200)
201. . Rendon v. Valleycrest Prods., Ltd., 294 F.3d 1279 (11th Cir. 2002). Gil, 993 F.3d at 1272. [↑](#footnote-ref-201)
202. . *Rendon*, 294 F.3d at 1286. [↑](#footnote-ref-202)
203. . *Gil*, 993 F.3d at 1278 (quoting *Rendon*, 294 F.3d at 1283 n.7). [↑](#footnote-ref-203)
204. . *Id*. at 1280. [↑](#footnote-ref-204)
205. . *See* *Haynes*, 741 F. App’x 752, 754 (11th Cir. 2018); Lucius v. ILOV305 I, LLC, No. 22-CV-20533, 2022 WL 4634115, at \*3-4 (S.D. Fla. Sept. 7, 2022). [↑](#footnote-ref-205)
206. . 42 U.S.C. § 12101. [↑](#footnote-ref-206)
207. . *Id*. [↑](#footnote-ref-207)
208. . H.R. 8478, 116th Cong. (2020); Letter from Curtis Decker, Exec. Dir. of the Nat’l Disability Rights Network to Ted Budd and Lou Correa, Congressmen (Oct. 14, 2020) https://www.ndrn.org/wp-content/uploads/2020/10/Online-Accessibilty-Act-H.R.-8478-Opposition-Letter-.pdf. [↑](#footnote-ref-208)
209. . Letter from Curtis Decker, Exec. Dir. of the Nat’l Disability Rights Network to Ted Budd and Lou Correa, Congressmen (Oct. 14, 2020) https://www.ndrn.org/wp-content/uploads/2020/10/Online-Accessibilty-Act-H.R.-8478-Opposition-Letter-.pdf. [↑](#footnote-ref-209)
210. . Online Accessibility Act, H.R. 8478, 116th Congress (2d Sess. 2020). [↑](#footnote-ref-210)
211. . Letter from Curtis Decker, *supra* note 208. [↑](#footnote-ref-211)
212. . Gus Alexiou, *New Online Accessibility Act in Dire Need of a 2020 Approach to Website Policing*, Forbes (Oct. 28, 2020, 8:00 AM), https://www.forbes.com/sites/gusalexiou/2020/10/28/new-online-accessibility-act-in-dire-need-of-a-2020-approach-to-website-policing/?sh=1872559d669a. [↑](#footnote-ref-212)
213. . H.R. 1100, 117th Cong. (1st Sess. 2021). [↑](#footnote-ref-213)
214. *Id*. [↑](#footnote-ref-214)
215. . Actions Overview: H.R.1100 – 117th Congress (2021-2022), https://www.congress.gov/bill/117th-congress/house-bill/1100/actions. [↑](#footnote-ref-215)
216. . Press Release, American Council of the Blind, et al. (Sept. 29, 2022) https://acb.org/websites-software-applications-accessibility-act. Attributing support of the proposed bill to the following disability and civil rights organizations: Access Living, American Association of People with Disabilities, American Council of the Blind, American Foundation for the Blind, Association of Programs for Rural Independent Living, Bazelon Center for Mental Health Law, Blinded Veterans Association, CommunicationFIRST, Disability Rights Education and Defense Fund, Epilepsy Foundation of America, Hearing Loss Association of America, National Association of the Deaf, National Council on Independent Living, National Disability Institute, National Disability Rights Network, National Federation of the Blind, Paralyzed Veterans of America, Telecommunications for the Deaf and Hard of Hearing, Inc., The Arc, United Spinal Association, and Vietnam Veterans of America. [↑](#footnote-ref-216)
217. . S. 4998, 117th Cong. (2022); H.R. 9021, 117th Cong. (2d Sess. 2022). [↑](#footnote-ref-217)
218. . *Id*. [↑](#footnote-ref-218)
219. . *Id*. [↑](#footnote-ref-219)
220. . *Id*. [↑](#footnote-ref-220)
221. . *Id*. [↑](#footnote-ref-221)
222. . Actions Overview: H.R. 9021 – 117th Congress (2021-2022), https://www.congress.gov/bill/117th-congress/house-bill/9021/actions; Actions Overview: S. 4998 – 117th Congress (2021-2022, https://www.congress.gov/bill/117th-congress/senate-bill/4998/actions. [↑](#footnote-ref-222)
223. . *See* Shruti Rajkumar, *DOJ Fails to Report on Making Federal Websites Accessible to Disabled People*, NPR (June 30, 2022, 2:55 PM), https://www.npr.org/2022/06/30/1108737968/federal-websites-accessible-disabled. [↑](#footnote-ref-223)
224. . Matt Gonzales, *Record Number of Lawsuits Filed Over Accessibility for People with Disabilities*, SHRM (Mar. 23, 2022), https://www.shrm.org/resourcesandtools/hr-topics/behavioral-competencies/global-and-cultural-effectiveness/pages/record-number-of-lawsuits-filed-over-accessibility-for-people-with-disabilities.aspx. [↑](#footnote-ref-224)
225. . *Id.* [↑](#footnote-ref-225)
226. . *Id.*  [↑](#footnote-ref-226)
227. . Shruti Rajkumar, *supra* note 221. [↑](#footnote-ref-227)
228. . *See* *Scribd*, 97 F. Supp. 3d at 574-76 (noting that the DOJ’s regulations use language that limits its terms to physical places, but giving some deference to the agency’s more informal statements to the contrary in finding that a digital library operated online and via mobile applications was a place of public accommodation under the ADA); *Gil*, 993 F.3d at 1276, 1284, 1276 n.11 (citing the DOJ’s detailed explanation in its regulations limiting “public accommodation” to physical spaces and the court’s inability to rewrite the unambiguous statute in rejecting a grocery store’s website as a place of public accommodation). [↑](#footnote-ref-228)
229. . *Robles*, 140 S. Ct. 122 (2019). [↑](#footnote-ref-229)
230. . *Carparts Distrib. Ctr., Inc.*, 37 F.3d 12, 19 (1st Cir. 1994) (quoting H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 99 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 382). [↑](#footnote-ref-230)