WEBSITE ACCESSIBILITY FOR THE VISUALLY-IMPAIRED

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I. INTRODUCTION

The American's with Disabilities Act (ADA) was signed into law by President George H. W. Bush on July 26, 1990.[1] The ADA outlines the civil rights afforded to individuals with disabilities—rights similar to those provided to individuals on the basis of race, religion and national origin.[2] It is an enormous piece of legislation, divided into five sections which govern different areas of public life.[3] Title III of the ADA prohibits discrimination in accessing public places.[4]

The ADA became law well before modern websites were a reality. While the internet existed, its use, availability, and scope were far different than today. For most of us, modern life is nearly unimaginable without the constant use of and access to the internet, cell phone data, cell phone applications (apps), and websites. This paper focuses on the civil rights issue of access to websites and apps for Americans with visual disabilities. A Pew Research study conducted in January and February of 2019, found only ten percent of Americans reported that they do not use the internet.[5] This study also found that each year the percentage of people who do not use the internet declines; in 2019 the number of non-internet users, ages sixty-five and up, decreased by seven percent.[6] Only twenty-seven percent of seniors do not use the internet.[7] These numbers suggest that internet use, and therefore website use, is widespread throughout all ages within the United States. With society's ever-increasing dependence on and use of the internet, people with disabilities are at a disadvantage when accessibility issues are not considered in the creation and updating of websites and apps.

The ADA was not written in anticipation that the concept of equal access would have to adapt with changing technology. Due to the lack of language in the ADA, website accessibility for the visually-impaired has become a hot topic of litigation in the past three years.[8]

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1. ADA NATIONAL NETWORK, *Timeline of the Americans with Disabilities Act*, https://adata.org/ada-timeline (last updated Oct. 2020).

2. ADA NATIONAL NETWORK, *What is the Americans With Disabilities Act (ADA)?*, (Nov. 14, 2019) https://adat.org.

3. *Id.*

4. *Id.*

5. *Some Americans Don't Use the Internet*, THE PEW RESEARCH CENTER (Nov. 17, 2019), https://www.pewresearch.org/fact-tank/2019/04/22/some-americans-dont-use-the-internt-who-are=they/.

6. *Id.*

7. *Id.*

8. Minh N. Vu, *ADA Title III Litigation: A 2019 Review and Hot Trends for 2020*, SEYFARTH SHAW LLP (Jan. 6, 2020) https://www.adatitleiii.com/2020/01/ada-title-iii-litigation-a-2019-review-and-hot-trends-for-2020/.

II. BACKGROUND

A. Need for Accessibility

An accessible website allows users who are visually-impaired equal access to the website's content. Individuals with vision impairments frequently use third party screen-reading programs that allow them to access websites.[9] The architecture of the website determines if a website is compatible with third party screen-reading programs.[10] Depending on how a website's code is written, the website may or may not be compatible with third party screen-reading programs.[11] This means that a person who is visually-impaired and uses a screen-reading program can be barred access to a website due to the program's incompatibility with the website's coding.

Yet another hurdle that the visually-impaired face in their fight for website accessibility, is alternative access to the information. Defendants in website accessibility cases have argued that a public accommodation can still comply with the ADA by ensuring *other* modes of access that facilitate "effective communication with individuals with disabilities," are available.[11] One such mode is the use of 1-800 numbers through which a disabled individual can access the same information as is available on the website. Yet, courts have found this defense unpersuasive, citing the prevalence of websites and apps, and the relatively low cost and burden to defendants when weighted against visually-impaired individuals' civil rights. Left unanswered by the courts, however, is what exactly it means to create and update websites that are accessible.

B. Web Content Accessibility Guidelines

Web Content Accessibility Guidelines (WCAG) outline how to make web content accessible to people with disabilities.[12] These guidelines were developed by the Web Accessibility Initiative (WAI), which is part of the World Wide Web Consortium.[13] The WAI is an

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

10. *Id.*

11. *Id.*

12. WEB ACCESSIBILITY INITIATIVE, *Web Content Accessibility Guidelines (WCAG) Overview*, https://www.w3.org/WAI/standards-guidelines/wcag/#wg (last updated Sept. 22, 2020).

13. *Id.*

international forum for collaboration between disability organizations, governments and others interested in web accessibility.[14]

WCAG has been adopted by both the United States federal government, and by many counties, as the legal standard of accessibility. The Access Board is the governing body of The Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability in programs conducted by federal agencies, in programs that receive federal financial assistance, in federal employment and in the employment of federal contractors.[15] The adoption of WCAG by the Rehabilitation Act of 1973 conveys the federal government's intent not to discriminate on the basis of disability via electronic information technology.

> WCAG 2.0 addresses new technologies and recognizes that the characteristics of products, such as native browser behavior and plug-ins and applets, have converged over time. A substantial amount of WCAG 2.0 support materials is available, and WCAG 2.0 compliant accessibility features are already built into many products. Further, use of WCAG 2.0 promotes international harmonization as it is referenced by, or the basis for, standards issued by the European Commission, Canada, Australia, New Zealand, Japan, Germany and France.[16]

The global acceptance of WCAG conveys not only the federal government's endorsement of WCAG standards, but its global acceptance as best practice for creating websites and apps that are accessible to individuals with disabilities. While WCAG is not legally binding to private parties, some plaintiff's firms are treating it as the legal standard for website accessibility for individuals with vision impairments. The following excerpt from the Access Board conveys that the WCAG standards have been incorporated into the 2017 update of Section 508 of the Rehabilitation Act of 1973:

> The functional performance criteria are outcome-based provisions that address speech, cognition, manual dexterity, reach, and strength. These criteria apply only where a technical requirement is silent regarding one or more functions or when evaluation of an alternative design or technology is needed under equivalent facilitation. If a technical provision covers a

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14. *Id*.

15. EMPLOYER ASSISTANCE AND RESOURCE NETWORK ON DISABILITY INCLUSION, *The Rehabilitation Act of 1973 (Rehab Act)*, https://askearn.org/topics/laws-regulations/rehabilitation-act/ (last accessed Dec. 19, 2020).

16. STATE OF MISSOURI: MISSOURI ASSISTIVE TECHNOLOGY, *Information Technology Access: Questions and Answers for State and Local Entities*, https://at.mo.gov/it-access/infotech-access.html (last accessed, Dec. 19, 2020).

> particular function of hardware or software, meeting the relevant functional performance criteria requires technologies with: visual modes also be useable with limited vision and without vision or color perception … and have features making its use simpler and easier for people . . . .[17]

This explains some of the many ways in which the WCAG have improved the website accessibility of federal agency websites. The WCAG applies four subsections, or "success criteria," to areas where website design impacts the usability of websites for users of different abilities. These subsections implicate whether a website is: (1) perceivable, (2) operable, (3) understandable, and (4) robust.[18]

The "perceivable" requirement of the WCAG requires that "information and user interface components . . . be presentable to users in ways they can perceive."[19] The perceivable category is further broken down into four more specific subsections. The three most relevant are: text alternatives, time-based media, and adaptability.[20] The "text alternative" subsection reads, "Provide text alternatives for any non-text content so that it can be changed into other forms people need, such as large print, braille, speech, symbols or simpler language."[21] "Time-based media" means adapting videos into accessible media for those who are visually or hearing impaired.[22] Strategies in this secondary subsection include, but are not limited to, audio descriptions of prerecorded videos.[23] To meet the requirements of the second subsection of the perceivable category, a website must be "adaptable," which is defined by the guidelines as "creat[ing] content that can be presented in different ways (for example simpler layout) without losing information or structure."[24] The guidelines provide much more detailed information on how to create a website that visually-impaired people can use.

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17. UNITED STATES ACCESS BOARD, *About the Update of the Section 508 Standards and Section 255 Guidelines for Information and Communication Technology*, (Jan. 2017), https://www.access-board.gov/guidlinesand-standards/communications-and0it/about-the-ict-refresh/overview-of-the-final-rule.

18. WEB ACCESSIBILITY INITIATIVE, https://www.w3.org/WAI/WCAG21/quickref/#principle1 (last updated Oct. 4, 2019).

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. WEB ACCESSIBILITY INITIATIVE, https://www.w3.org/WAI/WCAG21/quickref/#principle1 (last updated Oct. 4, 2019).

"Operable" in this context means that "user interface components and navigation must be capable of being used."[25] This section is broken down into the following relevant subcategories: keyboard accessibility, enough time, navigable, and input modalities.[26] "Keyboard accessibility" means all functionality of a website is made available from a keyboard.[27] "Enough time" means users are provided with enough time to read and use content, and provided warnings of the duration of user inactivity that could cause data loss.[28] "Navigable" means that users are able to navigate, find content and determine where they are.[22] "Input modalities" make it easier for users to operate functionality through inputs beyond keyboard strokes, mainly, a mouse pointer.[29]

The "understandable" guidelines require websites to present information in an understandable manner, and that the operation of a user's interface be presented understandably.[30] This category, is divided into the following subcategories: readable, predictable, and input accessible.[31] "Readable" means that text content must be readable and understandable.[32] The "predictability" guideline requires that web pages appear and operate in a predictable manner.[33] The "input assistance" guideline, outlines how to help users avoid and correct mistakes.[34]

The "robust" guideline requires content to be robust enough that it can be interpreted by a wide variety of user agents, including assistive technologies.[35] Robust is the last of the guideline criteria, and is the smallest, with only one subcategory—compatibility. "Compatibility," means maximizing compatibility with current and future user agents, including assistive technologies.[36] "Assistive technologies," refers to third party reading programs that allow visually-impaired individuals access to compliant websites.[37]

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25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. WEB ACCESSIBILITY INITIATIVE, https://www.w3.org/WAI/WCAG21/quickref/#principle1 (last updated Oct. 4, 2019).
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. WEB ACCESSIBILITY INITIATIVE, https://www.w3.org/WAI/WCAG21/quickref/#principle1 (last updated Oct. 4, 2019).
37. *Id.*

This discussion conveys the complexity of creating and maintaining a website accessible to everyone. However, it also illustrates that although many different issues must be considered in creating an accessible website, it is, in fact, very possible to do so. Further, such actions, when taken today, could prevent claims regarding website accessibility from being brought in the future. To avoid potential litigation, acting in compliance with the WCAG standards is thus in business's best interest.

C. Stakeholders: The Visually-Impaired

Typically, plaintiffs who initiate ADA website accessibility litigation are those with visual impairments who use third party screen-reading programs, but have been unable to access a website.[38] This is often due to incompatibility between the website's code, and third party screen-reading programs.[39] The plaintiff sues in order to correct this violation of public access to a website.[40] The majority of district courts have held that plaintiffs must prove, as a matter of fact, that they themselves attempted to use a website and were unable to, in order to have standing in a website accessibility claim.[41]

D. Trends in Litigation

From 2017 to 2018 the number of website accessibility lawsuits filed by the visually-impaired in federal court under Title III of the ADA increased by 177%.[42] It has been estimated that in 2019, plaintiffs were filing new ADA website accessibility suits as fast as one per hour.[43] While this number seems unfathomable, it is logical considering

38. INTERNATIONAL LAW OFFICE, *Surge of website accessibility suits to continue as Supreme Court declines to review Ninth Circuit decision* (Oct. 25, 2019) https://www.internationallawoffice.com/Newsletters/Tech-Data-Telecoms-Media/USA/Dentons-US-LLP/Surge-of-website-accessibility-suits-to-continue-as-Supreme-Court-declines-to-review-Ninth-Circuit-decision.

39. *Id.*

40. *Id.*

41. *See* Access Now, Inc. v. Blue Apron, LLC, 2017 DNH 236*;* Andrews v. Blick Art Materials, LLC, 268 F. Supp. 3d 381 (E.D.N.Y. 2017); Griffin v. Dep't of Labor Fed. Credit Union, 912 F.3d 649 (4th Cir. 2019); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006 (6th Cir. 1997); *see generally* Robles v. Domino's Pizza, LLC, 913 F.3d 898 (9th Cir. 2019).

42. Amanda Robert, *ADA questions remain over web accessibility cases and the lack of DOJ regulations*, ABA JOURNAL, (Jul. 1, 2019). https://www.abajournal.com/magazine/article/ada-web-accessibility-doj-regulations.

43. *Usablenet Releases its 2019 ADA Web Accessibility and App Lawsuit Report,* USABLENET (Dec. 18, 2019) https://blog.usablenet.com/usablenet-releases-its-2019-ada-web-accessibility-and-app-lawsuit-report.

the virtual explosion of website and app consumption by society. Further, individuals with disabilities are more likely to rely on this type of technology:

> When encountering an inaccessible website: most individuals will endeavor to access material on their own even if it requires an unreasonably greater amount of time or effort than required for nondisabled persons. Many individuals with disabilities will also seek assistance, either from an employee of a covered entity or a third party. It is not uncommon for the covered entity to refer the person back to the website or state that it is not his or her responsibility to help with the inaccessible request for information. In addition, a blind person would not wish to entrust a stranger, which may be the only option for some, with personal or financial information to submit a request or payment online when it is convenient for them.[44]

This amicus brief quote perfectly captures the chilling effect that inaccessible websites have on the full and equal participation of individuals with disabilities in modern society. It is hard to attend to all of life's necessities without access to a wide range of websites. From healthcare to education, website access affects our ability to relate to and function in modern society.

E. Common Arguments Against Accessibility

To clarify, most business owners do not deliberately make their website's inaccessible to people with disabilities. Rather, ensuring that their websites are accessible is an issue of time, money and planning that most businesses were not aware of until recently. The most common arguments against website accessibility focus on: the increased costs of the technology; the length of time required for development; that the accessibility only serves a small market; the necessity of special design requirements; the perception of a resulting low-tech product; a sacrifice of the website's aesthetic; and the challenges associated with meeting the needs of many different types of disabilities.

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44. *Brief for the National Federation of the Blind as Amici Curiae,* Robles v. Dominos Pizza LLC, 913 F.3d 898 (9th Cir. 2019).

III. WHAT THE LAW REQUIRES

A. The Americans with Disabilities Act

As alluded to above, little federal legislation exists on the issue of website accessibility. This is a relatively new legal issue caused by recent technological advancement and the widespread availability of such technology. The federal laws relevant to this issue are Title III of the ADA, and the Rehabilitation Act. The original statutory language of Title III of the ADA, which is the source of divergent holdings from various circuit courts, states:

> No individual shall be discriminated against on the basis of disability in the *full and equal enjoyment* of the *goods, series, facilities, privileges, advantages, or accommodations of any place of public accommodations*…
> ***
> [A] failure to take such steps as may be necessary to ensure that *no individual with a disability is excluded, denied services, segregated or otherwise treated differently* that other individuals because of the absence of auxiliary aids and series, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.[45]

The statute goes on to define "public accommodation" as places of lodging; places that serve food; places of public gatherings; shopping centers; service establishments; all forms of public transportation; place of recreation; places of education; social service establishments; and place of exercise and recreation.[46] Ostensibly, all areas of daily life, commerce, and the economy are subject to Title III of the ADA and its standard of public accommodation.

Due to the inclusive definition of areas of "public accommodation," the Department of Justice has ruled that public accommodation under Title III of the ADA includes websites.[47] Additionally, some courts have held that websites are like physical spaces that offer business to the public and therefore are places of public accommodation.[48]

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45. 42 U.S.C. § 12182 A-L (1990) (emphasis added).

46. *Id.*

47. DEP'T OF JUSTICE, *Americans with Disabilities Act Title II Regulations*, (Sept. 15, 2010) https://www.ada.gov/regs2010/titleIII_2010/titleIII_2010_regulations.pdf.

48. SMITH, GAMBRELL & RUSSELL, LLP, *Is Your Website a "Place of Public Accommodation" Under the Americans with Disabilities Act?,* https://www.sgrlaw.com/is-your-website-a-place-of-public-accommodation-under-the-americans-with-disabilities-act/

While there is lack of clear language from the original piece of legislation, this ambiguity is caused by the expanse of new technologies between the enactment of Title III and today's reliance on such technologies.

B. Section 508 of the Rehabilitation Act

The Rehabilitation Act is a significant piece of legislation in disability law, but it only applies to federal agencies. In 1998, Congress amended the Rehabilitation Act of 1973, requiring federal agencies to make their information technology accessible to people with disabilities. The law applies to all Federal agencies when they develop, procure or use information technology.[49] Under Section 508, agencies must give disabled employees and members of the public access to information comparable to the access available to others.[50] The Access Board is the government agency responsible for developing information and communication technology (ICT) accessibility standards to incorporate into regulations that govern federal procurement practices.[51] On January 18, 2017[52] the Access Board issued a final rule that updated accessibility requirements, "refreshing" guidelines for telecommunications equipment.[53] The Board updated the 508 standards and 255 guidelines together, to ensure consistency in accessibility across the spectrum of ICT.[54] Other goals of this refresh included: enhancing accessibility to ICT; updating the requirements so that they stay abreast of the ever-changing nature of the technologies covered; and harmonizing the requirements with other standards in the U.S. and abroad.[55] The Rehabilitation Act is also significant in the analysis of website accessibility because the Act has adopted WCAG 2.0.[56]

(last visited Dec. 19, 2020).

49. GSA GOVERNMENT-WIDE IT ACCESSIBILITY PROGRAM, *IT Accessibility Laws and Policies*, https://www.section508.gov/manage/laws-and-policies (last updated Jul. 2020).

50. *Id.*

51. *Id.*

52. *Id.*

53. UNITED STATES ACCESS BOARD, *Information & Computer Technology*, https://www.access-board.gov/ict.html (last visited Dec. 19, 2020).

54. *Id.*

55. U.S. GENERAL SERVICES ADMINISTRATION, *2017 Accessibility Refresh Fact Sheet*, https://www.section508.gov/sites/default/files/2017_508-Refresh-Fact-sheet-updated.pdf (last visited Dec. 19, 2020).

56. *Id.*

C. Standing

Plaintiffs usually must suffer an injury in fact to have standing in a cause of action. However, due to the nature of ADA claims, plaintiffs in many cases are not expected to prove injury in fact to have standing.[57]

D. Notice

Lack of fair notice of the need to have accessible websites has not been a defense in these lawsuits. Courts have held that businesses have received fair notice that their websites and apps must comply with the ADA.[58]

E. Mootness

Article III of the United States Constitution limits the jurisdiction of federal courts to the consideration of "cases" and "controversies."[59] Any case is moot when the issues being claimed are no longer "live;" the parties lack a legally cognizable interest in the outcome;[60]or when it no longer presents an issue to which the court can give meaningful relief.[61] Some defendants have been able to claim mootness when they have made quick remedial updates to their websites after being alerted that the site is not accessible to individuals with disabilities.[62] However, this approach of mootness through remedy has only been adopted by some jurisdictions.

Mootness has not prevented claims and cases from being brought if the website is not currently accessible.[63] Claims of ADA violations based on website inaccessibility may always be brought unless the defendant is constantly updating and maintaining their website in order to ensure accessibility.[64]

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

58. BUSINESS LITIGATION, *Supreme Court Declines to Clarify ADA Applicability to Websites and Mobile Apps* (Oct. 2019) https://www.blankrome.com/publications/supreme-court-declines-clarify-ada-applicability-websites-and-mobile-apps-resulting.

59. U.S. Const. art. III, § 2, cl. 2.

60. Haynes v. Hooters of Am., LLC, 893 F. 3d 781, 784 (11th Cir. 2018) (citing Troiano v. Supervisor of Elections in Palm Beach Cty., Fla., 382 F.3d 1276, 1281-82 (11th Cir. 2004)).

61. *Id.*

62. *When Good Sites Go Bad: The Growing Risk of Website Accessibility Litigation,* PIERCE ATWOOD LLP (Aug. 2, 2019), https://www.jdsupra.com/legalnews/when-good-sites-go-bad-the-growing-risk-65237/.

63. *Id.*

64. Haynes v. Hooters of Am., LLC, 893 F. 3d 781, 882, 2018.

F. Department of Justice

The Department of Justice (DOJ) enforces the ADA. It is undisputed that the DOJ has the authority to promulgate rules on website accessibility, through which it has claimed jurisdiction over websites and categorized them as places of public accommodation.[65] However, the DOJ has yet to promulgate rules and regulations for ADA standards on website accessibility. Therefore, we as a nation lack a clear standard from the DOJ regarding what is required for a website to be considered ADA accessible.[66]

The DOJ first sought comments on its proposal for addressing website accessibility in 2010.[67] No official action has been taken by the DOJ since. The federal government's "unified agenda" is a public record that indicates all proposed rules currently being worked on.[68] However, as of the time of writing, the "unified agenda" does not list website accessibility rules and regulations. Therefore, it is fair to assume that the federal government has essentially abandoned any effort to promulgate rules on the issue of website accessibility.

G. Lack of Legislation

This failure to create clear standards was compounded by President Trump's 2017 Executive Order 13771 entitled "Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs."[69] The executive order effectively prohibited federal agencies from issuing new regulations. Section 3(c) of the executive order states:

> Unless otherwise required by law, *no regulation shall be issued by an agency* if it was not included on the most recent version or update of the published unified regulatory agenda as required under Executive Order 12866, as amended, or any successor order, unless the issuance of such regulation was approved in advance in writing by the Director.[70]

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65. *Nondiscrimination on the Basis of Disability*, 75 Fed. Reg. 43460, 43466 (Jul. 26, 2010).

66. Laura Lawless, *US Supreme Court Leave Standards of Web-site Accessibility Ambiguous, Vexing Businesses*, EMPLOYMENT LAW WORLDVIEW (Nov. 4, 2019) https://www.employmentlawworldview.com/us-supreme-court-leaves-standards-of-website-accessibility-ambiguous-vexing-businesses/.

67. *Nondiscrimination on the Basis of Disability*, 82 Fed. Reg. 60932, 60932-33 (Dec. 26, 2017).

68. OFFICE OF INFORMATION & REGULATORY AFFAIRS: OFFICE OF MANAGEMENT & BUDGET, https://www.reginfo.gov/public/do/eAgendaMain (last accessed, Dec. 19, 2020).

69. Exec. Order No. 13771, 82 Fed. Reg. 9339 (Feb. 3, 2017).

70. *Id.* (emphasis added).

Section 3(c) states that the Director of the Office of Management and Budget (OMB) has the authority to grant additional exemptions.[71] The OMB serves the President in oversight and implementation of the Executive Branch.[72] The Trump administration has not endorsed any clarifying federal legislation on this issue. Legislation is a separate possible remedy for these website accessibility claims; however, because there are no rules being issued by the legislative or executive branches, the only source of guidance is coming from the judicial branch. The lack of federal laws and regulations is one of the reasons for the split decisions in the appellate courts on this issue. The lack of congressional or executive action has left courts unable to apply the primary jurisdiction doctrine discussed in the next section.

H. Primary Jurisdiction Doctrine

The primary jurisdiction doctrine allows courts to determine whether "an otherwise cognizable claim implicates technical and policy questions that should be addressed in the first instance by the agency with regulatory authority over the relevant industry rather than by the judicial branch."[73] This means that under normal circumstances courts should defer to the legislature when an agency is clearly the authority on an issue.

It is not disputed that the ADA is the only relevant piece of federal legislation that is applicable to non-federal website accessibility. However, plaintiffs are entitled to their civil right of access to places of public accommodation. Some appellate courts, such as the Ninth Circuit, have granted plaintiffs resolution of their claims despite the lack of clear guidelines, and that plaintiffs' civil rights of equal access outweigh the primary jurisdiction doctrine.[74] As discussed below, to further avoid problems caused by this doctrine, some courts have focused on liability in the same way that they do when evaluating the accessibility of physical locations for Title III public accommodations.

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71. Minh N. Vu, *Executive Order Likely Dooms Website Regulations for Public Accommodations*, SEYFARTH LLP (Feb. 3, 2017) https://www.adatitleiii.com/2017/02/executive-order-likely-dooms-website-regulations-for-publicaccommodations/.

72. WHITEHOUSE.GOV, *Office of Management and Budget*, https://www.whitehouse.gov/omb/.

73. Astiana v. Hain Celestial Group, Inc., 783 F.3d 753, 756 (9th Cir. 2015).

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

I. Circuit Court Holdings

The following circuit court holdings are not exhaustive, but convey the trends in litigation on the issue of website accessibility. The Fourth, Fifth, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits have not issued opinions on ADA claims for website accessibility. There are, however, current claims being brought in those jurisdictions. Interestingly, many of the claims are calling for the use of the WCAG guidelines specifically.

The appellate courts are divided on this issue. Some courts hold that websites *are* places of public accommodation, whereas others hold that a website is a place of public accommodation only if there is a nexus between the defendant's physical site and its website.

1. Circuits that Hold Websites to be Places of Public Accommodation

In *Access Now, Inc. v. Blue Apron, LLC*, a case out of the First Circuit Court of Appeals, multiple plaintiffs represented by the activist organization Access Now, were unable to access the plaintiff's website in order to access its delivery meal service.[75] This opinion was issued in 2017, and addressed the lack of DOJ guidance: "regulations imposing more specific website-accessibility standards may provide defendant and other website operators with a greater level of certainty about compliance with Title III, [but] defendant still had to comply with Title III's more general prohibition on disability-based discrimination in their absence."[76] Therefore, in the First Circuit Court of Appeals websites are considered places of public accommodation and must be accessible to the public. This case cites and reaffirms the holding of *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc*.[77] This is significant because it moved the First Circuit away from the nexus test imposed in other jurisdictions.

The Second Circuit Court of Appeals, like the First, has also held that websites are to be treated as places of public accommodation under Title III of the ADA. In *Andrews v. Blick Art Materials*, the court held that websites are places of public accommodation under Title III of the ADA.[78] The plaintiff in this case was unable to use the Blick website in order to find locations of the store or order products from the store

75. Access Now, Inc. v. Blue Apron, LLC, 2017 DNH 236 (D.N.H. 2017).

76. *Id.* at 236.

77. 987 F. Supp 77 D.N.H. (1997).

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

online.[79] The court reviewed the evidence, and determined that WCAG meets the international standards related to visually-impaired individuals access to the internet.[80]

Andrews v. Blick Art Materials also required the court to consider a state statute. The New York State Human Rights Law (NYSHRL) covers discrimination in the provision of "accommodations, advantages, services, facilities or privileges of the place or provider of public accommodation."[81] This statute allowed the plaintiff to prove personal jurisdiction, and have access to both attorney's fees and damages.[82] This is significant because these claims do not ordinarily bring about damages windfalls for plaintiffs.

2. Circuits with Intermediate Holdings

The Sixth Circuit Court of Appeals held, in *Castillo v. Jo-Ann Stores*, that where there is a nexus between a retailer's physical location and a website, the business will then be considered a "public" space. Therefore, where there is a nexus between retail location and website, the business must make necessary accessibility accommodations.[83] In this case the plaintiff was unable to access Jo-Ann's website to find physical locations of the store, purchase products, and learn about sales.[84]

The Ninth Circuit Court of Appeals has held an intermediate position on website accessibility cases.[85] In *Robles v. Domino's Pizza* the court held that websites, and the Dominos Pizza's corresponding mobile app, are places of public accommodation.[86] The court came to this conclusion because they found a "nexus" between the app and the physical location of the business.[87] The court upheld both Robeles's claim under Title III of the ADA, as well as his claim under California's Unruh Civil Rights Act (UCRA).[88] The court reasoned that the ADA applies to "the services of a place *of* public accommodation, not services *in* a place of public accommodation."[89] The case means that all physical

79. *Id.*
80. *Id.* at 384.
81. *Id.*
82. *Id.*
83. Castillo v. Jo-Ann Stores, LLC, 286 F. Supp. 3d 870 (N.D. Ohio 2018).
84. *Id.*
85. Robles v. Domino's Pizza, LLC, 913 F.3d 898 (9th Cir. 2019).
86. *Id.* at 905
87. *Id.*
88. *Id.*
89. *Id.*

places that are expected to make structural accommodations for people with disabilities must also have accessible websites for individuals with disabilities.

Robles filed suit seeking a "permanent injunction requiring Defendant to . . . comply with [Web Content Accessibility Guidelines (WCAG) 2.0] for its website and Mobile App."[90] This is one of the only cases where a court at any level has imposed a *standard* of accessibility guidelines; conformity with which would place them back in compliance with Title III of the ADA. The Ninth Circuit stated, "…Robles does not seek to impose liability based on Domino's failure to comply with WCAG 2.0. Rather, Robles merely argues—and we agree—that the district court can order compliance with WCAG 2.0 as an equitable remedy if, after discovery, the website and app fail to satisfy the ADA."[91] The precedent that this holding creates is that WCAG becomes an equitable remedy to satisfy compliance with Title III of the ADA. This case effectively gives the WCAG standards legal precedential power.

After this decision was issued on June 13, 2019, Domino's filed a petition for a writ of certiorari with the United States Supreme Court.[92] Unfortunately, and for reasons unknown, the United States Supreme Court denied the petition.[93] This is significant as the Ninth Circuit's acceptance of the WCAG guidelines will now act as legally binding precedent for nationwide businesses that operate within this jurisdiction.

3. Circuits that Hold Websites are Not Places of Public Accommodation

The Third Circuit Court of Appeals has ruled on this issue in two cases: *Ford v. Schering-Plough Corp*[94] and *Peoples v. Discover Financial Services*.[95] In *Ford v. Schering-Plough Corp,* the plaintiff sued the employer and insurer claiming that the disparity between the disability benefits for mental and physical disabilities violated the ADA.[78] The plaintiff brought a claim under Title III of the ADA, challenging the

90. *Id.* at 902.

91. *Id.* at 907.

92. Minh N. Vu and Kristina M. Launey, *Domino's Files Petition for US Supreme Court Review of Unfavorable Website Access Decision*, SEYFARTH SHAW LLP (June 13, 2019) https://www.adatitleiii.com/2019/06/dominos-files-petition-for-us-supreme-court-review-of-unfavorable-website-access-decision/.

93. *Id.*

94. Ford v. Schering-Plough Corp., 145 F.3d 601 (3sd Cir. 1998).

95. Peoples v. Discover Fin Services., 387 Fed. Appx. 179 (3d Cir. 2010).

terms and conditions of their employment and the disparity of the mental and physical disability benefits.[96] The court found that the claims did not qualify as public accommodation for purposes of Title III of the ADA, and therefore did not survive the motion to dismiss.[97] This court found that the term "public accommodation" only applies to *physical* structure.[98]

In *Peoples v. Discover Financial Services*, the plaintiff claimed that the defendant violated the ADA and the Rehabilitation Act by failing to provide reasonable accommodations to credit card holders with vision impairments.[99] The court held that the Rehabilitation Act claim failed because the issuer of the credit cards did not receive federal funds.[100] The court used the precedent they had set in *Ford v. Schering-Plough Corp.*, that public accommodations only include physical places.[101] Therefore, websites and apps within the Third Circuit are *not* considered places of public accommodation, because they are not "physical structures."[102]

IV. STATE LAWS

Another instrument that is aiding in addressing this issue is the creation of state legislation. Twenty-four states have incorporated language like Section 508 from the Rehabilitation Act into their own laws.[103] Nine states have specifically adopted the WCAG standards.[104] These state adoptions, like the Rehabilitation Act, only have jurisdiction over government agencies and are not enforceable against private parties.

Plaintiffs have successfully sued in both the Second and Ninth Circuits because of state civil rights laws that provide both personal jurisdiction and access to statutory damages.[105] If states create civil rights legislation similar to these examples, the legislation could solve the problem of lacking federal standards.

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96. *Id.*

97. *Id.*

98 *Id.*

99. Peoples v. Discover Financial Services., 387 F. Appx 179 (3d Cir. 2010).

100. *Id.*

101. *Id.* Ford v. Schering-Plough Corp. 145 F.3d 601 (3d Cir. 1998).

102. Peoples v. Discover Financial Services., 387 F. Appx 179 (3d Cir. 2010).

103. 3PLAY MEDIA, *Do Your States Laws Require Section 508 Accessibility Compliance?* https://www.3playmedia.com/blog/do-your-states-laws-require-section-508-compliance/ (last accessed, Dec. 19, 2020).

104. *Id.*

105. Cal Civ. Code §51(a-h).

A. New York State Human Rights Law (NYSHRL)

The NYSHRL is significant as an example of state legislation that has gone above and beyond Federal standards of accessibility:

> [T]he state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life and that the failure to provide such equal opportunity, whether because of discrimination, prejudice, intolerance or inadequate education, training, housing or health care not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants. A division in the executive department is hereby created to encourage programs designed to insure that every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the state; to encourage and promote the development and execution by all persons within the state of such state programs; to eliminate and prevent discrimination in employment, in places of public accommodation, resort or amusement, in educational institutions, in public services, in housing accommodations, in commercial space and in credit transactions and to take other actions against discrimination as herein provided . . . .[106]

The significance of this act is that it provides further state claims that plaintiffs may use in order to force private entities into compliance with accessible websites.

B. Unruh Civil Rights Act

California's Unruh Civil Rights Act is noteworthy in that its language is inclusive of websites. In its 1959 amendments to the Unruh Act, the California legislature eliminated the list of physical places contained in the Act and replaced that list with a reference to "all business establishments of every kind whatsoever."[107] This is significant because it applies the tenets of the ADA standards not just to public spaces but to all businesses, creating one less hurdle for plaintiffs in their claims. Further, this piece of legislation allows plaintiffs to recover damages beyond attorney's fees.[108] Plaintiffs who win or are able to settle their claim are entitled to three times the actual damages and

106. NY State Human Rights Law § 290.

107. Warfield v. Peninsula Golf Country Club, 10 Cal. 4th 594, 618 (1995).

108. Cal. Civ. Code §52.

no less than $4,000 in statutory damages.[109] This is extremely pro—plaintiff, and stands in stark contrast to federal law, because under the ADA, no damages are permitted for plaintiffs themselves—only attorney's fees are provided for.[110]

IV. CONCLUSION

Based on the current lack of guidance on this issue from the DOJ, and the United States Supreme Court's refusal to hear a case on the issue, it is difficult to speculate what the future holds for the issue of website accessibility. The Fourth, Fifth, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits have issued opinions on ADA claims for website accessibility. There are currently pending claims on the issue of website accessibility in these jurisdictions, and therefore there will likely be more opinions issued and case law produced by these jurisdictions. These opinions will likely be influenced by the existing persuasive authorities, specifically language from the "nexus test" that arose out of the Ninth Circuit. Further, many claims call for the use of the WCAG guidelines. Based on the above analysis it seems likely that most companies will proactively protect themselves by coming into compliance with the WCAG standards. Those that do not will risk liability and become targets for future website inaccessibility claims.

VI. NOVEL CORONAVIRUS/ COVID-19 PANDEMIC UPDATE

The novel coronavirus / COVID-19 pandemic has created many unprecedented effects. Around the world, people's lives have been interrupted due to this elusive and deadly virus. As of April 21, 2020, 82% of state-run websites containing updates regarding the Coronavirus Pandemic and its corresponding government imposed shutdowns were not accessible.[111] It is a terrible injustice and disservice to citizens with visual disabilities that in the age of a modern plague we are not holding the United States government accountable:

> [F]orty-one of the 50 state pages [The Markup] surveyed contained low-contrast text . . . Thirty-one of the 50 state pages contained empty links or buttons . . . WAVE, a website

109. Cal. Civ. Code §52(a).

110. Kris Rivenburgh, *California Unruh Act and ADA Website Accessibility Lawsuits in 2020*, THE MEDIUM (Jan. 6 202) https://medium.com/@krisrivenburgh/california-unruh-act-and-ada-website-accessibility-lawsuits-in-2020-db71a3e352b.

111. Adrianne Jeffries, *Blind Users Struggle with State Coronavirus Websites*, THE MARKUP (April 21, 2020), https://themarkup.org/2020/04/21/blind-users-struggle-with-state-coronavirus-websites.

> accessibility tool that flags common problems for blind and low-vision users for insight into issues . . . flagged an average of 28.5 errors per coronavirus homepage-which is lower than typical websites, which had an average of 60.9 errors per homepage in WebAIM's Februrary 2020 analysis of the top million websites.[112]

Over half of all websites have errors on their homepage.[113] This conveys the breadth and depth of the systemic problem of website accessibility. The fact that there is an average of 28.5 errors per coronavirus homepage[114] means that people with vision impairment are at a significant disadvantage to access local news and updates regarding the seemingly constant changes of government-imposed regulations. We must demand more from our government social safety nets, because this is not only an issue of right to access, but also one of public health and safety.

112. *Id.*
113. *Id.*
114. *Id.*