

## NOTE

# What Does Web Accessibility Look Like Under the ADA?: The Need for Regulatory Guidance in an E-Commerce World

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### ABSTRACT

*Suing website owners for violations of public accommodations law has become one of the fastest rising areas of civil litigation in recent years. In 2018, the Eleventh Circuit held that Dunkin' Donuts' website was in violation of Title III of the Americans with Disabilities Act ("ADA"). The plaintiff sued the online retailer, claiming that because portions of the website were not accessible to screen-reading software for the vision impaired, it violated Title III. The Eleventh Circuit reasoned that the online store had a "nexus" to physical locations, which made the website a place of public accommodation under the ADA. Unlike the Eleventh, Sixth, and Ninth Circuits, however, the First and Seventh Circuits have not required the "nexus" rule, but rather have found that any online retailer engaged in interstate commerce is subject to Title III liability.*

*The minority circuits have it right—online e-commerce boutiques are taking over industries all over the world, and whether or not a nexus exists in a physical store should not be dispositive. This circuit split is the result of two failures: (1) failure of the ADA to define "places of public accommodation" in a digital world, and (2) failure of the Department of Justice to promulgate any guidance that would outline the obligations of covered entities under Title III. Without guidance about how much accessibility is enough, companies can attempt to anticipate accessibility standards based on hazy case law and non-governmental standards, or they can brace themselves to pay.*

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\* J.D., expected May 2021, The George Washington University Law School. Many thanks to the staff and senior editors of *The George Washington Law Review* for their diligent work in editing this Note.

TABLE OF CONTENTS

INTRODUCTION ..... 401

I. A BRIEF HISTORY OF TITLE III OF THE ADA’S PUBLIC ACCOMMODATIONS LAW AND DOJ GUIDANCE ..... 406

    A. *The ADA: Whether or Not Websites are “Places of Public Accommodation”* ..... 407

    B. *Options for Compliance Regulation: Harmonization of the WCAG 2.0 and Section 508 Standards*..... 409

II. RESULTING UNCERTAINTY: THE CIRCUIT SPLIT AND THE PROBLEM WITH THE PHYSICAL NEXUS REQUIREMENT ..... 413

    A. *Websites as Places of Public Accommodation: Majority View*..... 415

    B. *Websites as Places of Public Accommodation: Minority View*..... 416

    C. *Failures of the Circuit Majority View in Light of Modern Internet Trends* ..... 417

III. FURTHER UNCERTAINTY: VIOLATION OF THE DEFENDANT’S DUE PROCESS ..... 419

IV. POTENTIAL SOLUTIONS: EMPLOYMENT OF PRIMARY JURISDICTION DOCTRINE AND FINALLY, A FINAL RULE ..... 422

    A. *How the Primary Jurisdiction Doctrine Could Help* . 423

    B. *A Final Rule, Promulgated by DOJ*..... 425

CONCLUSION ..... 427

INTRODUCTION

On May 30, 2017, Florida resident Dennis Haynes filed a lawsuit in the U.S. District Court for the Southern District of Florida against Dunkin’ Donuts LLC, an international restaurant chain.<sup>1</sup> Mr. Haynes is visually impaired and requires Screen Reader Software (“SRS”) in order to use a computer.<sup>2</sup> The Complaint alleged that Dunkin’ Donuts violated Title III of the Americans with Disabilities Act (“ADA”) of 1990<sup>3</sup> because its website, [www.dunkindonuts.com](http://www.dunkindonuts.com), is a “place of public accommodation” under the statute, and was not fully accessible to Mr. Haynes through his SRS, a platform called “JAWS.”<sup>4</sup> Mr.

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1 Complaint at 1, Haynes v. Dunkin’ Donuts LLC, No. 0:17-cv-61072, 2018 WL 10087065 (S.D. Fla. Jan. 19, 2018), *rev’d and remanded*, 741 F. App’x 752 (11th Cir. 2018) (per curiam).

2 *Id.*

3 42 U.S.C. §§ 12101–12213.

4 Complaint, *supra* note 1, at 1–2, 6; 42 U.S.C. § 12182(a).

Haynes's lawsuit and others like it have become increasingly common in federal courts.<sup>5</sup>

Title III website accessibility lawsuits have been filed across the country,<sup>6</sup> and in 2018 more than 1,500 were filed in New York state alone.<sup>7</sup> Indeed, plaintiffs who sought Title III injunctive relief for alleged website accessibility violations have filed lawsuits against multiple businesses under the same cause of action, serving as testers of the Title III rights. Mr. Haynes, for example, who is one of these plaintiff testers,<sup>8</sup> has filed Title III website accessibility lawsuits against other restaurant chains,<sup>9</sup> delivery services,<sup>10</sup> retailers,<sup>11</sup> and at least one chain of grocery stores.<sup>12</sup> Other tester plaintiffs have filed high profile ADA Title III lawsuits<sup>13</sup> with massive frequency,<sup>14</sup> including one Texas

<sup>5</sup> Kristina M. Launey & Melissa Aristizabal, *Website Accessibility Lawsuit Filings Still Going Strong*, SEYFARTH: ADA TITLE III (Aug. 22, 2017), <https://www.adatitleiii.com/2017/08/website-accessibility-lawsuit-filings-still-going-strong/> [https://perma.cc/V34C-YW7K].

<sup>6</sup> Minh N. Vu & Susan Ryan, *2017 Website Accessibility Lawsuit Recap: A Tough Year for Businesses*, SEYFARTH: ADA TITLE III (Jan. 2, 2018), <https://www.adatitleiii.com/2018/01/2017-website-accessibility-lawsuit-recap-a-tough-year-for-businesses/> [https://perma.cc/8NR9-J6WN].

<sup>7</sup> Minh N. Vu, Kristina M. Launey & Susan Ryan, *Number of Federal Website Accessibility Lawsuits Nearly Triple, Exceeding 2250 in 2018*, SEYFARTH: ADA TITLE III (Jan. 31, 2019), <https://www.adatitleiii.com/2019/01/number-of-federal-website-accessibility-lawsuits-nearly-triple-exceeding-2250-in-2018/> [https://perma.cc/DMS4-ALWN].

<sup>8</sup> Complaint, *supra* note 1, at 2.

<sup>9</sup> See, e.g., *Haynes v. Hooters of Am., LLC*, 893 F.3d 781 (11th Cir. 2018); *Haynes v. Panda Express, Inc.*, No. 17-cv-61567, 2018 U.S. Dist. LEXIS 156685 (S.D. Fla. Sept. 13, 2018); *Haynes v. Outback Steakhouse of Fla., LLC*, No. 17-CV-60851, 2017 WL 4284487 (S.D. Fla. Aug. 17, 2017); *Haynes v. Domino's Pizza, LLC*, No. 17-61002-CIV, 2018 U.S. Dist. LEXIS 49517 (S.D. Fla. Mar. 23, 2018); *Haynes v. Pollo Operations, Inc.*, No. 17-cv-61003, 2018 WL 1523421 (S.D. Fla. Mar. 28, 2018); *Haynes v. Host Int'l, Inc.*, No. 17-cv-21259, 2017 U.S. Dist. LEXIS 198086 (S.D. Fla. Nov. 30, 2017).

<sup>10</sup> See, e.g., *Haynes v. UPS*, No. 17-62057-CIV, 2018 U.S. Dist. LEXIS 18518 (S.D. Fla. Feb. 2, 2018).

<sup>11</sup> See, e.g., *Haynes v. Kohl's Dep't Stores, Inc.*, 391 F. Supp. 3d 1128 (S.D. Fla. 2018); *Haynes v. Interbond Corp. of Am.*, No. 17-CIV-61074, 2017 WL 4863085 (S.D. Fla. Oct. 16, 2017); *Haynes v. Genesco, Inc.*, No. 17-cv-61641, 2018 U.S. Dist. LEXIS 5939 (S.D. Fla. Jan. 11, 2018).

<sup>12</sup> See *Haynes v. Trader Joe's Co.*, No. 18-60214-CIV, 2018 WL 10883768 (S.D. Fla. Apr. 19, 2018).

<sup>13</sup> See Gwen Moran, *Beyoncé Was Sued Over Her Website Violating the Americans with Disabilities Act. And You Could Be Too*, FORTUNE (Sep. 21, 2019, 7:00 AM), <https://fortune.com/2019/09/21/beyonce-lawsuit-website-ada-compliant/> [https://perma.cc/MVA4-4R9Q] (describing how American businesswoman, recording artist, and cultural icon Beyoncé Knowles's company, Parkwood Entertainment, was sued in early 2019 under Title III because her website, Beyonce.com, violated the accessibility demands of the ADA).

<sup>14</sup> See Minh N. Vu, *ADA Title III Litigation: A 2019 Review and Hot Trends for 2020*, SEYFARTH: ADA TITLE III (Jan. 6, 2020), <https://www.adatitleiii.com/2020/01/ada-title-iii-litigation-a-2019-review-and-hot-trends-for-2020/> [https://perma.cc/L7GG-BFUG] ("ADA Title III lawsuits flooded federal courts in 2019 and will likely continue to do so in 2020 . . .").

plaintiff who filed 385 lawsuits alleging noncompliance with the ADA.<sup>15</sup>

The frequency and volume of Title III lawsuits reflect a dire need for regulatory guidance. A closer look at the reasons why these lawsuits are being filed so often shows that website owners may not even be aware that they are “private entities” required to meet accessibility standards as a place of public accommodation.<sup>16</sup> Title III prohibits discrimination by covered entities “on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any public place of public accommodations,”<sup>17</sup> but does not include websites in its list of public accommodations.<sup>18</sup> Instead, the ADA only contemplates traditional places of business like hotels, amusement parks, restaurants, art galleries, gyms, bowling alleys, and golf courses.<sup>19</sup> In the wake of litigation, courts have disagreed about whether certain websites should be considered places of public accommodation and why. Some courts, like the Eleventh Circuit in *Haynes v. Dunkin’ Donuts LLC*,<sup>20</sup> have agreed that websites are places of public accommodation because the plaintiff was able to show a nexus between the services he sought online and service he would seek in a store, while courts in other circuits have concluded that the nexus analysis is unnecessary.<sup>21</sup>

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15 Debra Cassens Weiss, *Lawyer Who Filed Hundreds of ADA Suits Barred from Practice in Texas Federal Court for Three Years*, ABA J. (July 13, 2017, 8:52 AM), [https://www.abajournal.com/news/article/texas\\_lawyer\\_who\\_filed\\_hundreds\\_of\\_ada\\_suits\\_is\\_temporarily\\_barred\\_from\\_pra#:~:text=for%20three%20years-](https://www.abajournal.com/news/article/texas_lawyer_who_filed_hundreds_of_ada_suits_is_temporarily_barred_from_pra#:~:text=for%20three%20years-) [<https://perma.cc/7MN3-QY8S>]; Greg Land, *State Bar to Ask Appeals Court to Revive Discipline Case Against Austin Lawyer*, TEX. LAW. (Feb. 11, 2019, 3:24 PM), <https://www.law.com/texaslawyer/2019/02/11/state-bar-to-ask-appeals-court-to-revive-discipline-case-against-austin-lawyer/> [<https://perma.cc/W724-HPMJ>].

16 42 U.S.C. § 12181(7).

17 *Id.* § 12182(a).

18 *Id.* § 12181(7).

19 *See id.* § 12181(7)(A)–(L).

20 741 F. App’x 752 (11th Cir. 2018) (per curiam).

21 Courts within the First, Second, and Seventh Circuits have held that websites are places of public accommodation notwithstanding any relationship to a brick-and-mortar location. *See, e.g., Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 393 (E.D.N.Y. 2017); *Morgan v. Joint Admin. Bd.*, 268 F.3d 456, 459 (7th Cir. 2001); *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999); *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New England*, 37 F.3d 12, 19 (1st Cir. 1994). On the other hand, the Third, Sixth, Ninth, and Eleventh Circuits have held that websites are only places of public accommodation if they have a nexus to the goods and services provided by a physical location. *See, e.g., Haynes*, 741 F. App’x at 754; *Peoples v. Discover Fin. Servs., Inc.*, 387 F. App’x 179, 183–184 (3d Cir. 2010); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1011 (6th Cir. 1997).

Even diligent website owners who take steps to comply with Title III may be unaware how to meet the law's requirements. Covered entities under the ADA lack proper guidance regarding compliance for their websites under Title III because the Department of Justice ("DOJ") has failed to articulate standards or guidelines for compliance. This lack of regulatory guidance has forced website owners to look to other sources of web accessibility rulemaking, such as those created by the World Wide Web Consortium ("W3C"), an independent, nongovernmental internet international standards organization staffed by members in academia, commerce, and government.<sup>22</sup> Some have also looked to the guidelines created by DOJ for federally owned websites, called the Section 508 Standards.<sup>23</sup> Despite a failed attempt by DOJ to do so, neither of these rules have been formally adopted, adapted, or harmonized to create a unified standard applicable to all websites.<sup>24</sup> In a world where e-commerce is expected to become the largest global retail channel by 2021,<sup>25</sup> and the market share of retail e-commerce sales in America has tripled in the past decade,<sup>26</sup> articulating clear guidelines for those who run websites is more important than ever to ensure equal opportunity web accessibility for people with disabilities. It is also necessary to prevent serious due process violations for website owners who are paying damages in web accessibility lawsuits despite a lack of clarity on what the law requires them to do.<sup>27</sup>

This Note seeks to articulate the necessary reforms by analyzing the physical nexus requirement under Title III of the ADA and the

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<sup>22</sup> See *Facts About W3C*, W3C, <https://www.w3.org/Consortium/facts> [<https://perma.cc/JF6T-BC37>].

<sup>23</sup> See generally *What is Section 508?*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/accessibility/what-section-508> [<https://perma.cc/T8S6-NCKS>] (summarizing the Section 508 Standards).

<sup>24</sup> See *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations*, 75 Fed. Reg. 43,460 (proposed July 26, 2010) (to be codified at 28 C.F.R. pts. 35, 36).

<sup>25</sup> Michelle Grant, *E-commerce Set for Global Domination—But at Different Speeds*, FORBES (Aug. 14, 2018, 10:24 A.M.), <https://www.forbes.com/sites/michellegrant/2018/08/14/e-commerce-set-for-global-domination/#75ea36babfaf> [<https://perma.cc/5SAV-5TUA>].

<sup>26</sup> See U.S. CENSUS BUREAU NEWS, U.S. DEP'T OF COM., QUARTERLY RETAIL E-COMMERCE SALES: 4TH QUARTER 2019, at 1 (2020), <https://www2.census.gov/retail/releases/historical/ecom/19q4.pdf> [<https://perma.cc/3KUK-KGHE>].

<sup>27</sup> See Letter from Stephen E. Boyd, Assistant Att'y Gen., to Congressman Ted Budd 1 (Sept. 25, 2018), <https://www.adatitleiii.com/wp-content/uploads/sites/121/2018/10/DOJ-letter-to-congress.pdf> [<https://perma.cc/KJE3-32SF>] (discussing the withdrawal of proposed rulemaking because "the Department is evaluating whether promulgating specific web accessibility standards through regulations is necessary").

potential due process concerns that will be triggered while Congress and DOJ remain supine. One solution to avoid due process concerns is for courts to exercise restraint under the primary jurisdiction doctrine instead of creating policy in the vacuum of DOJ regulatory guidance. The primary jurisdiction doctrine allows a court to stay or dismiss a party's claims in favor of a regulatory solution because the issue is a question within the agency's expertise, is particularly within the agency's discretion, and there is a substantial risk of inconsistent rulings among courts.<sup>28</sup> A better, more immediate solution would be for DOJ to promulgate standards based on the voluntary international guidelines for web accessibility created under the Web Accessibility Initiative ("WAI") by the W3C.<sup>29</sup> The W3C aggregates, updates, and publishes the internet's best practices guidelines for websites across the world, using the most modern and workable standards for website owners with an eye toward a "web for all."<sup>30</sup> DOJ-imposed standards following the W3C would provide clear guidance for covered entities and relieve courts from policymaking in a vacuum. It would also minimize the inconsistencies between courts that might leave defendants liable in one circuit and not in another.

Part I of this Note examines Title III of the ADA and the outgrowth of "places of public accommodation"<sup>31</sup> toward the internet landscape through a historical lens. Part II describes the current circuit split concerning the physical nexus requirement through the Eleventh Circuit's decision in *Haynes*, and the competing formulation by the minority circuits.<sup>32</sup> Part II also analyzes why, in the face of a future market entrenched in e-commerce, the brick-and-mortar nexus requirement is inadequate and contrary to the goals of the ADA. Part III analyzes the potential Fourteenth Amendment due process concerns for defendants in Title III cases and the steps Congress and DOJ have taken to provide agency guidance. Part III also briefly addresses how courts might use the primary jurisdiction doctrine to avoid creating further uncertainty in cases like *Haynes*.<sup>33</sup> Part IV argues that be-

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<sup>28</sup> See, e.g., *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 63–64 (1956); *Raritan Baykeeper v. NL Indus., Inc.*, 660 F.3d 686, 691 (3d Cir. 2011); *Town of New Windsor v. Avery Dennison Corp.*, No. 10-CV-8611, 2012 WL 677971, at \*9 (S.D.N.Y. Mar. 1, 2012).

<sup>29</sup> See *About W3C WAI*, W3C (Mar. 10, 2020), <https://www.w3.org/WAI/about/> [<https://perma.cc/K93Q-V4UH>].

<sup>30</sup> *W3C Mission*, W3C, <https://www.w3.org/Consortium/mission> [<https://perma.cc/65PM-3VA6>]; see *Facts About W3C*, *supra* note 22.

<sup>31</sup> 42 U.S.C. § 12181(7).

<sup>32</sup> See, e.g., *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 910–11 (9th Cir. 2019).

<sup>33</sup> For the purposes of this Note, the focus will be on suits from visually impaired plaintiffs suing for noncompliance with SRS software like JAWS, but plaintiffs with hearing impairment

yond avoiding due process issues through the primary jurisdiction doctrine, the best solution is for DOJ to promulgate a final rule that integrates the W3C standards because it would avoid the current due process and public accommodation concerns of litigants while also following the internet's best practices for web accessibility.

### I. A BRIEF HISTORY OF TITLE III OF THE ADA'S PUBLIC ACCOMMODATIONS LAW AND DOJ GUIDANCE

The ADA was signed into law by President George H.W. Bush on July 26, 1990 and broadened the scope of protections for disabled Americans not contemplated by the Civil Rights Act of 1964.<sup>34</sup> The ADA was a widely supported bipartisan legislation that passed the House by a vote of 403 to 20<sup>35</sup> and the Senate by a nearly unanimous vote of 76 to 8.<sup>36</sup>

But, even before the law was passed, Title III of the ADA garnered some concern. Title III specifically outlines twelve categories of public accommodations spanning from hotels to zoos.<sup>37</sup> These businesses are prohibited from discriminating against persons on the basis of disability and are required to provide “[g]oods, services, facilities, privileges, advantages, and accommodations . . . in the most integrated setting appropriate” to meet the needs of a disabled person.<sup>38</sup> Businesses in violation of Title III could face injunctive relief that would force compliance and civil penalties of up to \$50,000 for a first violation, and up to \$100,000 for each subsequent violation.<sup>39</sup> Senator Orrin Hatch disagreed with the imposition of costs on “the smallest of the small businesses” for “ramps and other changes” that would be required under Title III.<sup>40</sup> In response, he proposed an amendment

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have also brought suit. A hearing-impaired plaintiff sued three websites, including pornography website Pornhub.com, for lack of closed captioning available for video content. *See Minh N. Vu & Samuel Sverdlov, Deaf Man Demands Closed Captioning for Porn Videos in Federal Lawsuit*, SEYFARTH: ADA TITLE III (Jan. 21, 2020), <https://www.adatitleiii.com/2020/01/deaf-man-demands-closed-captioning-for-porn-videos-in-federal-lawsuit/> [<https://perma.cc/AT7A-644J>]. Other lawsuits stemming from Title III include those outside websites, like mobile apps. *See Vu, supra* note 14.

<sup>34</sup> *See George H. W. Bush Signs Americans With Disabilities Act into Law on This Day in 1990*, VOA NEWS (July 26, 2017, 7:07 AM), <https://www.voanews.com/science-health/george-h-w-bush-signs-americans-disabilities-act-law-day-1990> [<https://perma.cc/R799-Z2GK>]; *Introduction to the ADA*, ADA.GOV, [https://www.ada.gov/ada\\_intro.htm](https://www.ada.gov/ada_intro.htm) [<https://perma.cc/9D47-4PC4>].

<sup>35</sup> 136 CONG. REC. 11,466–67 (1990).

<sup>36</sup> 135 CONG. REC. 19,903 (1989).

<sup>37</sup> 42 U.S.C. § 12181(7).

<sup>38</sup> 42 U.S.C. § 12182(b)(1)(B).

<sup>39</sup> 42 U.S.C. § 12188(b)(2).

<sup>40</sup> 135 CONG. REC. 19,808 (1989) (statement of Sen. Orrin Hatch). Notably, no member of

that would allow small businesses to receive a tax credit for compliance.<sup>41</sup> After the ADA was passed in 1992, Staff Director of the ABA Commission on Mental and Physical Disability Law, John W. Parry, predicted that Title III would create “more conflicts in implementation than any other aspect of the ADA” because the divisions between private entities and persons with disabilities was pronounced, and “most private businesses and establishments are not accustomed to regulations that require them to change both their daily operations and their buildings and facilities.”<sup>42</sup>

In the years following the passing of the ADA, Director Parry’s concerns have proved true, particularly in the context of website accessibility under Title III. To better understand the trajectory of the current web accessibility debate, this Part discusses two major moments in the history of Title III interpretation. First, whether or not websites are contemplated as “places of public accommodation” under the ADA has been debated among politicians and DOJ for decades, including an attempt by DOJ to promulgate a final rule that would formally encompass websites under Title III.<sup>43</sup> Second, the Title III debate has centered around two distinct sources of potential guidance: (1) the W3C internet standards for web accessibility, and (2) the federal government’s existing Section 508 Standards for web accessibility.<sup>44</sup>

#### A. *The ADA: Whether or Not Websites are “Places of Public Accommodation”*

Title III prohibits discrimination on the basis of disability by places of public accommodation, commercial facilities, and private entities offering certain examinations and courses.<sup>45</sup> A “place of public

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Congress spoke the words “internet,” “website,” or “online” during the hearing, bolstering the critique that Congress failed to anticipate the role of the internet in commerce, and instead focused on discrimination based on disability that occurred in person or through personal interactions. See Jason P. Brown & Robert T. Quackenboss, *The Muddy Waters of ADA Website Compliance May Become Less Murky in 2019*, HUNTON ANDREWS KURTH: HUNTON EMP. & LAB. PERSPS. (Jan. 3, 2019), [https://www.huntonlaborblog.com/2019/01/articles/public-accommodations/muddy-waters-ada-website-compliance-may-become-less-murky-2019/#\\_ftn1](https://www.huntonlaborblog.com/2019/01/articles/public-accommodations/muddy-waters-ada-website-compliance-may-become-less-murky-2019/#_ftn1) [<https://perma.cc/FH5C-KY5E>].

<sup>41</sup> 135 CONG. REC. 19,808 (1989) (statement of Sen. Orrin Hatch).

<sup>42</sup> John W. Parry, *Public Accommodations Under the American with Disabilities Act: Non-discrimination on the Basis of Disability*, 16 MENTAL & PHYSICAL DISABILITY L. REP. 92, 92 (1992).

<sup>43</sup> See *infra* Part I.A.

<sup>44</sup> See *infra* Part I.B.

<sup>45</sup> 42 U.S.C. §§ 12181–12182, 12189.



accommodation” is privately owned, leased, or operated, and affects commerce.<sup>46</sup> Private entities liable under Title III must fall under one of the twelve categories of places, including establishments serving food and drink, sales or rental establishments, and service establishments.<sup>47</sup> Title III also specifies the U.S. Attorney General’s role in enforcing violations of the law, establishing DOJ as the source for agency guidance on compliance.<sup>48</sup>

Potential ADA-compliance issues regarding websites surfaced in the early 2000s with a DOJ report for President Bill Clinton in April 2000 that provided information about accessible webpage design.<sup>49</sup> DOJ released a Guidance Document in June 2003 for state and federal government websites, which included a “Voluntary Action Plan for Accessible Websites,” but did not provide guidance for private entities under Title III.<sup>50</sup> Despite the lack of a formal rule for private entities, DOJ has informally affirmed the application of Title III to websites of public accommodations since a 1996 letter from Assistant Attorney General Deval Patrick to Senator Tom Harkin confirmed that “[c]overed entities that use the Internet for communications regarding their programs, goods, or services must be prepared to offer those communications through accessible means as well.”<sup>51</sup>

In 2010, DOJ published an Advance Notice of Proposed Rulemaking (“ANPRM”) that acknowledged the need for promulgation of accessibility standards to websites of covered entities under Title III.<sup>52</sup> The ANPRM included a discussion of the voluntary inter-

<sup>46</sup> See generally U.S. DEP’T OF JUST., C.R. DIV., ADA TITLE III TECHNICAL ASSISTANCE MANUAL COVERING PUBLIC ACCOMMODATIONS AND COMMERCIAL FACILITIES (1993), <https://www.ada.gov/taman3.html> [<https://perma.cc/2YEC-LW9G>] (explaining definition of “place of public accommodation” under Title III).

<sup>47</sup> *Id.* § III-1.2000.

<sup>48</sup> See 42 U.S.C. § 12188(b).

<sup>49</sup> See U.S. DEP’T OF JUST., C.R. DIV., DISABILITY RIGHTS SECTION, ACCESSIBILITY OF STATE AND LOCAL GOVERNMENT WEBSITES TO PEOPLE WITH DISABILITIES 3 (2003), [https://www.ada.gov/websites2\\_scrn.pdf](https://www.ada.gov/websites2_scrn.pdf) [<https://perma.cc/5CFN-WWPF>] (“The Department of Justice has information about accessible web page design in an April 2000 report to the President.”).

<sup>50</sup> See *id.*

<sup>51</sup> Letter from Deval L. Patrick, Assistant Att’y Gen., C.R. Div., U.S. Dep’t of Just., to Tom Harkin, U.S. Sen. (Sept. 9, 1996), <https://www.justice.gov/crt/foia/file/666366/download> [<https://perma.cc/EVY9-8BM4>]; see also Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43,460, 43,460 (proposed July 26, 2010) (to be codified at 28 C.F.R. pt. 35, 36) (announcing DOJ’s intent to revise “regulations implementing [T]itle III . . . to establish requirements for making the goods, services, facilities, privileges, accommodations, or advantages offered by public accommodations via the Internet, specifically at sites on the World Wide Web (Web), accessible to individuals with disabilities”).

<sup>52</sup> Nondiscrimination on the Basis of Disability, 75 Fed. Reg. at 43,463–64.

national guidelines for web accessibility created under the WAI by the W3C.<sup>53</sup> At the time, DOJ suggested that W3C's most recent Web Content Accessibility Guidelines ("WCAG 2.0")<sup>54</sup> and the federal government's Electronic and Information Technology Accessibility Standards ("Section 508 Standards")<sup>55</sup> might be "harmonize[d]" to create an applicable rule for Title III.<sup>56</sup>

Despite DOJ's efforts in 2010, the rulemaking process stalled, and the ANPRM was formally withdrawn in December 2017.<sup>57</sup> In the absence of a formal rule, the 1996 letter to Senator Harkin is the last direct recommendation from DOJ.<sup>58</sup> Covered entities are still left without any formal guidance regarding which types of websites should be prepared to offer accessibility, what level of accessibility satisfies the statute, or where website owners should turn as web technologies advance.

### *B. Options for Compliance Regulation: Harmonization of the WCAG 2.0 and Section 508 Standards*

In the 2010 ANPRM, DOJ pointed to two potential sources of guidance for a formal rule: (1) the W3C's WCAG 2.0, and (2) the Section 508 Standards.<sup>59</sup> As acknowledged by industry leaders and DOJ in the proposed rule, the W3C provides the most up-to-date series of recommendations for web accessibility.<sup>60</sup> W3C is an unincorporated industry working group that describes its mission as "lead[ing] the World Wide Web to its full potential by developing protocols and guidelines that ensure the long-term growth of the [w]eb."<sup>61</sup> These guidelines and protocols are developed by industry groups, manufac-

<sup>53</sup> *Id.*

<sup>54</sup> W3C, WEB CONTENT ACCESSIBILITY GUIDELINES (WCAG) 2.0 (2008) [hereinafter WCAG 2.0], <https://www.w3.org/TR/2008/REC-WCAG20-20081211/> [<https://perma.cc/C3M5-9BGE>].

<sup>55</sup> 36 C.F.R. pt. 1,194 (2019).

<sup>56</sup> Nondiscrimination on the Basis of Disability, 75 Fed. Reg. at 43,465.

<sup>57</sup> Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions, 82 Fed. Reg. 60,932, 60,932 (Dec. 26, 2017) (to be codified at 28 C.F.R. pt. 35, 36).

<sup>58</sup> See *supra* note 51 and accompanying text.

<sup>59</sup> See Nondiscrimination on the Basis of Disability, 75 Fed. Reg. at 43,465.

<sup>60</sup> *Id.*; see also *W3C Mission*, *supra* note 30 ("One of W3C's primary goals is to make the [ ] benefits [of the internet] available to all people, whatever their hardware, software, network infrastructure, native language, culture, geographical location, or physical or mental ability.").

<sup>61</sup> *W3C Mission*, *supra* note 30; *Facts About W3C*, *supra* note 22 ("W3C Members and invited experts from the public provide energy to the groups that write W3C's Web standards. . . . W3C does not have a typical organizational structure, nor is it incorporated.").

turers, and others,<sup>62</sup> with funding from member organizations including Amazon, Apple, Inc., AT&T, Facebook, the Library of Congress, and hundreds of other international businesses, educational institutions, and research entities.<sup>63</sup> Once members in working groups reach a consensus, W3C publishes a “recommendation” that is nonbinding, but serves as a goalpost for developers.<sup>64</sup> Since W3C’s inception, their “Web for All” mission statement has included greater accessibility measures for persons with disabilities.<sup>65</sup> The working group responsible for web accessibility guidelines works within the WAI and has recently been renamed the Accessibility Guidelines Working Group (“AC WG”).<sup>66</sup> Following the publication of the Web Content Accessibility Guidelines 1.0 (“WCAG 1.0”) in 1999,<sup>67</sup> the AC WG published the updated WCAG 2.0 in December 2008.<sup>68</sup> Most recently, in June 2018, the W3C published the Web Content Accessibility Guidelines 2.1 (“WCAG 2.1”) as its official recommendation.<sup>69</sup>

Both the WCAG 2.0 and WCAG 2.1 use “testable success criteria,” including certain “understanding requirement[s]” to determine the degree to which web pages may be conforming to the guidelines.<sup>70</sup> Websites may achieve three “levels of conformance,” and are graded as A, AA, or AAA level compliance, in order from least to most con-

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62 W3C, W3C PROCESS DOCUMENT § 1 (2020), <https://www.w3.org/2020/Process-20200915/> [<https://perma.cc/6FRX-F85R>] (“There are three types of Working Group participants: Member representatives, Invited Experts, and Team representatives. . . . Working Groups generally create specifications and guidelines that undergo cycles of revision and review as they advance to W3C Recommendation status.”).

63 *Current Members*, W3C (Oct. 24, 2020), <https://www.w3.org/Consortium/Member/List> [<https://perma.cc/NKW6-CQYR>].

64 *See* W3C, *supra* note 62, § 1; *All Standards and Drafts*, W3C, <https://www.w3.org/TR/?status=rec> [<https://perma.cc/5QUP-D4G6>].

65 *About W3C WAI*, *supra* note 29 (“The World Wide Web Consortium’s (W3C) commitment to lead the web to its full potential includes promoting a high degree of usability for people with disabilities. The Web Accessibility Initiative (WAI) is an initiative of the W3C.”); *W3C Mission*, *supra* note 30.

66 *Accessibility Guidelines Working Group*, W3C, <https://www.w3.org/WAI/GL/> [<https://perma.cc/6SWZ-ELM7>]; *About W3C WAI*, *supra* note 29 (noting that the WAI includes the Web Content Accessibility Guidelines Working Group, the original AC WG).

67 W3C, WEB CONTENT ACCESSIBILITY GUIDELINES 1.0 (1999) [hereinafter WCAG 1.0], <https://www.w3.org/TR/2008/REC-WCAG20-20081211/> [<https://perma.cc/C3M5-9BGE>].

68 WCAG 2.0, *supra* note 54.

69 W3C, WEB CONTENT ACCESSIBILITY GUIDELINES (WCAG) 2.1 (2018) [hereinafter WCAG 2.1], <https://www.w3.org/TR/2018/REC-WCAG21-20180605/> [<https://perma.cc/M6E8-XXDE>].

70 *Id.*; *Understanding Conformance*, W3C, <https://www.w3.org/WAI/WCAG21/Understanding/conformance> [<https://perma.cc/SW3Z-QE59>].

forming.<sup>71</sup> The grading is based on five requirements, including whether the whole webpage or only part conforms to the guidelines.<sup>72</sup> These five requirements, along with other informal guidance and WCAG 2.1 “Supporting Documents”<sup>73</sup> give website authors greater control over compliance because website owners can choose a level of compliance that fits with the company’s budget and provides the company with a realistic timeline to achieve web accessibility. Additionally, the rules outline exactly which standards a company must meet in order to avoid noncompliance.<sup>74</sup>

In comparison, section 508<sup>75</sup> of the Rehabilitation Act of 1973<sup>76</sup> sets standards for U.S. government agencies to create and use technology that would increase information and communication technology (“ICT”) for government employees and members of the public with disabilities.<sup>77</sup> Unlike W3C, the Section 508 Standards only apply to technology procured or developed by a government agency or department.<sup>78</sup> These standards apply to all electronic and information technology (“EIT”)<sup>79</sup> that may be found on government websites, internal web portals, software, internet or mobile applications, and even hardware applications like computer networks.<sup>80</sup> Despite the differences between the two potential standards, authors of the Section 508 Standards have already acknowledged the usefulness of the nongovernmental guidelines by incorporating WCAG 2.0 into the updated Section 508 Standards.<sup>81</sup> In early 2017, the U.S. Access Board published the “Section 508 Refresh” in the Federal Register, which updated section 508 with consideration for the new web landscape and

71 WCAG 2.1, *supra* note 69, § 0.2 (“[T]hree levels of conformance are defined: A (lowest), AA, and AAA (highest).”).

72 See *Understanding Conformance*, *supra* note 70.

73 WCAG 2.1, *supra* note 69, § 0.3.

74 See generally *id.* (detailing the conformance process).

75 29 U.S.C. § 794d.

76 29 U.S.C. §§ 701–797b.

77 36 C.F.R. pt. 1194 app. A E203.1 (2019); *accord* 29 U.S.C. § 794d.

78 *Id.* pt. 1194 app. A E101.1.

79 EIT is defined as “information technology and any equipment or interconnected system or subsystem of equipment, that is used in the creation, conversion, or duplication of data or information” and “includes, but is not limited to, telecommunications products (such as telephones), information kiosks and transaction machines, World Wide Web sites, multimedia, and office equipment such as copiers and fax machines.” *Id.* pt. 1194 app. D § D1194.4.

80 *Id.* pt. 1194 app. B C201.1, app. D § D1194.1.

81 See Information and Communication Technology (ICT) Standards and Guidelines, 82 Fed. Reg. 5,790, 5,791 (Jan. 18, 2017) (to be codified at 36 C.F.R. pts. 1193–1194) (“The Revised 508 Standards and 255 Guidelines incorporate by reference the Web Content Accessibility Guidelines (WCAG) 2.0, a globally-recognized and technologically-neutral set of accessibility guidelines for Web content.”).

modernized technologies by including reference to the WCAG 2.0 standards.<sup>82</sup> This incorporation of WCAG 2.0 into a formal government regulation, is harmonization by reference.<sup>83</sup> The 2018 Section 508 Refresh married W3C's conformance requirements with compliance for software, websites, and other applications for the federal government.<sup>84</sup> Because government websites, technologies, and software are required to follow guidelines that include the WCAG 2.0 by reference, this solution may also be useful for private covered entities under Title III.

But harmonization by reference is not without its challenges; differences between the two standards display important considerations for rule makers. A key difference between the WCAG guidelines and the section 508 requirements is the speed and manner in which implementation is enforced. Under section 508, federal agencies had one year to comply with the Section 508 Refresh requirements.<sup>85</sup> In contrast, WCAG 2.0, which is a nonbinding nongovernmental guidance document, acknowledges several threshold barriers to compliance including "which or how many assistive technologies must support a [w]eb technology in order for it to be classified as accessibility supported."<sup>86</sup> Another key difference between the WCAG guidelines and section 508 is the W3C's ability to respond quickly to inconsistencies in compliance requirements as they arise. For example, the question of which metric to use when measuring website compliance has created inconsistent results because multiple testing methodologies are accepted under the current standard.<sup>87</sup> In response, the W3C created a

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<sup>82</sup> *Id.* at 5,790; *Section 508 of the Rehabilitation Act*, LEVEL ACCESS, <https://www.levelaccess.com/accessibility-regulations/section-508-rehabilitation-act/> [<https://perma.cc/GX7G-7GF4>].

<sup>83</sup> See U.S. Gen. Servs. Admin., *Accessibility News: The Section 508 Update*, SECTION 508.GOV, <https://www.section508.gov/blog/accessibility-news-the-section-508-Update> [<https://perma.cc/GC23-MWFZ>].

<sup>84</sup> For example, the E205.4 Accessibility Standard requires that "[e]lectronic content shall conform to Level A and Level AA Success Criteria and Conformance Requirements in WCAG 2.0 . . . ." 36 C.F.R. pt. 1194 app. A E205.4; see also *id.* (detailing how the Section 508 Refresh aligns with WCAG 2.0).

<sup>85</sup> U.S. Gen. Servs. Admin., *Revised 508 Standards, Safe Harbor and FAR Update*, SECTION 508.GOV, <https://www.section508.gov/blog/Revised-508-Standards-Safe-Harbor-and-FAR-Update> [<https://perma.cc/2C7D-RSRN>].

<sup>86</sup> *Understanding Conformance*, *supra* note 70.

<sup>87</sup> For example, one testing methodology may fail a website if the text alternatives are too long, even though length is not a required conformance standard under the WCAG 2.1. Shadi Abou-Zahra, *Harmonized Accessibility Testing*, W3C (July 30, 2019), <https://www.w3.org/blog/2019/07/harmonized-accessibility-testing/> [<https://perma.cc/F9KM-SNQC>]. Another testing methodology might instead mark a long text alternative short of a failure, but rather a "warning because it is advisory good practice." *Id.* These conflicts create problems for websites trying to

task force that will harmonize these disparate results and create a set of guidelines to prevent inconsistency in the future.<sup>88</sup> The WCAG 2.0 would provide greater control for website authors because it accounts for realistic barriers to compliance, allows for levels of compliance if there are inconsistent testing requirements, and is responsive to changes in assistive technologies, like Mr. Haynes' screen reader software, JAWS.

DOJ's failed attempt to provide guidance through formal rulemaking has left covered entities without sufficient guidance in the event of litigation. Though the proposed rule suggested looking to the WCAG 2.0 or the Section 508 Standards for guidance in assessing Title III compliance for websites,<sup>89</sup> neither of these standards have been given full consideration or influence by the legislature or DOJ. The result is inconsistent application of the law depending on where the plaintiff brings suit.

## II. RESULTING UNCERTAINTY: THE CIRCUIT SPLIT AND THE PROBLEM WITH THE PHYSICAL NEXUS REQUIREMENT

The threshold question of whether a website is even contemplated under Title III of the ADA is the first source of disagreement among courts.<sup>90</sup> Varying formulations of whether, and most recently how, online retailers may be implicated in ADA lawsuits for the visually impaired has created further grey area for retailers attempting to reach full compliance. The First Circuit decided in a 1994 case, *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England*,<sup>91</sup> that "places of 'public accommodation'" under Title III of the ADA are not limited to actual physical structures.<sup>92</sup> The

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follow the WCAG because it leads to "conflicting results" and wasting time, which "reduces credibility and sheds negative light on accessibility overall." *Id.*

<sup>88</sup> W3C has embarked on an Accessibility Conformance Testing ("ACT") project, which created the ACT Rules Format 1.0. See W3C, ACCESSIBILITY CONFORMANCE TESTING (ACT) RULES FORMAT 1.0 (2019) [hereinafter ACT RULES FORMAT 1.0], <https://www.w3.org/TR/act-rules-format/> [<https://perma.cc/HHZ6-GSQ8>]. Although the format is not a formal publication like the WCAG 2.1, some of these rules may be published with the next update of the WCAG. See Abou-Zahra, *supra* note 87; *Accessibility Conformance Testing (ACT) Overview*, W3C (Oct. 31, 2019), <https://www.w3.org/WAI/standards-guidelines/act/> [<https://perma.cc/X6FQ-LTLA>]; ACT RULES FORMAT 1.0, *supra*.

<sup>89</sup> Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43,460, 43,465 (proposed July 26, 2010) (to be codified at 28 C.F.R. pts. 35–36).

<sup>90</sup> See, e.g., *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England*, 37 F.3d 12, 19 (1st Cir. 1994).

<sup>91</sup> 37 F.3d 12 (1st Cir. 1994).

<sup>92</sup> *Id.* at 19.

court in *Carparts* reasoned that, at worst, the meaning of public accommodation is ambiguous, and “considered together with agency regulations and public policy concerns” must not be limited to physical structures.<sup>93</sup> In 1999, the Seventh Circuit agreed that the definition of public accommodation extends to places “whether in physical space or in electronic space.”<sup>94</sup>

In contrast, the majority of circuits, including the Third, Fifth, Sixth, Ninth, and Eleventh Circuits, rejected the *Carparts* holding, declining to find that Title III places of public accommodation can be divorced from physical structures.<sup>95</sup> Relying on various dictionaries and the canon of *noscitur a sociis*—emphasizing meaning through associated context—the Fifth Circuit in *Magee v. Coca-Cola Refreshments USA, Inc.*<sup>96</sup> reasoned that vending machines could not be considered “sales establishments” because Title III, though not exhaustive, includes only “actual, physical places where goods or services are open to the public, and places where the public gets those goods or services.”<sup>97</sup> Though no courts today have held that websites are not places of public accommodation by virtue of being digital spaces, the disagreement among courts regarding the website’s connection to a physical structure has created a circuit split, with the majority finding that Title III only applies where there is a “sufficient nexus” to a brick-and-mortar covered entity.<sup>98</sup>

<sup>93</sup> *Id.*

<sup>94</sup> *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999); *see also Morgan v. Joint Admin. Bd.*, 268 F.3d 456, 459 (7th Cir. 2001) (reaffirming the Seventh Circuit’s holding that Title III is not limited to physical structures).

<sup>95</sup> *See, e.g., Haynes v. Dunkin’ Donuts LLC*, 741 F. App’x 752, 753–54 (11th Cir. 2018) (per curiam); *Magee v. Coca-Cola Refreshments USA, Inc.*, 833 F.3d 530, 534–35 (5th Cir. 2016) (holding that the ADA definition of public accommodation only includes actual physical spaces open to the public, and thus vending machines are not places of public accommodation); *Earll v. eBay, Inc.*, 599 F. App’x 695, 696 (9th Cir. 2015) (“We have previously interpreted the term ‘place of public accommodation’ to require ‘some connection between the good or service complained of and an actual physical place.’” (quoting *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000))); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612–14 (3d Cir. 1998) (rejecting the reasoning in *Carparts* and holding that “public accommodation” does not refer to nonphysical access); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1013–14 (6th Cir. 1997) (“The clear connotation of the words in § 12181(7) is that a public accommodation is a physical place.”); *see also Access Now, Inc. v. Blue Apron, LLC*, No. 17-cv-116, 2017 WL 5186354, at \*4 (D.N.H. Nov. 8, 2017) (“The Third, Fifth, Sixth, and Ninth Circuit Courts of Appeals have rejected, either expressly or by implication, the holding in *Carparts*.”).

<sup>96</sup> 833 F.3d 530, 534 (5th Cir. 2016).

<sup>97</sup> *Id.* at 534–35 (quoting *Weyer*, 198 F.3d at 1114).

<sup>98</sup> *See Brown & Quackenboss, supra* note 40.

### A. *Websites as Places of Public Accommodation: Majority View*

The majority circuits' requirement for a physical nexus under Title III reflects traditional notions of business by requiring a connection between services offered online and services and communications offered in a physical store location. The inquiry into whether websites should be considered places of public accommodation under Title III, like in *Haynes*, follows a series of cases about whether insurance companies might be considered places of public accommodation under the ADA. In *Weyer v. Twentieth Century Fox Film Corp.*,<sup>99</sup> the Ninth Circuit addressed whether an insurance company administering an employer-sponsored disability insurance could be considered a place of public accommodation under the meaning of Title III.<sup>100</sup> Following the Sixth Circuit's lead, the court declined to consider the insurance company a place of public accommodation because there was "no nexus between the disparity in benefits and the services which [the insurance company] offers."<sup>101</sup> In other words, the insurance company's service—to provide insurance—was unrelated to the services that were unavailable to the plaintiff policyholders as a result of that insurance.<sup>102</sup>

As cases involving website compliance began to appear with greater frequency, the "nexus" reasoning followed in those opinions. In *Haynes* the Eleventh Circuit reasoned that "the alleged inaccessibility of Dunkin' Donuts' website denies Haynes access to the services of the shops," thereby excluding from its analysis e-commerce retailers without physical locations or e-commerce websites that offer services and goods not offered in physical stores.<sup>103</sup> Specifically, the court found that because "Dunkin' Donuts' shops . . . are places of public accommodation" and "the website is a service that facilitates the use of Dunkin' Donuts' shops," Mr. Haynes and other visually impaired people were unable to discover "information about store locations and the ability to buy gift cards online."<sup>104</sup> The focus of the court's inquiry was on the goods and services Mr. Haynes should have access to in the store and should therefore also have access to on the website.<sup>105</sup> Relying on the language of the ADA, the court reasoned that

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<sup>99</sup> 198 F.3d 1104 (9th Cir. 2000).

<sup>100</sup> *Id.* at 1107.

<sup>101</sup> *Id.* at 1115 (quoting *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1011 (6th Cir. 1997)).

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

<sup>103</sup> *Haynes v. Dunkin' Donuts LLC*, 741 F. App'x 752, 754 (11th Cir. 2018) (per curiam).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*



this “nexus” requirement would prevent website retailers from treating blind people “differently than other individuals because of the absence of auxiliary aids and services.”<sup>106</sup>

### B. *Websites as Places of Public Accommodation: Minority View*

In contrast to the physical nexus requirement, the more flexible standard from *Carparts* emphasized that “[t]he site of the sale is irrelevant to Congress’s goal of granting the disabled equal access to sellers of goods and services. What matters is that the good or service be offered to the public.”<sup>107</sup> In *Morgan v. Joint Administration Board*,<sup>108</sup> the Seventh Circuit refused to apply the rule articulated by the majority of circuits and instead held,

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. The site of the sale is irrelevant to Congress’s goal of granting the disabled equal access to sellers of goods and services. What matters is that the good or service be offered to the public.<sup>109</sup>

Following the reasoning in *Carparts*, the court in *Morgan* rejected the need for a physical nexus requirement but denied relief to the plaintiff on different grounds.<sup>110</sup>

The majority opinion in *Haynes* tethers itself to the more traditional interpretation of Title III.<sup>111</sup> Remaining faithful to congressional intent at the time the ADA was passed, courts have attempted to reconcile the clear physical establishment standard with websites that associate with those physical locations.<sup>112</sup> Despite this, the physical nexus requirement burdens plaintiffs with disabilities to prove that the services and goods they seek on the website are also the types of

<sup>106</sup> *Id.* (quoting 42 U.S.C. § 12182(b)(2)(A)(iii)).

<sup>107</sup> *Morgan v. Joint Admin. Bd.*, 268 F.3d 456, 459 (7th Cir. 2001).

<sup>108</sup> 268 F.3d 456 (7th Cir. 2001).

<sup>109</sup> *Id.* at 459 (citations omitted).

<sup>110</sup> *Id.*

<sup>111</sup> The original, traditional interpretation of ADA Title III, as reflected in the transcript of the Congress that passed the law, never mentions “web” or “internet.” Instead, the discussion focused entirely on physical locations, physical barriers, and physical solutions for persons with disabilities. See *Senate Session*, at 2:06:50 (C-SPAN television broadcast Sept. 7, 1989), <https://www.c-span.org/video/?9050-1/senate-session&start=7641> [<https://perma.cc/J3SY-3P25>] (proposing tax credits for the ACA’s requirements for physical accommodations such as ramps and doorways).

<sup>112</sup> See, e.g., *Haynes v. Dunkin’ Donuts LLC*, 741 F. App’x 752, 754 (11th Cir. 2018) (per curiam).

services and goods they might be able to seek in a physical store. In contrast, the minority view would encompass all websites that participate in interstate commerce, regardless of whether or not they can be traced back to a physical store location. Because the minority view is a broader application of Title III, the burden to prove a physical nexus is alleviated for plaintiffs. The minority view is also better for defendants, even though more defendants would need to meet Title III compliance, because more consumers—including those with visual disabilities—would have access to their websites. Finally, the minority view is the better rule in light of consumer trends, which are consistently moving towards e-commerce over physical stores.<sup>113</sup>

### C. *Failures of the Circuit Majority View in Light of Modern Internet Trends*

The rule set forth by the Eleventh Circuit in *Haynes* fails to consider three important situations that would fail the physical nexus requirement but should be included in the Title III definition. First, the physical nexus requirement would not apply to e-commerce websites selling products online only. Though Amazon.com’s annual shopping holiday “Prime Day” is the third-largest shopping holiday in America, generating \$4 billion in a single day,<sup>114</sup> it might not have a sufficient nexus to a physical place of public accommodation. Second, the physical nexus requirement may not apply for services and goods only offered online, but not in store. Brick-and-mortar stores like women’s apparel retailer, Loft, has a number of “[o]nline [e]xclusives” that are only available for purchase via their website, loft.com.<sup>115</sup> Retailers in other industries also offer goods and products only available for purchase through a website or mobile application, even though the retailer has physical store fronts.<sup>116</sup> Third, websites that only provide

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<sup>113</sup> Fareeha Ali, *Holiday E-commerce 2018 Data Analysis in 10 Charts*, DIG. COM. 360 (Jan. 14, 2019), <https://www.digitalcommerce360.com/2019/01/14/holiday-season-e-commerce-analysis/> [<https://perma.cc/SJW5-HY6C>] (reporting that over sixty percent of consumers planned on conducting over fifty percent of holiday shopping completely online in 2018, evidencing that consumer trends are moving towards e-commerce over physical stores, and further noting that seventy-six percent of shoppers also planned to purchase more than a quarter of their gifts online in 2018, which increased from seventy-three percent in 2017).

<sup>114</sup> *Id.*

<sup>115</sup> *Online Exclusives*, LOFT, <https://www.loft.com/online-exclusives/cat540002> [<https://perma.cc/N9N3-CSRH>].

<sup>116</sup> *See, e.g., FAQs*, BURBERRY, <https://us.burberry.com/customer-service/faqs/what-does-online-exclusive-mean/> [<https://perma.cc/H6Y3-QJYQ>]; *Online Exclusives*, ZALES, <https://www.zales.com/collections/online-exclusives/c/0103030100> [<https://perma.cc/KRX8-VALE>].

information and do not offer goods or services, may also be excluded from the majority's definition of a place of public accommodation.

As litigation continues to swell for ADA Title III web compliance,<sup>117</sup> courts will be forced to reconcile these nontraditional forms of internet commerce. Whether the three forms of e-commerce mentioned above are contemplated by the *Haynes* standard will require a super-flexible interpretation of the nexus requirement. The better standard is the Seventh Circuit's approach, which treats any "site of [ ] sale,"<sup>118</sup> whether internet or physical, as equal under the definition of Title III. Solely e-commerce shops will face the same Title III requirements as brick-and-mortar stores, while webpages that do not offer goods, services, or access to goods and services are excluded. This standard also best aligns with congressional intent to protect those with disabilities from being treated "differently than other individuals because of the absence of auxiliary aids and services."<sup>119</sup> Although the *Haynes* standard has the same goal,<sup>120</sup> the nexus requirement undermines the ADA's potency in a world where disabled and visually impaired Americans encounter digital barriers just as frequently as they may encounter physical ones.

Furthermore, the Seventh Circuit's approach best reflects the federal government's regulatory position for the last twenty years: "Recognizing that structural barriers may prevent individuals with disabilities from accessing and fully engaging with websites, the DOJ has construed websites as 'places of public accommodation' under Title III of the ADA . . . ." <sup>121</sup> In 2002, DOJ's amicus brief in *Rendon v. Valleycrest Productions, Ltd.*<sup>122</sup> argued against the need for a brick-and-mortar facility to obtain coverage under Title III.<sup>123</sup> The plaintiffs in *Rendon* were unable to call in to the show "Who Wants To Be A Millionaire" because access to the phone quiz was not compliant with disability standards.<sup>124</sup> DOJ criticized the appellee studio's argument

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<sup>117</sup> Vu et al., *supra* note 7.

<sup>118</sup> Morgan v. Joint Admin. Bd., 268 F.3d 456, 459 (7th Cir. 2001).

<sup>119</sup> 42 U.S.C. § 12182(b)(2)(A)(iii).

<sup>120</sup> Haynes v. Dunkin' Donuts LLC, 741 F. App'x 752, 754 (11th Cir. 2018) (per curiam) ("The failure to make those services accessible to the blind can be said to exclude, deny, or otherwise treat blind people 'differently than other individuals because of the absence of auxiliary aids and services . . . ." (quoting 42 U.S.C. § 12182(b)(2)(A)(iii))).

<sup>121</sup> Access Now, Inc. v. Blue Apron, LLC, No. 17-cv-116, 2017 WL 5186354, at \*5 (D.N.H. Nov. 8, 2017).

<sup>122</sup> 294 F.3d 1279 (11th Cir. 2002).

<sup>123</sup> See Brief for the United States as Amicus Curiae in Support of Appellant at 4, *Rendon*, 294 F.3d 1279 (No. 01-11197).

<sup>124</sup> *Rendon*, 294 F.3d at 1280.

that the phone quiz, as an independent service, would not have a physical nexus to the studio because “[s]uch a view ignores the plain import and scope of [Title III].”<sup>125</sup> Though DOJ’s lack of formal guidance led to this circuit split in the first place, its position as articulated in the *Rendon* amicus brief best reflects the route that courts should take, considering policy, legislative purpose, and the internet’s ever-growing influence on the economy.

### III. FURTHER UNCERTAINTY: VIOLATION OF THE DEFENDANT’S DUE PROCESS

The lack of DOJ or legislative guidance on (1) which websites are places of public accommodation under Title III, and (2) how much accessibility is enough accessibility has already created inconsistent results in the courts. This inconsistency creates due process concerns for defendants who are ordered by courts to pay damages under Title III without any real notice of what the law is and how it applies to them. Defendants like Domino’s Pizza, Winn-Dixie Stores, and Blue Apron are among many that have faced Title III litigation and raised due process concerns resulting from the lack of guidance from DOJ on required internet standards.<sup>126</sup> In the absence of formally promulgated DOJ regulations or informal interpretive rules about how websites can achieve compliance with Title III, companies conducting business using websites are given insufficient notice about what constitutes a “minimally accessible website” and “who should make that determination in the first instance.”<sup>127</sup> Under due process principles, “laws which regulate persons or entities must give fair notice of conduct that is forbidden or required,”<sup>128</sup> and DOJ’s silence on whether, where, and how much accessibility constitutes sufficient Title III compliance presents a due process problem for private covered entities.<sup>129</sup>

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<sup>125</sup> Brief for the United States as Amicus Curiae in Support of Appellant, *supra* note 123, at 18.

<sup>126</sup> See generally *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898, 903 (9th Cir. 2019) (noting “Domino’s argument that applying the ADA to its website and app violated its due process rights because the Department of Justice (DOJ) had failed to provide helpful guidance”); *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340, 1349-50 (S.D. Fla. 2017) (suing Winn-Dixie for ADA violation on its website); *Access Now, Inc.*, 2017 WL 5186354, at \*2 (noting the company’s argument that “due process . . . mandate[s] dismissing or staying this action pending regulatory guidance from the Department of Justice (DOJ) on website accessibility for the blind and visually-impaired”).

<sup>127</sup> Defendant-Appellee’s Answering Brief at 20, *Robles*, 913 F.3d 898 (No. 17-55504).

<sup>128</sup> *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

<sup>129</sup> See Lauren Stuy, Comment, *No Regulations and Inconsistent Standards: How Website*

In *Access Now, Inc. v. Blue Apron, LLC*,<sup>130</sup> the U.S. District Court for the District of New Hampshire rejected defendant Blue Apron's due process arguments, reasoning that the language of the ADA itself provides sufficient notice to alleviate due process concerns.<sup>131</sup> Ironically, this conclusion by the District of New Hampshire follows its own admission that a majority of courts have disagreed with *Carparts* in determining whether websites should be considered places of public accommodation at all.<sup>132</sup> The district court also rejected Blue Apron's reliance on the Ninth Circuit's opinion in *United States v. AMC Entertainment, Inc.*,<sup>133</sup> which held that requiring a movie theater to retrofit its theaters for accessibility compliance was too ambiguous to satisfy due process.<sup>134</sup> The distinction between *AMC* and *Access Now*, according to the court, is that *AMC* was decided in the context of existing DOJ regulations, while the instant case concerned a lack thereof.<sup>135</sup>

In *Robles v. Domino's Pizza, LLC*,<sup>136</sup> the Ninth Circuit also rejected appellee Domino's Pizza's due process arguments.<sup>137</sup> The district court had granted Domino's motion to dismiss, observing that without DOJ regulations, it would violate "due process principles for it to adopt wholesale, non-binding guidelines promulgated by [a] non-governmental entity that were not intended to be formal regulations."<sup>138</sup> On appeal, the Ninth Circuit reversed, instead finding that "the Constitution only requires that Domino's receive fair notice of its legal duties, not a blueprint for compliance with its statutory obligations."<sup>139</sup> The court also noted the U.S. District Court for the Central District of California's opinion in *Reed v. CVS Pharmacy, Inc.*,<sup>140</sup> where the court considered that lack of guidance from DOJ might

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*Accessibility Lawsuits Under Title III Unduly Burden Private Businesses*, 69 CASE W. RESRV. L. REV. 1079, 1092–93 (2019).

<sup>130</sup> No. 17-cv-116, 2017 WL 5186354 (D.N.H. Nov. 8, 2017).

<sup>131</sup> *Id.* at \*5.

<sup>132</sup> *Id.* at \*4.

<sup>133</sup> 549 F.3d 760 (9th Cir. 2008).

<sup>134</sup> *Id.* at 768–70; *Access Now, Inc.*, 2017 WL 5186354, at \*7 (citing *AMC Ent., Inc.*, 549 F.3d at 768–70).

<sup>135</sup> *Id.*

<sup>136</sup> 913 F.3d 898 (9th Cir. 2019).

<sup>137</sup> *Id.* at 907.

<sup>138</sup> Defendant-Appellee's Answering Brief at 21, *Robles*, 913 F.3d 898 (No. 17-55504); see *Robles v. Dominos Pizza LLC*, No. CV 16-06599, 2017 WL 1330216, at \*6–8 (C.D. Cal. Mar. 20, 2017), *rev'd and remanded*, 913 F.3d 898.

<sup>139</sup> *Robles*, 913 F.3d at 908.

<sup>140</sup> No. CV 17-3877, 2017 WL 4457508 (C.D. Cal. Oct. 3, 2017).

actually be purposeful,<sup>141</sup> stating that “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 . . . because the ADA and its implementing regulations are intended to give public accommodations maximum flexibility . . . .”<sup>142</sup> Under this calculus, the court reasoned that the ambiguity from Title III and the lack of guidance from DOJ are a “feature, not a bug, and certainly not a violation of due process.”<sup>143</sup>

Fourteenth Amendment “[d]ue process requires that the government provide citizens and other actors with sufficient notice as to what behavior complies with the law. Liberty depends on no less.”<sup>144</sup> When faced with due process questions regarding Title III compliance for websites, the focus of courts has been to reject any claim that web authors and owners are entitled to a “blueprint” or “specific regulatory guidance” from DOJ.<sup>145</sup> These answers, however, only address whether website owners are entitled to a prescription for the means by which they will achieve compliance and do not directly address whether DOJ or ADA create a clear picture of what compliance might look like. As discussed above, courts have already announced inconsistent and conflicting obligations for covered entities. In New York, a district court held that even if a website owner is actively undergoing attempts to meet industry compliance standards, the owner’s efforts will not shield the owner from ADA Title III litigation.<sup>146</sup> In Florida, the district court in *Gil v. Winn-Dixie Stores, Inc.*<sup>147</sup> issued an injunction ordering compliance with the WCAG 2.0 without specify-

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<sup>141</sup> *Id.* at \*5.

<sup>142</sup> *Robles*, 913 F.3d at 908 (quoting *Reed*, 2017 WL 4457508, at \*5).

<sup>143</sup> *Id.* (quoting *Reed*, 2017 WL 4457508, at \*5).

<sup>144</sup> *United States v. AMC Ent., Inc.* 549 F.3d 760, 768 (9th Cir. 2008); *see also* *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (“[W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.”); *Forbes v. Napolitano*, 236 F.3d 1009, 1011 (9th Cir. 2000) (“The due process clause . . . guarantees individuals the right to fair notice of whether their conduct is prohibited by law.”); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) (“[A]gencies should provide regulated parties ‘fair warning of the conduct [a regulation] prohibits or requires.’” (quoting *Gates & Fox Co. v. Occupational Safety & Health Rev. Comm’n*, 790 F.2d 154, 156 (D.C. Cir. 1986) (second alteration in original))).

<sup>145</sup> *Robles*, 913 F.3d at 908, 909; *see* *Fortyune v. City of Lomita*, 766 F.3d 1098, 1105 (9th Cir. 2014).

<sup>146</sup> *See* *Markett v. Five Guys Enters. LLC*, No. 17-cv-788, 2017 WL 5054568, at \*3 (S.D.N.Y. July 21, 2017).

<sup>147</sup> 257 F. Supp. 3d 1340 (S.D. Fla. 2017).

ing which level of compliance or success criteria would satisfy legal obligations.<sup>148</sup>

Central to the due process problem is that there is no clear guidance for owners on which portions of the website must be accessible. This issue stems directly from the nexus requirement used by the majority of circuits.<sup>149</sup> In Florida, for example, a district court rejected a visually impaired plaintiff's claim because he was "unable to demonstrate that either Busch Gardens' or SeaWorld's online website prevents his access to 'a specific, physical, concrete space.'"<sup>150</sup> Cases in which the plaintiff's claim for accessibility does not relate to the goods or services offered in a physical location may not require compliance at all. In other cases, only those portions of the website that do relate to the goods and services offered at the physical establishment require compliance.

Under the current regulatory structure, the only concrete roadmap for covered entities to determine whether they are obligated to comply with Title III and with which standards they are bound to comply can only be resolved through litigation. Even then, competing outcomes and disparate reasoning puts covered entities and their websites in a precarious position. Because of the lack of regulatory guidance, defendants will continue to face noncompliance fines under Title III without "sufficient notice as to what behavior complies with the law."<sup>151</sup>

#### IV. POTENTIAL SOLUTIONS: EMPLOYMENT OF PRIMARY JURISDICTION DOCTRINE AND FINALLY, A FINAL RULE

Stemming from the lack of guidance from lawmakers and DOJ, the scope of covered entities' liability is being regulated by litigation rather than through guidance from the agency responsible for executing the ADA. The resulting compliance landscape is a dartboard, with covered entities attempting to hit the bullseye as the rules change from jurisdiction to jurisdiction. One immediate solution is for courts to employ the primary jurisdiction doctrine which would allow a court

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<sup>148</sup> *Id.* at 1349-50.

<sup>149</sup> See *supra* note 21 and accompanying text.

<sup>150</sup> *Kidwell v. Fla. Comm'n on Hum. Rels.*, No. 2:16-cv-403-FtM-99, 2017 WL 176897, at \*5 (M.D. Fla. Jan. 17, 2017) (quoting *Access Now, Inc. v. Sw. Airlines Co.*, 227 F. Supp. 2d 1312, 1321 (S.D. Fla. 2002)); see also *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 956 (N.D. Cal. 2006) ("To the extent that Target.com offers information and services unconnected to Target stores, which do not affect the enjoyment of goods and services offered in Target stores, the plaintiffs fail to state a claim under Title III of the ADA.").

<sup>151</sup> *United States v. AMC Ent., Inc.*, 549 F.3d 760, 768 (9th Cir. 2008).

to stay or dismiss a claim under Title III in deference to DOJ because it has concurrent jurisdiction over interpretation of the ADA.<sup>152</sup> Another more permanent solution is for DOJ to promulgate a final rule that incorporates the most updated W3C web accessibility standard, the WCAG 2.1. Formally relying upon the WCAG 2.1 would cure the due process concerns currently present in Title III litigation and provide courts with a consistent, workable test for finding noncompliance with the ADA's requirements.

### A. *How the Primary Jurisdiction Doctrine Could Help*

In the context of Title III lawsuits, courts could stay their decision in a matter pending formal DOJ rulemaking, or even dismiss a case without prejudice in deference to the agency's authority on interpretation of Title III. However, courts have consistently declined to invoke the primary jurisdiction doctrine in Title III cases,<sup>153</sup> which would allow "a court to stay its hand while allowing an agency to address issues within its ken."<sup>154</sup> As a prudential doctrine, courts are not compelled to dismiss an action and "[n]o fixed formula exists for applying the doctrine," but courts should consider the doctrine's underlying goals when considering its application.<sup>155</sup> Arising "from a series of Supreme Court cases addressing the Interstate Commerce Commission (ICC) and its regulation of common carriers,"<sup>156</sup> the primary jurisdiction doctrine responds to "the possibility that a court's ruling might disturb or disrupt the regulatory regime of the agency in question."<sup>157</sup> The doctrine serves "the goal of national uniformity in the interpretation and application of a federal regulatory regime . . . by permitting the agency that has primary jurisdiction over the matter in question to have a first look at the problem."<sup>158</sup> The doctrine is not meant to "'secure expert advice' from [the administrative] agenc[y]"

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<sup>152</sup> See generally *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 62–65 (1956) (formulating the primary jurisdiction doctrine); *Raritan Baykeeper v. NL Indus., Inc.*, 660 F.3d 686, 691 (3d Cir. 2011) (explaining the primary jurisdiction factors).

<sup>153</sup> See, e.g., *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 909–11 (9th Cir. 2019).

<sup>154</sup> *U.S. Pub. Int. Rsch. Grp. v. Atl. Salmon of Me., LLC*, 339 F.3d 23, 34 (1st Cir. 2003).

<sup>155</sup> *W. Pac. R.R. Co.*, 352 U.S. at 64; see also *Access Now, Inc., v. Blue Apron, LLC*, No. 17-cv-116, 2017 WL 5186354, at \*7 n.16 (D.N.H. Nov. 8, 2017) ("Consistent with the primary jurisdiction doctrine's position as a prudential doctrine, Blue Apron suggests only that this court 'should' and 'may' dismiss or stay this action on that basis . . .").

<sup>156</sup> Aaron J. Lockwood, *The Primary Jurisdiction Doctrine: Competing Standards of Appellate Review*, 64 WASH. & LEE L. REV. 707, 710 (2007) (citing *Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 430 (1907)).

<sup>157</sup> *Am. Auto. Mfrs. Ass'n v. Mass. Dep't of Env't Prot.*, 163 F.3d 74, 81 (1st Cir. 1998).

<sup>158</sup> *Id.*



‘every time a court is presented with an issue conceivably within the agency’s ambit,’”<sup>159</sup> but rather to protect “the integrity of a regulatory scheme”<sup>160</sup> or resolve “a particularly complicated issue that Congress has committed to a regulatory agency.”<sup>161</sup>

In these ADA Title III cases, the lack of uniformity in a federal regulatory regime has only been deepened by the courts’ disagreements about whether all aspects of a website should be deemed accessible, which software programs it should be accessible to, how to formulate the scope of covered entities’ duties, and whether compliance with nongovernment guidelines like the WCAG 2.1 is necessary.<sup>162</sup> Covered entities are currently forced to rely on the inadequate and informal guidance published by DOJ on website accessibility compliance such as amicus briefs, proposed—and withdrawn—federal regulations, and general gesturing toward the W3C’s industry compliance guidelines, while also being held liable under inconsistent legal requirements.<sup>163</sup>

As the government agency charged with administering the ADA, DOJ has been delegated rulemaking authority by Congress,<sup>164</sup> and its proposed “harmonization” of the federal government’s Section 508 Standards and the WCAG 2.0<sup>165</sup> is simply insufficient to give website owners enough guidance to make sure their website is accessible for visually impaired individuals. In a hearing before Congress in 2000, Judy Brewer, then Director of W3C’s Web Accessibility Initiative, explained that an accessible website is a “matter of good design,” and that the “cost for accessibility on many sites is negligible.”<sup>166</sup> Dr. Steven Lucas, Chief Information Officer and Senior Vice President of Privaseek, Inc.,<sup>167</sup> also testified in the same hearing that compliance is

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<sup>159</sup> *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008) (quoting *Brown v. MCI WorldCom Network Servs.*, 277 F.3d 1166, 1172 (9th Cir. 2002)).

<sup>160</sup> *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 353 (1963).

<sup>161</sup> *Brown*, 277 F.3d at 1172.

<sup>162</sup> *See supra* Part II.

<sup>163</sup> *See supra* Part I.

<sup>164</sup> 42 U.S.C. § 12188.

<sup>165</sup> Information and Communication Technology (ICT) Standards and Guidelines, 82 Fed. Reg. 5,790, 5,791 (Jan. 18, 2017) (codified at 36 C.F.R. pts. 1193–1194) (“The Revised 508 Standards and 255 Guidelines incorporate by reference the Web Content Accessibility Guidelines (WCAG) 2.0, a globally-recognized and technologically-neutral set of accessibility guidelines for [w]eb content.”).

<sup>166</sup> *Applicability of the Americans with Disabilities Act (ADA) To Private Internet Sites: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 106th Cong. 20 (2000) (statement of Judy Brewer, Dir., WAI Int’l Program Off., W3C).

<sup>167</sup> Privaseek was a web-based company that sold tools to web consumers to manage privacy. *See* Nora Draper, *Fail Fast: The Value of Studying Unsuccessful Technology Companies*, 4

“simply a matter of spending a few hours, depending on the size of the site, going through the code,” and even suggested that companies claiming that developing an accessible website would be too burdensome are being untruthful.<sup>168</sup>

The way web developers and web consultants sell their compliance services tells another story. Depending on a number of unique page layouts, ADA website compliance and web accessibility consultant Kris Rivenburgh suggests the cost of compliance “typically starts in the low five-figures.”<sup>169</sup> Similar to how accessibility for physical spaces requires businesses shouldering additional costs, the costs of implementing web accessibility also falls on the entrepreneurs and operators of Title III–covered entities. Unlike accessibility for physical spaces, however, which are governed by specific standards for public accommodations in commercial facilities,<sup>170</sup> web owners have no such clarity. These factors of cost and lack of uniformity go towards the complexity of regulating accessibility for websites, which should be left to DOJ, rather than trial-by-error for commercial website owners in the courts. Admittedly, even if courts were to employ the primary jurisdiction doctrine, this would only provide a short-term solution. The long-term resolution to the Title III web accessibility issues need to be resolved with proper guidance from DOJ.

### *B. A Final Rule, Promulgated by DOJ*

The due process and inconsistency issues with Title III litigation would be cured with a final rule promulgated by DOJ that would define (1) which websites are considered covered entities for the purposes of Title III, (2) how compliance will be measured, and (3) how much accessibility is required for a website to be compliant with Title III. Between the two current proposed standards, the WCAG 2.1 or

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MEDIA INDUS., no. 1, 2017, at 1, 6, <https://quod.lib.umich.edu/cgi/p/pod/dod-idx/fail-fast-the-value-of-studying-unsuccessful-technology.pdf?c=mij;idno=15031809.0004.101;format=pdf> [<https://perma.cc/A93G-7XQW>].

<sup>168</sup> *Applicability of the Americans with Disabilities Act (ADA) To Private Internet Sites*, *supra* note 166, at 34 (statement of Dr. Steven Lucas, Chief Info. Officer & Senior Vice President, Privaseek, Inc.).

<sup>169</sup> Kris Rivenburgh, *Cost of Making Your Website Accessible, ADA Compliant is Workable*, MEDIUM (Nov. 22, 2018), <https://medium.com/@krisrivenburgh/cost-of-making-your-website-accessible-ada-compliant-is-workable-fe108b8d4151> [<https://perma.cc/MM82-LFBC>].

<sup>170</sup> The 2010 Standards for Public Accommodations and Commercial Facilities within the 2010 ADA Standards for Accessible Design includes both technical and scoping requirements. U.S. DEP’T OF JUST., 2010 ADA STANDARDS FOR ACCESSIBLE DESIGN 4 (2010), <https://www.ada.gov/regs2010/2010ADASTandards/2010ADASTandards.htm#titleIII> [<https://perma.cc/3ZE4-4FG5>].

the Section 508 Refresh, the WCAG 2.1 is the standard that rule makers should look to. Because the most recent Section 508 Refresh applies only to government entities,<sup>171</sup> the WCAG 2.1 is a more flexible standard for private entities under Title III. As discussed in Part II, private entities are more likely to incorporate e-commerce platforms, online retailers, and e-commerce related communications, which are all contemplated by the W3C, but not by section 508.

DOJ should incorporate the WCAG 2.1 standard for three other reasons: (1) the W3C's policy goals, "Web for All," align with the policy goals of the ADA;<sup>172</sup> (2) the option for multiple levels of compliance is more realistic and achievable for covered entities of differing sizes, needs, and budgets;<sup>173</sup> and (3) the WCAG 2.1's position as a nongovernmental, nonpolitical entity is more responsive to the changing landscape of web accessibility, like updates to SRS software and new ways of measuring accessibility compliance.<sup>174</sup> Whether discussing the purpose of the ADA in general or Title III specifically, Congress and the courts have agreed that the policy underlying the ADA is to provide accessibility in places of public accommodation to all members of the public, including those with disabilities.<sup>175</sup> Since W3C's inception, its "Web for All" mission statement has included greater accessibility measures for persons with disabilities,<sup>176</sup> and is reflected in the release of their first WCAG 1.0 in 1999.<sup>177</sup>

Despite holding all websites to a high standard of accessibility, covered entities should also support the use of WCAG 2.1 because it is the only standard that incorporates varying levels of compliance, allowing companies to choose how much to invest in compliance. Even if future versions of the WCAG do not include A, AA, and AAA levels of compliance, it is clear that the W3C has always considered the feasibility of accessibility by incorporating implementation concerns and providing multiple pathways for companies to achieve compliance.<sup>178</sup> The WCAG 2.0, which was the version mentioned in DOJ's ANPRM, incorporated multiple standards for how a single

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171 Information and Communication Technology (ICT) Standards and Guidelines, 82 Fed. Reg. 5,790, 5,790 (Jan. 18, 2017) (codified at 36 C.F.R. pts. 1193–1194).

172 See *W3C Mission*, *supra* note 30.

173 See *Understanding Conformance*, *supra* note 70.

174 See *Accessibility Conformance Testing (ACT) Overview*, *supra* note 88.

175 135 CONG. REC. 19,806 (1989) (statement of Sen. Kennedy) (describing the ADA as "legislation to end segregation and discrimination against the 43 million individuals with disabilities in our society").

176 See *W3C Mission*, *supra* note 30.

177 See WCAG 1.0, *supra* note 67.

178 See *Understanding Conformance*, *supra* note 70.

webpage's accessibility might be measured for compliance.<sup>179</sup> The W3C's view on web accessibility is particularly beneficial for covered entities because these guidelines are written by industry experts, leaders, and academics<sup>180</sup> who are insulated from political influence and focused on real-world application.

Finally, the internet's e-commerce landscape is a rapidly growing marketplace that has changed the way that Americans shop.<sup>181</sup> In order to anticipate the changes in technology both for websites and accessibility software, incorporating the WCAG is the best chance for the DOJ rule to stay relevant. Indeed, changes in software are discussed by the W3C's web accessibility taskforce in the context of inconsistent accessibility conformance testing, and will continue to develop under the guidance of responsive task forces like the one currently authoring the ACT Rules 1.0.<sup>182</sup> In order to preserve the underlying purpose of the ADA, provide clear guidance to covered entities, and stay ahead of changes in technology, DOJ should incorporate the WCAG 2.1 into a final rule that formally interprets Title III's compliance requirements.

#### CONCLUSION

Until DOJ promulgates rules outlining accessibility standards for private covered entities under Title III of the ADA, defendants will be unable to ensure that their websites are compliant for visually impaired consumers. Guidance from DOJ in the form of proposed rules, amicus briefs, and letters to Congress help guide private covered entities in the direction that Title III compliance is moving, but does not indicate a distance, destination, or speed for website owners to follow. The lack of guidance from DOJ has resulted in inconsistent outcomes in the courts, as well as serious due process concerns for defendants in Title III actions who can be held liable for damages without any sense of how to interpret their duties under the law. In order to avoid further confusion, courts may employ the primary jurisdiction doctrine until DOJ formally promulgates a rule that incorporates a clear standard. That standard should follow the WCAG 2.1, the guidelines origi-

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<sup>179</sup> *Id.*

<sup>180</sup> See W3C, *supra* note 62, § 1 ("There are three types of Working Group participants: Member representatives, Invited Experts, and Team representatives. Team representatives both contribute to the technical work and help ensure the group's proper integration with the rest of W3C.").

<sup>181</sup> See *supra* Section II.C.

<sup>182</sup> *Accessibility Conformance Testing (ACT) Overview*, *supra* note 88; ACT RULES FORMAT 1.0, *supra* note 88.

nally contemplated by DOJ and best suited to resolve the current problems of Title III enforcement.