

ADA Litigation and Digital Accessibility¹

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Introduction

In 1990, Congress passed the Americans with Disabilities Act (ADA) to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”² The ADA prohibits discrimination in all aspects of society—from employment to government services to businesses to telecommunications. Despite these broad proclamations against discrimination, the ADA was silent about its application to the Internet, web sites and other digital technology. This is not surprising, of course, as in 1990, such technology, at least as we know it today, did not exist.

Throughout the last three decades, there has been a debate about whether the ADA’s non-discrimination requirements apply to websites under Title III of the ADA. More recently, courts have started to consider other questions, such as how to measure a website’s accessibility and whether there is an alternative to making a website accessibility. While most litigation continues to surround Title III cases, there has been an uptick in cases about digital accessibility under Titles I and II as well.

This Legal Brief explores the legal issues surrounding digital accessibility, focusing on case law, regulatory interpretations, and settlement agreements.

Internet Accessibility: Why it Matters to People with Disabilities

Over the past three decades, the Internet has completely altered the way most people live their lives. Instead of visiting a local government office, residents can easily apply for benefits, renew State-issued identification cards, file taxes, and even register to vote in some states, all by visiting their local government’s website. Instead of traveling from store to store to compare prices, consumers can quickly find the best deal by searching online or buy goods from an e-commerce website. Instead of going to the movies, people can stream right to their own living room. These technological advances have changed the way that college students register for classes, and how health care offices share test results. The Department of Justice (DOJ) called the Internet “the ubiquitous infrastructure for information and commerce.”³ In short, the Internet is everywhere, and affects nearly everything.

For some people, including many people with disabilities, the technology opens doors. However, many people with disabilities have a difficult or impossible time navigating certain websites or mobile apps due to the existence of electronic barriers.

A Primer on Website Accessibility

This Legal Brief does not provide technical guidance on how to make an accessible website. Nonetheless, it is important to have a basic understanding of what accessibility means in the virtual world to have a better understanding of the legal issues at play. Thus, this Legal Brief includes a short (albeit incomplete) introduction to a few common barriers to website access. For those interested in the technical aspects of website access, see the end of this Legal Brief for information about the various technical standards, and technical assistance materials regarding such standards.

Many barriers that exist in the virtual world impact blind individuals who use assistive technology, such as screen-reading software. To aid the user, screen-reading software reads the text on the computer screen aloud. Screen-reading software only works, however, if the electronic content is configured in a readable way. For instance, if a website uses a graphic or an image to convey content, screen-reading software cannot read (or comprehend) the graphic or image, and as a result, the individual who is blind will be disadvantaged by not having access to the graphic/image's meaning. However, there is a simple solution to this problem. The web developer, or the individual adding the content to the site, can label the graphic/image with a text description. This is frequently referred to as tagging the image with an "alt text." With this additional description, the screen-reader (and consequently, the individual), will be able to obtain the same information conveyed visually through the graphic/image. For similar reasons, information conveyed through graphics or charts in an image form are only accessible with appropriate text descriptions. Further, given the way screen-reading software reads content, websites containing tables need to be labeled with row and column identifiers that ensure that the information is understood in a meaningful way. Likewise, screen-reading software is unable to comprehend color, so when color is the exclusive medium to convey content, this content becomes inaccessible to a screen-reader. Color coding content also renders the content inaccessible to individuals who are colorblind. Similarly, some individuals with low-vision need to adjust a website's font, size, or color contrast to access the information. Websites can be designed in a way to allow the user to manipulate the text in this way.

Barriers to digital access exist for individuals with other types of disabilities as well. For example, if a website includes a video, this content is inaccessible to a user who is deaf

or hard of hearing unless the video is captioned. Websites that require the user to manipulate a mouse, without providing keyboard alternatives, are inaccessible to some individuals with mobility disabilities. While there are certainly several additional examples of electronic barriers, and solutions, one final example is that web content should not include flashing visual content, which can trigger seizures.

Although websites exist in the virtual world, an accessible website has much in common with an accessible building. Like a physical building, it is more cost-effective to create an accessible website in the first instance, instead of retrofitting it later for accessibility. Second, the principles of universal design apply to websites, just as they do to physical buildings. A ramp might be intended to create access for an individual who uses a wheelchair, but also benefits others, including parents with strollers or travelers with suitcases. Likewise, accessible websites might be intended to benefit people with disabilities, but can benefit others as well. Captioning on a video may be intended for a user who is deaf, but would also benefit a non-native English speaker, or a user navigating the website in a noisy venue. Further, the same technology that enables text to be readable by screen-reading software also makes text searchable, a feature that benefits all users.

Does the ADA Apply to Websites?

Whether websites are covered by the ADA and therefore, required to be accessible to people with disabilities has been a hot topic in the legal and disability community for the past three decades.

Title II (State and Local Governments)

Under Title II of the ADA, qualified individuals with disabilities shall not be excluded from “participation in or be denied the benefits of the services, programs, or activities *of* a public entity.”⁴ Given this broad language, there has not been much dispute about whether the websites of state and local governments are subject to the ADA.

The DOJ’s position on this question has been clear for some time. In 2003, the DOJ published a technical assistance document called “Accessibility of State and Local Government Websites to People with Disabilities,” which states that under Title II, state and local governments must provide equal access to programs, services or activities, subject to the ADA’s standard defenses.⁵ The DOJ explained that one way for state and local governments to comply with the ADA is to ensure that a government website is accessible to people with disabilities. In 2010, the DOJ reiterated this position in its

Advanced Notice of Proposed Rulemaking (ANPRM) stating “[t]here is no doubt that the Web sites of state and local government entities are covered by [T]itle II of the ADA.”⁶

Recent cases have confirmed the same result. In ***Meyer v. Walthall*, 528 F. Supp. 3d 928 (S.D. Ind. 2021)**, the plaintiffs encountered access barriers on three State websites used to provide information about government benefits and brought a lawsuit under Title II of the ADA and Section 504 of the Rehabilitation Act.⁷ The State filed a motion for summary judgment asserting, among other challenges, that Title II did not apply to its websites. The court easily rejected that argument, explaining that Title II applies to “services, programs, or activities” and that the State offered no “articulable reason” why websites “would fall outside [that] broad category of government activities.”⁸ The court further opined that “the realities of 21st century interactions—including those brought about by the COVID-19 pandemic—further confirm that a government’s provision of information and services via websites is encompassed by Title II.”⁹ **See also *Payan v. Los Angeles Cmty. Coll. Dist.*, 2019 WL 9047062 (C.D. Cal. Apr. 23, 2019)** (finding website to be a “service”).¹⁰

These recent decisions align with older ones that first considered this question. In ***Martin v. Metropolitan Atlanta Rapid Transit Authority*, 225 F. Supp. 2d 1362 (N.D. Ga. 2002)**, plaintiffs with mobility- and vision-related disabilities alleged that MARTA violated the ADA in a number of ways, including by failing to provide access to information via the agency’s website, and moved for a preliminary injunction.¹¹ Granting the injunction, the court held that the information available on MARTA’s website was not equally available to people with disabilities. The court explained that until MARTA’s website was made accessible, MARTA was “violating the ADA mandate of ‘making adequate communications capacity available, through accessible formats and technology, to enable users to obtain information and schedule service.’”¹²

The DOJ has entered into several agreements Project Civic Access agreements with state and local governments that include requirements for website accessibility. The 2021 agreement with the ***City of Killeen, Texas***,¹³ included several provisions with respect to web-based programs and services, as well as the 2018 agreements with ***City of Trinidad, Colorado***¹⁴ and ***City and County of Denver, Colorado***¹⁵ and the 2016 agreement with the ***City of Milwaukee, Wisconsin***.¹⁶

Title III (Places of Public Accommodation)

The more complicated questions about applicability of the ADA to websites and other digital technology arise out of cases brought under Title III of the ADA. Title III provides



that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of *any place of public accommodation* by any person who owns, leases (or leases to), or operates a place of public accommodation.”¹⁷

The ADA and its implementing regulations define “public accommodation” by listing twelve categories of entities that are “considered public accommodations,” so long as they “affect commerce.”¹⁸

These twelve categories are:¹⁹

- an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;
- a restaurant, bar, or other establishment serving food or drink;
- a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
- an auditorium, convention center, lecture hall, or other place of public gathering;
- a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
- a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
- a terminal, depot, or other station used for specified public transportation;
- a museum, library, gallery, or other place of public display or collection;
- a park, zoo, amusement park, or other place of recreation;
- a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
- a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
- a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

Thus, the threshold question in any case challenging the accessibility of a website under Title III of the ADA is: Is the website a place of public accommodation?

The DOJ has a well-established position that the ADA requires websites to be accessible to people with disabilities. Although the DOJ has not yet promulgated regulations about digital accessibility, it has expressed its position through technical assistance guidance and its own enforcement activities.

Indeed, the DOJ articulated its position long before courts were asked to rule on this issue. In 1996, then Assistant Attorney General for Civil Rights, Deval L. Patrick, signed a letter addressed to Senator Tom Harkin, stating that “[c]overed entities under the ADA are required to provide effective communication, regardless of whether they generally communicate through print media, audio media, or computerized media such as the Internet. Covered 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.”²⁰ This letter did not address the question of whether the ADA covered businesses operating exclusively online, but it did squarely state that otherwise covered entities that use the Internet must ensure the accessibility of the website to meet the ADA’s requirement to provide effective communication.

The DOJ reiterated its position in 2000 when it filed an amicus brief in the Fifth Circuit in ***Hooks v. OKBridge, Inc., No. 99-50891, (5th Cir. June 30, 2000)***.²¹ In ***Hooks***, an individual with bipolar disorder and other disabilities brought an ADA claim against an Internet-only business. Instead of challenging the website’s accessibility, however, the plaintiff claimed that the site had barred him from an online bridge tournament and associated bulletin board because of his disability. The district court granted the business’s motion for summary judgment, finding that the website was not a place of public accommodation because it provided services over the Internet rather than at a physical place, while also concluding that it was a private membership club exempt from the ADA. The Fifth Circuit affirmed the lower court’s decision, but on grounds that added little to the jurisprudence regarding website access. The Fifth Circuit concluded that the defendant was unaware of the plaintiff’s disability and thus, could not have discriminated against him.

Nonetheless, this case is important as it provided a forum for the DOJ to issue its interpretation that the ADA applies to Internet-only businesses. The DOJ explained that to limit Title III to entities that provide services on-site would be an “arbitrary and irrational limitation on coverage that conflicts with the clear and important purposes of the Act.”²² It also explained that Congress’s decision to include “catchall phrases” in its definition of public accommodation, such as “other service establishment,” demonstrate that the definition is “plainly broad enough to encompass establishments that provide services in



their clients' homes, over the telephone, or through the internet."²³ The DOJ also argued that courts regularly "apply old words to new technology," noting that the Supreme Court has applied the First Amendment's principles of freedom of speech to new mediums not originally envisioned, including the Internet.²⁴

On September 25, 2018, in a letter addressed to Congressman Budd, the DOJ provided additional insight into its position on website accessibility.²⁵ The DOJ stated that it "first articulated its interpretation that the ADA applies to public accommodations' websites over 20 years ago" and that such interpretation "is consistent with the ADA's title III requirement that the goods, services, privileges, or activities provided by places of public accommodation be equally accessible to people with disabilities."²⁶

More recently, in March 2022, the DOJ issued a long-awaited "Guidance on Web Accessibility and the ADA."²⁷ In such guidance, the DOJ writes: "[a] website with inaccessible features can limit the ability of people with disabilities to access a public accommodation's goods, services, and privileges available through that website—for example, a veterans' service organization event registration form."²⁸ It reiterates that "the ADA's requirements apply to all the goods, services, privileges, or activities offered by public accommodations, including those offered on the web."²⁹

The DOJ has not promulgated regulations about the scope or requirements related to website accessibility. For some time, it appeared that the DOJ would be moving forward with regulatory action. In 2010, it published an Advanced Notice of Proposed Rulemaking. Despite delays, many expected that in 2015, the DOJ would issue its Notice of Proposed Rulemaking (NPRM), the next step in the rule-making process. But in 2015, the DOJ instead announced that it would not finalize its regulations until 2018 at the earliest.³⁰ During the Trump administration, however, the DOJ first placed its web access rulemaking in inactive status and then, in December 2017, removed website accessibility from its rulemaking agenda.³¹

Even though it has not promulgated regulations, the DOJ has continued to engage in enforcement activity, file statements of interest in web accessibility litigation, and move to intervene in web accessibility cases as a co-plaintiff. These types of actions significantly slowed during the Trump Administration³² and appear to be ramping up again during the Biden Administration.³³

Throughout the country, courts have expressed differing opinions about whether Title III of the ADA applies to the Internet, and if so, under what circumstances.

History: Insurance Precedents and Other Cases Preceding ADA Access Cases

To understand the current state of law as it relates to the ADA and website access, it is helpful to understand the cases that shaped these decisions, many of which were against insurance companies. In the insurance cases, litigants alleged that the insurance companies' policies violated Title III of the ADA because disparities existed either in coverage for physical versus mental disabilities, or because the policy placed a cap on specific disabilities, such as HIV- and AIDS-related illnesses.³⁴

Because these cases were brought under Title III, the courts considered whether the insurance companies, and the policies that they offered, were places of public accommodation. While the courts reached different conclusions on the merits of the cases, they made important statements about the ADA's definition of public accommodation. Some courts held that Title III applied to conduct that occurred outside of a physical place of public accommodation,³⁵ while others found that Title III applied only to physical places of public accommodation and did not regulate conduct that occurred outside of the physical structure, unless there was a nexus to a physical place of public accommodation.³⁶ These decisions are frequently reviewed when courts now consider the ADA's applicability to websites.

Legal Theory: Title III Applies to Conduct Outside of a Physical Structure

The first appellate court decision on this issue was ***Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Association of New England, Inc.***, 37 F.3d 12 (1st Cir. 1994).³⁷ In ***Carparts***, the First Circuit assessed whether Title III applied to an insurance policy. In holding that it did,³⁸ the First Circuit reviewed the ADA's definition of public accommodations and concluded that the list of twelve categories is "illustrative," meaning that it does not include every entity that could be a public accommodation. Then, it noted that the definition of public accommodation does not explicitly include a requirement that the entity be limited to a physical structure. The court also emphasized that Congress must have intended Title III to include entities that do not require a person to physically enter "an actual physical structure" because it included "travel service" as an example of a place of public accommodation.³⁹ The court reasoned that many travel services conduct business by phone or correspondence, with customers who never actually enter a physical site, and concluded that: "[i]t would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have

intended such an absurd result.”⁴⁰ This language and rationale is relied on in future website access cases.

To further support its decision, the court in *Carparts* also cited the ADA’s legislative history, emphasizing that the ADA “invoke[s] the sweep of Congressional authority ... in order to address the major areas of discrimination faced day-to-day by people with disabilities.”⁴¹ Given this purpose, the court determined that “[t]o exclude this broad class of businesses from the reach of Title III and limit the application of Title III to physical structures which persons must enter to obtain goods and services would run afoul of the purposes of the ADA and would severely frustrate Congress’s intent that individuals with disabilities fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public.”⁴² Notably, the First Circuit did not state that a service offered off-site required a nexus to a place of public accommodation to be covered by Title III.

When faced with a similar legal question regarding the applicability of Title III to an insurance policy, the Seventh Circuit in *Doe v. Mutual of Omaha Ins. Co.*, **179 F.3d 557 (7th Cir. 1999)** cited the First Circuit’s decision in *Carparts*, and stated that the “core meaning” of Title III is that the owner or operator of a “store, hotel, restaurant, *Web site*, or other facility (whether in physical space *or in electronic space*) . . . that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do.”⁴³ Like in *Carparts*, the Seventh Circuit said nothing about requiring a nexus between the website and a physical place of public accommodation.

The first decision finding a web-based business subject to Title III came from a Massachusetts court. In *National Association of the Deaf v. Netflix, Inc.* **869 F. Supp. 2d 196 (D. Mass. 2012)**, the plaintiffs asserted that Netflix’s “Watch Instantly” streamed content without providing closed captioning in violation of Title III of the ADA.⁴⁴ Netflix filed a motion to dismiss, arguing that as a web-based business, Netflix was not a place of public accommodation. The plaintiffs opposed the motion, and the DOJ filed a statement of interest in support of the plaintiffs’ arguments.⁴⁵

The court agreed with the DOJ and the plaintiff, denying Netflix’s motion to dismiss and holding that Netflix could be a place of public accommodation. In so doing, the court relied heavily on the *Carparts* decision. The court found it irrelevant that the ADA did not reference any web-based services as examples of public accommodations in light of the

legislative history, which indicated Congress’s intent that the examples were not intended to be exhaustive, and that the ADA was intended to adapt to changes in technology. Instead, the court reviewed the categories of places of public accommodation, and found that Netflix “falls within at least one, if not more, of the enumerated ADA categories,” identifying “service establishment,” “place of exhibition or entertainment,” and “rental establishment” as potentially relevant categories.⁴⁶ Shortly after the court denied Netflix’s motion to dismiss, the parties resolved the case through a consent decree.⁴⁷ Netflix agreed to provide captioning for 100% of its content by 2014.⁴⁸

District courts in the First and Seventh Circuits continue to follow these legal principles applying the ADA to web-based companies. In ***Wright v. Thread Experiment*, 2021 WL 243604 (S.D. Ind. Jan 22, 2021)**, the court entered a default judgment against an Internet company finding the web-based business subject to Title III in light of several court cases, including ***Doe v. Mutual of Omaha***.⁴⁹ **See also *Access Now, Inc. v. Blue Apron, LLC*, 2017 WL 5186354 (D.N.H. Nov. 8, 2017)** (“Blue Apron may amount to an online “grocery store,” which is listed under Title III’s definition of “public accommodation”); ***Gathers v. 1-800-Flowers.com, Inc.*, 2018 WL 839381 (D. Mass. Feb. 12, 2018)** (holding that plaintiff stated claim for relief by alleging that website was inaccessible to him as blind person).

At least one district court from the Fourth Circuit – a circuit that has not yet decided which legal theory to follow – has embraced the legal principal that a public accommodation need not be tied to a physical site. In ***Mejico v. Alba Web Designs, LLC*, 515 F.Supp.3d 424 (W.D. Va. 2021)**, the plaintiff sued a web-based company that sells personalized labels.⁵⁰ After recognizing that the Fourth Circuit had not yet ruled on the scope of Title III, the district court concluded that Title III applied to web-based services. The court noted that “travel service” was included within the enumerated list of examples and recognized that travel services regularly conducted business by phone or mail. The court then concluded that this reasoning applies with greater force today in the modern world of e-commerce, especially during the COVID-19 pandemic. Finally, the court concluded that excluding online retailers would produce “absurd results” and “run afoul of the purposes of the ADA and would severely frustrate Congress’s intent.”⁵¹

Legal Theory: Title III Requires a Nexus Between the Discrimination and a Physical Structure

The Third, Sixth, Ninth and possibly the Eleventh Circuit, however, have concluded that places of public accommodation are “actual, physical places where goods or services are open to the public, and places where the public gets those goods and services.”⁵² For

instance, in ***Weyer v. Twentieth Century Fox Film Corp.***, 198 F.3d 1104 (9th Cir. 2000), the Ninth Circuit reviewed the ADA's list of examples of places of public accommodation, and concluded that each example is a physical place and thus, for Title III to apply, there must be a connection between the alleged good or service, and the actual physical place. This language is later relied on by courts in the Ninth Circuit when assessing ADA web access cases.

Likewise, the Sixth Circuit in ***Parker v. Metropolitan Life Insurance Co.***, 121 F.3d 1006 (6th Cir. 1997),⁵³ and the Third Circuit in ***Ford v. Schering-Plough Corp.***, 145 F.3d 601 (3d Cir. 1998)⁵⁴ concluded that Title III did not apply to insurance policies because there was no nexus between the policy and the physical insurance office.

In addition to the insurance cases, one other case is important to the development of the website access jurisprudence. In ***Rendon v. Valleycrest Productions, Ltd.***, 294 F.3d 1279 (11th Cir. 2002), individuals who are deaf and hard of hearing, as well as individuals with mobility disabilities sued the producers of the television show "Who Wants to be a Millionaire," alleging that the show's contestant hotline screened out applicants with disabilities.⁵⁵ The show screened potential contestants by using a game called "fast finger," which required applicants to answer a series of questions via a telephone number, without a TTY option (the common technology at the time). Because speed was critical to an applicant's success, use of the relay service for deaf individuals was not an option, and individuals with mobility impairments were disadvantaged. The court was faced with the question of whether the contestant hotline was a place of public accommodation. The lower court found that it was not, dismissed the case, and the plaintiffs appealed the decision.

The Eleventh Circuit first noted that the quiz show itself was a place of public accommodation because it fell within the category of "theaters and other places of entertainment."⁵⁶ After reviewing the statutory language, the court held that nothing in Title III suggests that discrimination must occur on site to be unlawful, stating that "the fact that the plaintiffs in this suit were screened out by an automated telephone system, rather than by admission policy administered at the studio door, is of no consequence under the statute."⁵⁷ While this case does not expressly state that it required a nexus, as demonstrated below, it has been interpreted by other courts to require a nexus between the good/service and physical place of public accommodation. The insurance precedents and *Rendon* created the framework for courts to analyze whether a website is a place of public accommodation subject to Title III of the ADA.



One clear consequence of the nexus theory is that web-based businesses are found outside the scope of Title III. For example, in ***Mahoney v. Bittrex, Inc.*, 2020 WL 212010 (E.D. Pa. Jan. 14, 2020)**, the plaintiff brought a lawsuit against an inaccessible cryptocurrency exchange.⁵⁸ The district court dismissed the action, stating that in the Third Circuit, websites need a nexus to a physical place to be covered by Title III. Similarly, in ***Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017, 1023 (N.D. Cal. 2012)**, the court recognized the conflicting *Netflix* opinion in Massachusetts, but held that it “must adhere to Ninth Circuit precedent” which defined “place of public accommodation” to be a physical place.⁵⁹ Thus, because Netflix was not “an actual physical place,” and because it had no nexus to one, the court dismissed the case.⁶⁰ **See also *Earll v. eBay, Inc.*, 599 Fed.Appx. 695 (9th Cir. 2015)** (affirming dismissal of case against eBay because Ninth Circuit precedent requires a connection between the good or service and an “actual physical place”).

When considering website accessibility cases, courts in these circuits analyze whether there is a “nexus” between the inaccessible website and a physical place of public accommodation. The court in ***Murphy v. Bob Cochran Motors, Inc.*, 2020 WL 6731130 (W.D. Pa. Aug. 4, 2020)** described the nexus requirement as follows: “What seems to be essential to the nexus requirement is an allegation that a website’s inaccessibility interferes with the ‘full and equal enjoyment’ of the goods and services offered at the physical location.”⁶¹ While not always articulated in those precise terms, courts generally find a nexus if there is some relationship between the website and the physical place. In ***Haynes v. Dunkin’ Donuts*, 741 Fed.Appx. 752 (11th Cir. July 31, 2018)**, for example, the court found a nexus because the website had a function to search for physical store locations and purchase gift cards; thus, the court concluded that the site facilitated the use of physical Dunkin Donut shops.⁶² Likewise, in ***Castillo v. Jo-Ann Stores, LLC*, 2018 WL 838771 (N.D. Oh. Feb. 13, 2018)**, the court found a nexus between a website and physical location because the website enabled users to learn about sales, offers and discounts and product information; browse product selections; and make purchases.⁶³ **See also *Gomez v. J. Lindeberg*, 2016 WL 9244732 (S.D. Fla. Oct. 18, 2016)** (finding a nexus because the site enabled a user to search for physical store locations and buy goods online).

While it was generally presumed that the Eleventh Circuit endorsed the nexus test, it caused much confusion with its evolving decisions about the appropriate analysis for web site accessibility cases in ***Gil v. Winn-Dixie***. As background, ***Gil v. Winn-Dixie*** is a Title III lawsuit brought by a blind plaintiff who encountered Winn-Dixie’s inaccessible website. In 2017, this case was tried before a judge who found for the plaintiff. In ***Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340 (S.D. Fla. 2017)**, the court ordered

Winn-Dixie to revise its website to comply with the Web Content Accessibility Guidelines (WCAG 2.0) by December 1, 2017, including its third-party vendors, implement a web access policy and train employees.⁶⁴ Winn Dixie appealed the decision, which remained pending with the Eleventh Circuit for four years.

On April 7, 2021, the Eleventh Circuit published an opinion in ***Gil v. Winn-Dixie*, 993 F.3d 1266 (11th Cir. 2021)**, that was, by all accounts, a shocking decision. Finding for Winn-Dixie, the Eleventh Circuit first concluded that a website, in and of itself, was not a “place of public accommodation.” It went on to say that a website could still fall within the scope of Title III; however, it rejected the nexus theory. Instead, the Eleventh Circuit announced a new test, which asked whether a website created an “intangible barrier” to access the goods and services of a place of public accommodation. Here, the court concluded, it did not given the limited use of the Winn-Dixie website.

Dissatisfied with the decision, the Plaintiff filed a petition for *en banc* review, asking the entire Eleventh Circuit to reconsider the decision, arguing that the decision was inconsistent with prior precedent and that this was an issue of exceptional importance. In another surprise ruling, the original panel issued ***Gil v. Winn-Dixie*, 2021 WL 6129128 (11th Cir. Dec. 28, 2021)**, where it found that the case was now moot, given that the district court injunction had expired, and vacated both its earlier opinion and the underlying judgment, remanding the case back to the district court to dismiss as moot. Following that decision, Winn-Dixie took a shot at reversal by filing its own petition for *en banc* review; this was denied in March 2022.

Legal Theory: Title III Applies to Services “Of” a Place of Public Accommodation

Another line of cases takes a slightly different approach. In ***Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28 (2d Cir. 1999)**, the court reviewed Title III’s language requiring the “full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.”⁶⁵ Noting that the meaning of the word “of” is distinct from the word “in,” the Second Circuit concluded that Title III could apply to the sale of insurance policies, even if such policies were sold outside of the insurance office.⁶⁶

Other courts have positively referenced this theory, even in combination with others. For example, in ***Robles v. Domino’s Pizza LLC*, 913 F.3d 898 (9th Cir. 2019)**, the Ninth Circuit held that the ADA applies to Domino’s website and application because the ADA



requires places of public accommodation, like Domino's, to provide effective communication. It explained that it does not matter that the services are provided through a website or mobile application, because the ADA applies to services *of* a place of public accommodation, not just services *in* a public accommodation.

Most courts in the Second Circuit applying this theory find websites to be covered by Title III. **See, e.g., *Andrews v. Blick Art Materials, LLC*, 268 F.Supp.3d 381 (E.D.N.Y. 2017)** (finding Title III applied to a website even absent a connection to Blick's brick-and-mortar stores); ***Markett v. Five Guys Enterprises LLC*, 2017 WL 5054568 (S.D.N.Y. July 21, 2017)** (finding Fiveguys.com "covered under the ADA, either as its own place of public accommodation or as a result of its close relationship as a service of defendant's restaurants, which indisputably are public accommodations under the statute."); ***Suvino v. Time Warner Cable, Inc.*, 2017 WL 3834777 (S.D.N.Y. Aug. 31, 2017)**; ***Del-Orden v. Bonobos.*, 2017 WL 6547902 (S.D.N.Y. Dec. 20, 2017)**.

However, several recent district court decisions in the Second Circuit have reached a different result. In ***Winegard v. Newsday*, 556 F.Supp.3d 173 (E.D.N.Y. 2021)**, the court considered the plaintiff's claim that Newsday violated the ADA by failing to caption the videos published to its website.⁶⁷ The court dismissed the case, finding Newsday to fall outside the scope of Title III. The court acknowledged that it was interpreting *Pallozzi* differently than other New York district courts, but held that based on its interpretation of the statutory text, "public accommodation" referred only to physical places. **See also *Suris v. Gannett Co.*, 2021 WL 2953218 (E.D.N.Y. July 14, 2021)** (finding USA Today does not fall within one of 12 enumerated categories so not covered by Title III).

Defining Web Accessibility

Although the DOJ has not yet promulgated regulations to define website accessibility, there are guidelines that are considered to be the industry standard for defining what it means to have an accessible website – namely the Web Content Accessibility Guidelines (WCAG). These standards are developed by Web Accessibility Initiative (WAI) of the World Wide Web Consortium (W3C) and contain twelve guidelines for web access. There are different versions of WCAG. WCAG 2.0 was published in December 2008; WCAG 2.1 in June 2018; and WCAG 2.2 is expected out in 2022. There are also three levels of success criteria, A, AA and AAA.

Despite the lack of regulations, it is fair to say that the federal government has demonstrated its approval of WCAG as a standard in several ways. In January 2017, the U.S. Access Board published a final rule updating the accessibility requirements for technology covered by Section 508 of the Rehabilitation Act.⁶⁸ This rule, referred to as the Section 508 refresh, incorporated WCAG 2.0. Likewise, the Department of Transportation (DOT), the federal agency charged with implementing regulations under and enforcing the Air Carrier Access Act of 1986, requires airlines to make their website pages accessible and specifies WCAG 2.0 AA as the required standard.⁶⁹

A review of DOJ enforcement actions also show comfort with WCAG 2.0 and, more recently, WCAG 2.1. In 2021-2022, the DOJ has entered into several settlement agreements with drug and grocery stores that offer the COVID-19 vaccine to ensure that its web-based vaccine-related information is accessible to users with disabilities. For each of these settlement agreements, the required standard for compliance is WCAG 2.1 AA. **See, e.g., DOJ Settlement with Hy-Vee;**⁷⁰ **Rite Aid;**⁷¹ **Kroger;**⁷² **Meijer;**⁷³ and **CVS.**⁷⁴

Some defendants have argued that it is unjust to hold them accountable for web access barriers when the DOJ has not yet promulgated regulations. While this argument gained some short-lived traction, it has now been nearly universally rejected. In ***Robles v. Domino's Pizza LLC*, 2017 WL 1330216 (C.D. Cal. Mar. 20, 2017)**, the court dismissed the plaintiff's lawsuit against Domino's Pizza without prejudice finding that due process requires dismissal until DOJ issues regulations.⁷⁵ The court concluded its opinion by "calling on Congress, the Attorney General, and the Department of Justice to take action to set minimum web accessibility standards for the benefit of the disabled community, those subject to Title III, and the judiciary."⁷⁶

The Ninth Circuit overturned this decision on appeal in ***Robles v. Domino's Pizza LLC*, 913 F.3d 898 (9th Cir. 2019)**.⁷⁷ It held that there was no due process violation as the ADA was not impermissibly vague and the DOJ had been clear on its position that the ADA applied to websites since 1996. The court also distinguished between WCAG 2.0 as a basis of liability versus a possible remedy. It also emphasized that the lack of regulations does not eliminate a statutory requirement. The court also assessed the primary jurisdiction doctrine, which says that federal agencies with particularized expertise must be given the chance to regulate certain areas. To that, the Ninth Circuit found that courts are "perfectly capable" of determining whether plaintiff had effective communication.⁷⁸ Following this opinion, Domino's asked the U.S. Supreme Court to hear this case, which it declined to do.



Other courts have similarly rejected defendant's due process arguments. In ***Gorecki v. Hobby Lobby***, 2017 WL 2957736 (C.D. Cal. June 15, 2017), the defendant argued that a website access case should be dismissed on due process grounds.⁷⁹ Rejecting that argument, the court found that the basis of plaintiff's claim was a failure to comply with Title III, generally. It further emphasized that the "lack of specific regulations does not eliminate [the] obligation to comply with the ADA or excuse [defendant's] failure to comply with the mandates of the ADA."⁸⁰ Finally, the court noted that the defendant had been on notice as DOJ's position that the ADA applied to websites had been clear for over twenty years. **See also *Rios v. NY & Co.***, 2017 WL 5564530 (C.D. Cal. Nov. 16, 2017) (rejecting due process arguments); ***Reed v. CVS Pharmacy***, 2017 WL 4457508 (C.D. Cal. Oct. 3, 2017); ***Access Now v. Blue Apron***, 2017 WL 5186354 (D.N.H. Nov. 8, 2017).

Courts have generally declined to find ADA liability based exclusively on a defendant's failure to ensure that its website complied with WCAG, though some have referenced the information to be informative. In ***Meyer v. Walthall***, 528 F. Supp. 3d 928 (S.D. Ind. 2021), the court declined to determine liability based on the defendant's failure to comply with WCAG 2.1; however, the court concluded that the State's failure to comply with WCAG raised triable issues of fact as to the accessibility of website.⁸¹ **See also *Alcazar v. Bubba Gump Shrimp Co. Restaurants***, 2020 WL 4601364 (N.D. Cal. Aug. 11, 2020) ("[W]hether Bubba Gump's website violates WCAG 2.1 standards is informative to, but not dispositive of, whether it violates the ADA.").

Once liability is established, however, courts have ordered compliance with WCAG as a remedy. When ***Robles v. Domino's Pizza***, 2021 WL 2945562 (C.D. Cal. June 23, 2021) was remanded back to the district court following the Ninth Circuit decision, the court granted the plaintiff's motion for summary judgment finding that Domino's website was not accessible.⁸² As a remedy, the court ordered Defendant to ensure that its website complied with WCAG 2.0, noting that the Ninth Circuit found this would be an appropriate equitable remedy. In ***Hindel v. Husted***, 2017 WL 432839 (S.D. Ohio Feb. 1, 2017), the court ordered the State of Ohio to make its voter-information website compliant with WCAG 2.0 AA after the parties agreed that was the appropriate standard.⁸³ **See also *Panerese v. Shiekh Shoes, LLC***, 2020 WL 7041083 (E.D.N.Y. Dec. 1, 2020) (ordering compliance with WCAG 2.0); **but see *Wright v. Thread Experiment***, 2021 WL 243604 (S.D. Ind. Jan 22, 2021) (ordering Defendant to ensure website complied with the ADA within 90 days or risked permanent shutdown but refusing to order specific compliance with WCAG).

Parties in settlement agreements regularly agree to WCAG 2.1 as the standard for compliance. Examples include *National Federation of the Blind, et al. & The County of Alameda*⁸⁴ and *American Council of the Blind et al v. Hulu LLC*.⁸⁵

Another issue percolating in the courts is when, if ever, a public accommodation can provide effective communication by providing an alternative method to access web-based information, such as a phone line. The DOJ has been consistent that public accommodations have some discretion when it comes to how to ensure that digital information is communicated effectively. In its 2022 guidance document, the DOJ states that “[b]usinesses and state and local governments can currently choose how they will ensure that the programs, services, and goods they provide online are accessible to people with disabilities” while also directing readers to WCAG, Section 508, and other standards.⁸⁶

Whether a phone line offers equivalent access to an accessible website is a fact-specific question; as a result, when defendants raise this defense as part of a motion to dismiss, courts have rejected it. *See, e.g., Nat’l Fed’n of the Blind v. Target*, 452 F.Supp. 2d (N.D. Cal. 2006) (declining to dismiss case based on argument that Target provides information contained on its website in other formats); *Access Now v. Blue Apron*, 2017 WL 5186354 (D.N.H. Nov. 8, 2017) (denying motion to dismiss based on phone alternatives, explaining whether telephone number is sufficient for “effective communication” is a fact-specific inquiry not for motion to dismiss); *Gorecki v. Dave & Buster’s*, 2017 WL 6371367 (C.D. Cal. Oct. 10, 2017) (finding an issue of fact whether website’s banner referring people to phone line is itself accessible).

The court considered the viability of phone access as an alternative to an accessible website in *Robles v. Domino’s Pizza*, 2021 WL 2945562 (C.D. Cal. June 23, 2021). Following the Ninth Circuit decision, the plaintiff filed a motion for partial summary judgment about Defendant’s website claims. In response, Domino’s argued that it had a phone number to use as an alternative. However, the plaintiff presented undisputed evidence that when he tried this number, he waited over 45-minutes before hanging up on two occasions. The court found this to be so insufficient that it granted the plaintiff’s motion for summary judgment. The court stated: “No person who has ever waited on hold with customer service – or ever been hungry for a pizza – would find this to be an acceptable substitute for ordering from a website.”⁸⁷

Recently, the topic of accessibility overlays has become a controversial one and courts are just starting to consider this issue. Overlays, according to several experts in the field of digital accessibility, are technologies that aim to improve accessibility by applying third-party code, such as tools, plug-ins, or widgets. In other words, accessibility overlays attempt to make accessibility improvements to the front-end code as opposed to addressing the underlying access issue.⁸⁸ Many businesses are attracted to overlays as a low-cost fix, while experts warn that they do not adequately resolve accessibility issues.

At least three recent cases and settlement agreements have an overlay-component. In such cases, the court did not have the opportunity to opine on the overlay-issue, as the cases were resolved through settlement. However, the settlements and the cases themselves prove instructive.

In ***Murphy v. Eyebobs, LLC, 21-cv-17 (W.D. Penn. Filed Jan. 7, 2021)***, the plaintiff filed a lawsuit about the website and mobile app barriers he encountered when attempting to use the Eyebobs website.⁸⁹ Notably, the plaintiff specifically plead that Eyebobs used an overlay, which proved ineffective at redressing the barriers. The plaintiff also attached an expert report about problems with overlays. The parties eventually entered a court-approved consent decree resolving this case.⁹⁰ As part of the resolution, Eyebobs agreed to implement an extensive accessibility program, ensuring that its website and mobile app, including third-party content, are accessible, as defined by WCAG 2.1. Eyebobs also agreed to maintain an accessibility coordination team, hire an accessibility consultant, conduct an accessibility audit, publish an accessibility statement, implement an accessibility strategy, and conduct employee training.

Another recent case involving overlays is ***LightHouse et al. v. ADP, Inc. et al. No. 4:20-cv-09020 (N.D. Cal.)***. Here, the plaintiffs asserted that ADP's products remained inaccessible despite its use of an overlay to address accessibility. The parties reached a settlement resolving this case where ADP agreed upon a set schedule to remediate the web and mobile app barriers pursuant to WCAG 2.1.⁹¹ The parties specifically addressed the overlay issue; in their definition of "Accessibility," the parties excluded overlay solutions as follows: "For the purpose of this Agreement, 'overlay' solutions such as those currently provided by companies such as AudioEye and AccessiBe will not suffice to achieve Accessibility."

Other recent settlements have also rejected the use of overlays. See, e.g., ***Settlement Between the American Council of the Blind and Discord*** (providing that "Discord will



not meet the obligations set forth in this Agreement merely by licensing, purchasing, or otherwise using any software tool that: (1) requires users to download particular assistive technology to obtain any accessibility features on the Discord Website or Mobile Applications(s); or (2) promises ADA compliance upon the installation of one line of code.”⁹²

Hosted and Controlled Content

Whether covered entities must ensure the accessibility of third-party content on their website is another important topic.

The DOJ has entered into settlement agreements with varying approaches to third-party content. In certain agreements, it has taken the position that third-party content can be exempted unless it is required for certain important actions. For example, in its agreement with **Hy-Vee**, there is a carve out for third-party content unless such “content is required for the user to schedule a vaccination appointment or complete vaccination-related forms on the Vaccine Registration Portal.”⁹³ In its agreements under Project Civic Access, on the other hand, it has specifically included third party information if the City relies on it to provide services or content.⁹⁴

Private litigants have also taken several approaches. One example comes from the **ACB and Discord** settlement.⁹⁵ There, for any new third-party content after the effective date for which Discord issues a request for proposals for development or inclusion of customer-facing third-party content, Discord will include accessibility as a component to all requests and will use reasonable efforts to select third-party vendors who conform to such standards. Discord will also ensure that all staff with decision-making responsibility for procurement of third-party content are familiar with the Accessibility Technology Procurement Toolkit published by Disability:IN.⁹⁶ Other agreements have a carve out for third-party content.

Additional guidance about hosted and control content comes from court cases against Harvard and MIT. The National Association of the Deaf has two parallel lawsuits against Harvard University and MIT, both of which asserted that the universities have no closed captioning for online materials provided free to the public, including recordings of speeches and educational materials. In this extensive and complex litigation, the courts have issued several opinions about various aspects of digital accessibility. In **National Association of the Deaf v. Harvard University, 2016 WL 6540446 (D. Mass. Nov. 3,**

2016) and *National Association of the Deaf v. MIT*, 2016 WL 6652471 (D. Mass. Nov. 4, 2016), the courts rejected the Universities' argument that Title III did not apply to the accessibility of online content and that captioning was a fundamental alteration of content.⁹⁷

Harvard later moved for judgment on the pleadings asserting, among other arguments, that it could not be liable for content on websites hosted by third parties, such as Harvard on YouTube, Harvard on iTunes and Harvard on SoundCloud. In *National Association of the Deaf v. Harvard University*, 2019 WL 1409302 (D. Mass. March 28, 2019), the court stated that the outcome of this argument depends on information it did not yet have: whether the university arranges for the content to appear on its platform, and whether the university has control over how the content is displayed.⁹⁸

Harvard also argued that it cannot be held liable as the Communications Decency Act (CDA) limits website operators from being treated as the publisher of material posted on the website by third party users. The court noted that the CDA limits liability for two types of content. First, the CDA limits liability for "embedded content," meaning content that is hosted on a third-party site that does not belong to the university that is then linked, in its existing form, to content on a university platform. For this narrow group, the court granted judgment on the pleadings.

But the court found that it was premature to dismiss the claims about "third party content," meaning content posted on a Harvard platform that the university did not create, produce, or substantially alter. The court stated that it needed more information to assess if the kind of content in the litigation was actually "third party content." **See also *Nat'l Ass'n of the Deaf v. MIT*, 2019 WL 1409301 (D. Mass. Mar. 28, 2019)** (adopting reasoning from Harvard decision)

Shortly after this decision, Harvard⁹⁹ entered a consent decree resolving this case, with MIT¹⁰⁰ following shortly after. Per the agreements, the Universities agreed to implement new guidelines to make their websites and online resources accessible for people who are deaf and hard of hearing, as well as provide captioning for publicly-available online content, including video and audio content posted on their university sites, YouTube, Vimeo, Soundcloud pages, certain live-streaming events, and online courses. Also, there is now a process to request captioning for previously posted content within certain timeframes. There is a requirement to have industry-standard live captioning for certain University-wide live-streamed events, and a process for responding to requests for live captioning for all other live-streamed event.



Lessons from Settlement Agreements

Entities looking to revamp their accessibility policies, practices and procedures should review and consider the steps required by recent settlement agreements, especially ones entered with the DOJ. Common tips from digital accessibility settlements include: (1) drafting and implementing website accessibility policies; (2) maintaining an employee as web accessibility coordinator; (3) training website content personnel on how to conform content and services to WCAG 2.1 AA; (4) adding accessibility to performance review of employees; (5) ensuring automated, manual, and user testing with individuals with different disabilities; (6) retaining an independent consultant to evaluate website and online services and do annual evaluations; (7) ensuring the website has an accessible link for feedback; (8) have a set period of time to take reasonable steps to remediate issues; and (9) focusing on accessibility during procurement process.

Other Technologies

While there are countless other kinds of digital technology – and interesting cases involving such technology – this legal brief does not touch on all of them. However, here are a few highlights regarding other kinds of digital technology.

In ***Panarra v. HTC Corp.*, 2022 WL 1128557 (W.D.N.Y. Apr. 15, 2022)**, the plaintiff filed a lawsuit against an online Virtual Reality subscription service called “Viveport Infinity”, which has been referred to as “the Netflix of VR,” for failing to offer captioning.¹⁰¹ The defendant filed a motion to dismiss, which the court denied. It explained that a VR subscription, like Netflix, is a place of public accommodation even though it has no tie to a physical place. It further concluded that the plaintiff was not trying to regulate content such as goods offered at a store; instead, the plaintiff was seeking access to the same content due to failure to provide auxiliary aids and services. Without opining as to what the standard would be, the court said whether the defendant had sufficient control to ensure captioning was a question of fact.

There is pending litigation about the accessibility of several podcast streaming services. In December 2021, NAD filed ***NAD v. Sirius XM, Stitcher Media and Pandora*, 21-cv-10542 (S.D. N.Y. filed 12/9/2021)**, asserting that the podcast streaming services do not provide transcripts, thereby failing to ensure effective communication for deaf and hard



of hearing people.¹⁰² This case is now stayed as the parties discuss possible resolution through Structured Negotiation.

Accessibility of kiosks is another important topic, as more and more entities rely on kiosks to capture information. In ***National Federation of the Blind v. Wal-Mart*, 2021 WL 4750521 (D. Md. Oct. 12, 2021)**, the issue was whether the ADA required Wal-Mart to make their self-serve kiosks accessible for blind users.¹⁰³ Blind shoppers were able to enter their financial information into a tactile numeric keypad; however, for all other parts of the transaction, associates were trained to assist blind shoppers. The court found for Wal-Mart in this case. It noted that the plaintiff's had brought an accessible design claim, but the 2010 ADA Standards did not govern kiosks. The plaintiffs also asserted that the inaccessible kiosk violated the ADA's requirement to provide necessary auxiliary aids and services. Here, the court found that staff assistance was sufficient to provide effective communication in retail transaction, distinguishing this situation from voting and noting that sensitive financial info can be entered privately.

In ***Vargas, ACB v. Quest*, 2021 WL 5989961 (C.D. Cal. Oct 15, 2021)**, ACB filed a lawsuit against Quest because it required patients to use a visual, touchscreen, self-service kiosk to enter personal information to check in, but the kiosk was not accessible for blind users and trained staff were not regularly available to ensure communication access.¹⁰⁴ During the parties' summary judgment briefing, the DOJ filed a Statement of Interest where it opined that Quest must provide auxiliary aids and services to afford its patients a "like experience" and a full and equal opportunity to enjoy its services, including its self-service kiosks as kiosks are services.¹⁰⁵ Quest attempted to paint the plaintiff's request as one for "special goods" that are not required under the ADA; the court rejected that argument, explaining that the plaintiff's request was one for access to the goods currently being made available. **See also *Social Security Kiosk Settlement (March 2020)*** (agreeing to improve visitor intake processing kiosks (VIPr kiosks) at field offices – redesign with access expert).¹⁰⁶

Title I (Employment)

Title I of the ADA prohibits employers from discriminating against qualified individuals with a disability regarding "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment."¹⁰⁷ As more employers rely on digital technology on the worksite and during the application process, the more likely we are to see digital cases arise under Title I.

In ***Murad v. Amazon, 19-cv-12578 (E.D. Mich.) (settled July 2020)***, the plaintiff tried to apply for a virtual customer service position.¹⁰⁸ However, the technology required to do the job was not accessible with Voiceover, the Apple text-to-speech screen reading software. Amazon resolved this case through a settlement where it agreed to implement accessible technology that will allow blind people to work from home as Amazon customer service representatives. For this plaintiff specifically, she was offered a work-from-home position upon successful completion of the application process as well as an undisclosed monetary settlement.

Similarly, in ***Bartleson v. Miami-Dade County School Board, 18-cv-21605 (S.D. Fla. Feb. 25, 2019)***, a blind counselor and clinician who had worked for school system for 27 years brought a lawsuit under Titles I and II of the ADA challenging the lack of accessibility with her school system's websites, forms and software applications.¹⁰⁹ As a result of the inaccessible technology, she had been forced to rely on help from a sighted coworker to do her job, such as completing student progress notes, and accessing her employment benefit information. She entered into a consent decree, where the school system resolved the case by agreeing to make its existing websites, forms and software accessible (and in the meantime, provide scheduled, dedicated assistance); procure only accessible software in the future; and pay plaintiff \$250,000 in monetary damages.

Section 508 of Rehabilitation Act of 1973, as Amended

In 1998, Congress amended the Rehabilitation Act to require federal agencies to make their electronic and information technology accessible to people with disabilities.¹¹⁰ Specifically, Congress enacted Section 508, which required federal agencies to give employees with disabilities and members of the public access to information that is comparable to access provided by others. Section 508 also charged the U.S. Access Board with establishing standards for electronic and information technology, which were approved in April 2001 and enforceable as of June 25, 2001.¹¹¹

In 2017, the U.S. Access Board published the Section 508 refresh which updated its accessibility requirements incorporating WCAG 2.0. One recent example of a Section 508 claim is ***NFB et al v. OPM et al, 19-cv-06249 (N.D. Ill.)***.¹¹² In this case, OPM agreed to ensure that health benefit information is accessible to blind federal employees, retirees and other plan participants.

Technical Standards and Resources

Those interested in learning more about the technical standards for website access should review the Web Content Accessibility Guidelines, or WCAG, updated in December 2018, as WCAG 2.1. These standards are developed by Web Accessibility Initiative (“WAI”) of the World Wide Web Consortium (“W3C”), and contain twelve guidelines for web access. Various resources exist to become familiar with these guidelines.

- WCAG 2.1: <https://www.w3.org/TR/WCAG21/>
- Technical Assistance
 - How to Meet WCAG 2.1: A Customizable Quick Reference: <https://www.w3.org/WAI/WCAG21/quickref/>
 - WebAim’s WCAG 2 Checklist: <https://webaim.org/standards/wcag/checklist>

There are a number of resources that exist to evaluate a website’s accessibility. The World Wide Web Consortium compiled a list of various sites that assess website accessibility: www.w3.org/WAI/ER/tools/complete and <https://www.w3.org/WAI/test-evaluate/preliminary/>

Attorney Lainey Feingold maintains a list of accessibility consultants: www.lflegal.com/resources/#consult and usability testing: www.lflegal.com/resources/#test

The ADA National Network also provides technical assistance on website accessibility issues. To reach your local center, contact (800) 949-4ADA or www.adata.org.

Conclusion

Accessibility barriers can completely prevent a person with a disability from navigating a website or enjoying the services it has to offer. As more aspects of society shift from the physical to virtual space—especially during the COVID-19 pandemic—the more important it is to ensure that everyone has access to the digital world. Even without regulations on website accessibility, the DOJ has made its position clear through technical assistance guidance and its own enforcement initiatives. DOJ settlements offer robust examples to covered entities about the steps to put in place to develop, implement and maintain effective accessibility policies, practices and procedures. This is an issue that is hugely important now and for the foreseeable future.



¹ This legal brief was written by Barry C. Taylor, Vice President of Systemic Litigation and Civil Rights and Rachel M. Weisberg, Managing Attorney, with Equip for Equality, the Illinois Protection and Advocacy Agency (P&A). Equip for Equality is providing this information under a subcontract with the Great Lakes ADA Center.

² 42 U.S.C. § 12101(b)(1).

³ Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 142, 43461 (proposed July 26, 2010), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2010-07-26/pdf/2010-18334.pdf>

⁴ 42 U.S.C. § 12132 (emphasis added).

⁵ Department of Justice, Accessibility of State and Local Government Websites to People with Disabilities (June 2003), *available at* <http://www.ada.gov/websites2.htm>

⁶ Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 142, 43464 (proposed July 26, 2010), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2010-07-26/pdf/2010-18334.pdf>

⁷ *Meyer v. Walthall*, 528 F. Supp. 3d 928 (S.D. Ind. 2021).

⁸ *Id.* at 958-59.

⁹ *Id.* at 959.

¹⁰ *Payan v. Los Angeles Cmty. Coll. Dist.*, 2019 WL 9047062 (C.D. Cal. Apr. 23, 2019).

¹¹ *Martin v. Metro. Atlanta Rapid Transit Auth.*, 225 F. Supp. 2d 1362 (N.D. Ga. 2002).

¹² *Id.* at 1377 (quoting 49 C.F.R. § 37.167(f)).

¹³ Settlement Agreement Between the United States of America and the City of Killeen, Texas, Under the Americans with Disabilities Act (June 29, 2021), *available at* https://www.ada.gov/killeen_tx_pca/killeen_sa.html

¹⁴ Settlement Agreement Between the United States of America and the City of Trinidad, Colorado, Under the Americans with Disabilities Act (2018), *available at* https://www.ada.gov/trinidad_pca_sa.html

¹⁵ Settlement Agreement Between the City and County of Denver, Colorado, Under the Americans with Disabilities Act (Jan. 8, 2018), *available at* https://www.ada.gov/denver_pca/denver_sa.html

¹⁶ Settlement Agreement Between the United States of America and the City of Milwaukee, Wisconsin (June 17, 2016), *available at* https://www.ada.gov/milwaukee_pca/milwaukee_sa.html

¹⁷ 42 U.S.C. § 12182(a) (emphasis added).

¹⁸ 42 U.S.C. § 12181(7); 28 C.F.R. § 36.104.

¹⁹ *Id.*

²⁰ Ltr. from Deval L. Patrick, Assistant Attorney General, Civil Rights Division, Department of Justice, Sept. 9, 1996, *available at* http://www.justice.gov/crt/foia/readingroom/frequent_requests/ada_tal/tal712.txt

²¹ Brief of the United States as Amicus Curiae in Support of Appellant, *Hooks v. OKBridge, Inc.*, No. 99-50891, (5th Cir. June 30, 2000) available at www.justice.gov/crt/briefs/hooks.htm

²² *Id.* at 7.

²³ *Id.* at 12.

²⁴ *Id.* at 17.

²⁵ DOJ Letter to Congressman Ted Budd, Sept. 25, 2018, available at <https://www.lflegal.com/2018/09/doj-cut/#Full-text-of-September-25-2018-Letter-From-the-US-Department-of-Justice>

²⁶ *Id.*

²⁷ See Press Release, Department of Justice, Justice Department Issues Web Accessibility Guidance Under the Americans with Disabilities Act (Mar. 22, 2022), available at <https://www.justice.gov/opa/pr/justice-department-issues-web-accessibility-guidance-under-americans-disabilities-act>; Guidance on Web Accessibility and the ADA, available at <https://beta.ada.gov/web-guidance/>

²⁸ *Id.*

²⁹ *Id.*

³⁰ See https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201510/Statement_1100.html.

³¹ https://www.reginfo.gov/public/jsp/eAgenda/InactiveRINs_2017_Agenda_Update.pdf

³² Settlement Agreement Between the City and County of Denver, Colorado, Under the Americans with Disabilities Act (Jan. 8, 2018), available at https://www.ada.gov/denver_pca/denver_sa.html

³³ See, e.g., Settlement Agreement Under the Americans with Disabilities Act Between the United States of America and Rite Aid Corporation (Nov. 1, 2021), available at https://www.ada.gov/rite_aid_sa.pdf

³⁴ E.g., *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28 (2d Cir. 1999); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006 (6th Cir. 1997); *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9th Cir. 2000).

³⁵ See *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994); *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999).

³⁶ See *Parker v. Metropolitan Life Insurance Co.*, 121 F.3d 1006 (6th Cir. 1997); *Ford*, 145 F.3d 601; *Weyer*, 198 F.3d 1104.

³⁷ *Carparts*, 37 F.3d 12.

³⁸ Title V of the ADA creates limitations for the application of insurance policies; thus, courts that find insurance policies subject to Title III of the ADA, qualify this finding as subject to the safe harbor provision in Section 501(c) of Title V. See, e.g., *Pallozzi*, 198 F.3d at 33.

³⁹ *Carparts*, 37 F.3d at 19.

⁴⁰ *Id.*

⁴¹ *Id.* (citing 42 U.S.C. § 12101(b)).

⁴² *Id.* at 20.

⁴³ *Doe*, 179 F.3d at 559 (emphasis added).

⁴⁴ *Nat'l Ass'n of the Deaf, et al. v. Netflix, Inc.* 869 F. Supp. 2d 196 (D. Mass. 2012).

⁴⁵ Statement of Interest of the United States of America in Opposition to Defendant's Motion for Judgment on the Pleadings, *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 3:11-cv-30168 (D. Mass. May 15, 2012), available at http://www.ada.gov/briefs/netflix_SOI.pdf

⁴⁶ *Netflix*, 869 F. Supp. 2d at 201.

⁴⁷ Press Release, Disability Rights Education and Defense Fund, Netflix and National Association of the Deaf (NAD) Reach Historic Agreement to Provide 100% Closed Captioning in On-Demand Streaming Content Within Two Years (Oct. 10, 2012), available at <http://dredf.org/captioning/netflix-press-release-10-10-12.pdf>

⁴⁸ Consent Decree, *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, No. 11-30168-MAP (D. Mass. Oct. 9, 2012), available at <http://dredf.org/captioning/netflix-consent-decree-10-10-12.pdf>

⁴⁹ *Wright v. Thread Experiment*, 2021 WL 243604 (S.D. Ind. Jan 22, 2021).

⁵⁰ *Mejico v. Alba Web Designs, LLC*, 515 F.Supp.3d 424 (W.D. Va. 2021).

⁵¹ *Id.* at 434.

⁵² *Weyer*, 198 F.3d 1104 (holding that insurance policy was not subject to Title III because it lacked a connection with an actual physical place).

⁵³ *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006 (6th Cir. 1997).

⁵⁴ *Ford*, 145 F.3d at 612-13 (finding insurance policy outside the scope of Title III because there was no “nexus” between the challenged policy and the services offered to the public from the insurance office).

⁵⁵ *Rendon*, 294 F.3d 1279.

⁵⁶ *Id.* at 1283.

⁵⁷ *Id.* at 1286.

⁵⁸ *Mahoney v. Bittrex, Inc.*, 2020 WL 212010 (E.D. Pa. Jan. 14, 2020).

⁵⁹ *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017, 1023 (N.D. Cal. 2012) (citing *Weyer*, 198 F.3d at 1114).

⁶⁰ *Id.* at 1024.

⁶¹ *Murphy v. Bob Cochran Motors, Inc.*, 2020 WL 6731130 (W.D. Pa. Aug. 4, 2020).

⁶² *Haynes v. Dunkin' Donuts*, 741 Fed.Appx. 752 (11th Cir. July 31, 2018).

⁶³ *Castillo v. Jo-Ann Stores, LLC*, 2018 WL 838771 (N.D. Oh. Feb. 13, 2018).

⁶⁴ *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340 (S.D. Fla. 2017), vacated and remanded, 993 F.3d 1266 (11th Cir. 2021), opinion vacated on reh'g, 21 F.4th 775 (11th Cir. 2021), and appeal dismissed and remanded, 21 F.4th 775 (11th Cir. 2021).

⁶⁵ 42 U.S.C. § 12182(a) (2014) (emphasis added).

⁶⁶ *Palozzi*, 198 F.3d at 33.

⁶⁷ *Winegard v. Newsday*, 556 F.Supp.3d 173 (E.D.N.Y. 2021).

⁶⁸ <https://www.access-board.gov/ict>

⁶⁹ 14 CFR 382.43(c)(3), available at <https://www.law.cornell.edu/cfr/text/14/382.43>

⁷⁰ Settlement Agreement Under the Americans with Disabilities Act Between the United States of America and Hy-Vee (Nov. 30, 2021), available at www.ada.gov/hy-vee_sa.pdf

⁷¹ Settlement Agreement Under the Americans with Disabilities Act Between the United States of America and Rite Aid (Nov. 1, 2021), available at https://www.ada.gov/rite_aid_sa.pdf

⁷² Settlement Agreement Under the Americans with Disabilities Act Between the United States of America and Kroger (Jan. 28, 2022), available at https://www.ada.gov/kroger_co_sa.pdf

⁷³ Settlement Agreement Under the Americans with Disabilities Act Between the United States of America and Meijer (Feb. 2, 2022); available at https://www.ada.gov/meijer_sa.pdf

⁷⁴ Settlement Agreement Under the Americans with Disabilities Act Between the United States of America and CVS (April 11, 2022), available at https://www.ada.gov/cvs_sa.pdf

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- ⁷⁵ *Robles v. Domino's Pizza LLC*, 2017 WL 1330216 (C.D. Cal. Mar. 20, 2017).
- ⁷⁶ *Id.* at *8.
- ⁷⁷ *Robles v. Domino's Pizza LLC*, 913 F.3d 898 (9th Cir. 2019).
- ⁷⁸ *Id.* at 911.
- ⁷⁹ *Gorecki v. Hobby Lobby*, 2017 WL 2957736 (C.D. Cal. June 15, 2017).
- ⁸⁰ *Id.* at *4.
- ⁸¹ *Meyer v. Walthall*, 528 F. Supp. 3d 928 (S.D. Ind. 2021).
- ⁸² *Robles v. Domino's Pizza*, 2021 WL 2945562 (C.D. Cal. June 23, 2021).
- ⁸³ *Hindel v. Husted*, 2017 WL 432839 (S.D. Ohio Feb. 1, 2017).
- ⁸⁴ Settlement Agreement Between the National Federation of the Blind et al and the County of Alameda, available at www.lflegal.com/2018/11/alameda-voting
- ⁸⁵ Settlement Agreement, *American Council of the Blind et al v. Hulu*, 17-cv-12285 (D. Mass.), available at <https://dralegal.org/press/hulu-becomes-latest-streaming-service-to-commit-to-accessibility-for-blind-users/>
- ⁸⁶ Guidance on Web Accessibility and the ADA, available at <https://beta.ada.gov/web-guidance/>
- ⁸⁷ *Robles v. Domino's Pizza*, 2021 WL 2945562, at *8 (C.D. Cal. June 23, 2021).
- ⁸⁸ Overlay Fact Sheet, available at <https://overlayfactsheet.com>
- ⁸⁹ *Murphy v. Eyebobs, LLC*, 21-cv-17 (W.D. Penn. Filed Jan. 7, 2021).
- ⁹⁰ *Murphy v. Eyebobs*, 21-cv-00017 (W.D. Penn. entered Oct. 6, 2021), available at <http://equalentry.com/wp-content/uploads/2022/03/Eyebobs-Opinion.pdf>
- ⁹¹ *LightHouse et al. v. ADP, Inc. et al.*, No. 4:20-cv-09020-HSG (N.D. Cal. executed Oct. 21, 2021), available at <https://dralegal.org/wp-content/uploads/2021/12/LightHouse-ADP-Settlement-Agreement-FINAL-10-18-21.pdf>
- ⁹² Settlement Between the American Council of the Blind and Discord (Oct. 2021), available at <https://www.lflegal.com/2021/10/discord-agreement/>
- ⁹³ Settlement Agreement Under the Americans with Disabilities Act Between the United States of America and Hy-Vee (Nov. 30, 2021), available at www.ada.gov/hy-vee_sa.pdf
- ⁹⁴ Settlement Agreement Between the United States of America and the City of Trinidad, Colorado, Under the Americans with Disabilities Act (2018), available at https://www.ada.gov/trinidad_pca_sa.html; Settlement Agreement Between the City and County of Denver, Colorado, Under the Americans with Disabilities Act (Jan. 8, 2018), available at https://www.ada.gov/denver_pca/denver_sa.html; Settlement Agreement Between the United States of America and the City of Milwaukee, Wisconsin (June 17, 2016), available at https://www.ada.gov/milwaukee_pca/milwaukee_sa.html
- ⁹⁵ Settlement Between the American Council of the Blind and Discord (Oct. 2021), available at <https://www.lflegal.com/2021/10/discord-agreement/>
- ⁹⁶ Accessible Technology Procurement Toolkit published by Disability:IN, available at <https://private.disabilityin.org/procurementtoolkit>
- ⁹⁷ *National Association of the Deaf v. Harvard University*, 2016 WL 6540446 (D. Mass. Nov. 3, 2016); *National Association of the Deaf v. MIT*, 2016 WL 6652471 (D. Mass. Nov. 4, 2016).
- ⁹⁸ *Nat'l Ass'n of the Deaf v. Harvard University*, 2019 WL 1409302 (D. Mass. March 28, 2019).
- ⁹⁹ NAD v. Harvard, consent decree, available at <https://creeclaw.org/wp-content/uploads/2019/11/NAD-v-Harvard-Consent-Decree.pdf?eType=EmailBlastContent&eId=4cc687f3-ea3a-47c4-935f-19d1e5b56216>

¹⁰⁰ NAD v. MIT, consent decree, available at <https://creeclaw.org/wp-content/uploads/2020/02/MIT-Consent-Decree-2.7.20-FINAL.docx>

¹⁰¹ *Panarra v. HTC Corp.*, 2022 WL 1128557 (W.D.N.Y. Apr. 15, 2022).

¹⁰² *NAD v. Sirius XM, Stitcher Media and Pandora*, 21-cv-10542 (S.D. N.Y. filed 12/9/2021), complaint available at: https://dralegal.org/wp-content/uploads/2021/12/1_Complaint.pdf

¹⁰³ *National Federation of the Blind v. Wal-Mart*, 2021 WL 4750521 (D. Md. Oct. 12, 2021).

¹⁰⁴ *Vargas, ACB v. Quest*, 2021 WL 5989961 (C.D. Cal. Oct 15, 2021).

¹⁰⁵ *Vargas, ACB v. Quest*, 19-cv-08108 (C.D. Cal. Filed Sept. 20, 2021), https://www.ada.gov/quest_soi.pdf

¹⁰⁶ *Social Security Kiosk Settlement* (March 2020), available at <https://nfb.org/about-us/press-room/blind-americans-settle-lawsuit-against-social-security-administration>

¹⁰⁷ 42 U.S.C. § 12112(a).

¹⁰⁸ *Murad v. Amazon*, 19-cv-12578 (E.D. Mich.) (settled July 2020), available at <https://nfb.org/sites/www.nfb.org/files/files-pdf/settlement-agreement-and-general-release-signed-ace.pdf>

¹⁰⁹ *Bartleson v. Miami-Dade County School Board*, 18-cv-21605 (S.D. Fla. Feb. 25, 2019), available at www.browngold.com/blind-employee-settles-lawsuit-against-miami-dade-county-public-schools

¹¹⁰ 29 U.S.C. § 794d.

¹¹¹ *Id.*

¹¹² *NFB et al v. OPM et al*, 19-cv-06249 (N.D. Ill.). available at <https://nfb.org/about-us/press-room/federal-office-personnel-management-improving-access-health-benefits>.