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The Americans with Disabilities Act (ADA) and Public Accommodations in Web Services

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The Americans with Disabilities Act (ADA) and Public Accommodations in Web Services

The Americans with Disabilities Act (ADA) requires businesses open to the public to accommodate people with disabilities. To comply, businesses must work to remove physical barriers and modify policies that limit access. References to websites and mobile applications are absent from the ADA’s text and regulations, and businesses, courts, and advocates have long struggled to apply the 1990 law to online services.

Courts are divided on whether the parts of the ADA that govern businesses and nonprofits cover websites, and which websites they cover. While there is little debate that government websites are required to be accessible, either under the ADA or the Rehabilitation Act, assuming the ADA does apply to private websites, the question becomes, “How does a covered entity make its website accessible?” Litigants have asserted that lack of clarity leaves businesses unsure of how to comply.

The Department of Justice (DOJ), charged with enforcing the relevant provisions of the ADA, recently attempted to clarify the agency’s view, issuing guidance on cyberspace accessibility. The guidance follows a long history of agency statements, litigation, and attempted rulemakings.

The recent agency guidance helps solidify DOJ’s position that the ADA applies to websites, and it offers some suggestions about how websites can comply with the ADA. It does not, however, present a detailed, uniform standard. DOJ’s recently proposed regulations for state and local government websites, for which ADA applicability is largely settled, are more comprehensive, and they suggest what course the agency may take if it chooses to specify businesses’ ADA obligations with respect to the internet. Over the past several years, without binding regulations defining ADA compliance, web developers, litigants, and courts have often turned to the Web Accessibility Initiative’s (WAI’s) Web Content Accessibility Guidelines (WCAG), a set of private web accessibility standards. The federal government has modeled rules for its own web content on these industry standards, and DOJ has proposed incorporating these standards as it creates regulations for state and local government websites. These rules provide technical standards and address issues such as the inclusion of captions or other text alternatives for nontext content; using high contrast; and ensuring compatibility with third-party accessibility hardware and software. With an accessible website, a user with hearing impairment can read audio material (such as with visual captions) and a user with low vision can use forms, buttons, and other features (often by playing aloud these features’ associated audible descriptions). Some commentators have asserted that standards such as WCAG should be made legally binding, while others see value in permitting website owners to select among possible accessibility options.

One difficulty with regulation of internet technology is its changeability. Since the passage of the ADA in 1990 and the advent of the internet, the practical meanings of the terms *website* and *web content* have expanded. Websites have become more interactive, allowing users to consume, create, collaborate, and distribute multimedia content such as audio and video files. This increased interactivity may sometimes create greater opportunity for disability access. However, the shift from static to interactive websites and from traditional web browsers to mobile apps may also increase their technical complexity, bringing new challenges for applying ADA requirements.

Web accessibility presents many issues for Congress. Congress may consider whether to wait for agency action, engage in oversight, or enact legislation. Options for legislation include clarifying ADA applicability to websites and mandating specific accessibility standards such as WCAG—in whole, in part, or not at all. Bills on this topic in previous Congresses have included S. 2984, introduced in September 2023; H.R. 1100, introduced in 2021; and H.R. 4686, introduced in 2020. None of these bills were enacted.

In formulating any legislative measures, Congress could consider crafting different requirements depending on a website’s scale (in terms of resources or traffic) or purpose (whether it is for-profit, nonprofit, or governmental). Congress might also consider regulation beyond websites, such as for mobile apps; regulation of user-generated content; rules for AI-generated content; and potential retroactive requirements for existing websites. Technical issues, such as security concerns, and legal questions, such as venue and standing, may also warrant consideration.

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Contents

ADA Applicability to Websites	2
The ADA: Text and History	2
The Meaning of “Website” and “Web Content”	3
Judicial Interpretations of “Public Accommodation” and Websites.....	5
Agency Interpretation and Guidance on ADA Application to Websites	7
Website Accessibility Standards.....	8
The Web Content Accessibility Guidelines (WCAG).....	11
Section 508 of the Rehabilitation Act	13
Litigation and Judicial Interpretations of Accessibility Standards.....	14
Legislative Options and Considerations for Congress	16

Tables

Table 1. Four Principles of Web Content Accessibility in WCAG 2.1	11
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Contacts

Author Information.....	18
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In 1990, passage of the Americans with Disabilities Act (ADA) required businesses nationwide to accommodate people with disabilities.¹ Under the statute’s terms, for example, a “motion picture house” or other “place of exhibition or entertainment” may not turn someone away because she uses a wheelchair, must provide wheelchair seating with lines of sight comparable to standard seating, and must close-caption movies so deaf patrons can understand the dialogue.² Courts have long struggled with how the ADA applies, if at all, to online businesses, however. For instance, in the present day, would Netflix be considered a “place of exhibition or entertainment” covered like a physical “motion picture house” was in 1990?³ Some courts have concluded that the ADA generally does not apply to private business websites, some have concluded that it does, and some have concluded that it only applies to certain websites—those affiliated with brick-and-mortar businesses. Several commentators have claimed that courts’ inconsistent rulings have encouraged forum shopping (filing suit in the most favorable jurisdiction).⁴ Advocates for businesses and for people with disabilities alike have called for regulatory and legislative action.⁵ The Department of Justice (DOJ), charged with enforcing the relevant provisions of the ADA, recently attempted to clarify the agency’s view, issuing guidance on web accessibility.⁶

Focusing on private websites, this report discusses the ADA’s text and history, examines the meanings of the terms *website* and *web content*, and then looks at judicial assessment of whether and when the ADA applies to websites and web applications.⁷ Next, the report discusses DOJ’s views and considers what the ADA may require for website compliance, an issue that also remains unsettled.⁸ For example, website compliance could include compatibility with accessibility software such as screen readers, which convert visual screen information into synthesized speech. The report then examines some particular website accessibility standards, including the one recommended by the World Wide Web Consortium (W3C) and standardization efforts made by federal agencies. The report closes with considerations for Congress, including

¹ 42 U.S.C. § 12111.

² 42 U.S.C. § 12181(7)(c); Press Release, U.S. Dep’t of Just., Justice Department Announces Settlement of Litigation with AMC Entertainment Inc. (Nov. 18, 2010), <https://www.justice.gov/opa/pr/justice-department-announces-settlement-litigation-amc-entertainment-inc>; 28 C.F.R. § 36.303(g) (2024).

³ Nat’l Ass’n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 201 (D. Mass. 2012).

⁴ Reply Brief for Petitioner at 1, Domino’s Pizza, LLC v. Robles, 140 S. Ct. 122 (2019) (No. 18-1539).

⁵ *Website Accessibility DOJ Guidance*, NAT’L ASS’N OF REALTORS (Mar. 21, 2022), <https://www.nar.realtor/washington-report/ada-website-accessibility-doj-guidance>; *Disability Organizations Call on DOJ to Finalize Digital Accessibility Regulations*, DISABILITY INSIDER (Mar. 1, 2022), <https://disabilityinsider.com/2022/03/01/law/disability-organizations-call-on-doj-to-finalize-digital-accessibility-regulations/>; Allen Smith, *Bill to Establish Web Accessibility Guidelines Fails to Pass*, SHRM.ORG (Jan. 8, 2021), <https://www.shrm.org/topics-tools/employment-law-compliance/bill-to-establish-web-accessibility-guidelines-fails-to-pass>.

⁶ Press Release, U.S. Dep’t of Just., Justice Department Issues Web Accessibility Guidance Under the Americans with Disabilities Act (Mar. 18, 2022), <https://www.justice.gov/opa/pr/justice-department-issues-web-accessibility-guidance-under-americans-disabilities-act>; *Guidance on Web Accessibility and the ADA*, U.S. DEP’T OF JUST. (Mar. 18, 2022), <https://www.ada.gov/resources/web-guidance/>.

⁷ As explained below, federal websites fall under another statute, Section 508 of the Rehabilitation Act, 29 U.S.C. § 794(d). Websites run by state and local governments and those run by private entities fall under different titles of the ADA. It is in regulating private websites, rather than government websites, that courts have divided over the ADA’s applicability. CRS Legal Sidebar LSB10844, *The Americans with Disabilities Act in Cyberspace: ADA Applicability to Websites*, by April J. Anderson (2022).

⁸ CRS Legal Sidebar LSB10845, *The Americans with Disabilities Act in Cyberspace: Website Accessibility Standards*, by April J. Anderson (2022). Regulations for state and local government websites, recently issued by DOJ, illustrate possible requirements. 28 C.F.R. § 35.200 (effective June 24, 2024).

potential legislative measures to clarify if and when the ADA applies to websites and web applications and potential standards to determine a website's ADA compliance.

ADA Applicability to Websites

The ADA: Text and History

In passing the ADA, lawmakers took aim at the long-standing exclusion of people with disabilities from active participation in society. Congress found that “historically, society has tended to isolate and segregate individuals with disabilities.”⁹ Disability discrimination, as Congress recognized in discussing the ADA’s statutory predecessor, often comes from apathy and “neglect” rather than intentional exclusion.¹⁰ Thus, the ADA aimed to remedy, among other things, the “failure to make modifications to existing facilities and practices” and “communication barriers” that tend to exclude people with disabilities.¹¹ One of the committee reports accompanying the ADA acknowledged, in particular, a concern with information access, indicating that “[i]nformation exchange is one of the areas where there are still substantial barriers.”¹² The ADA, the report suggested, should “keep pace with the rapidly changing technology of the times.”¹³

The ADA defines a “disability” as a “physical or mental impairment that substantially limits one or more major life activities.”¹⁴ The statute covers three major areas of public life: employment (Title I),¹⁵ public services (state and local government) (Title II),¹⁶ and public accommodations (businesses and nonprofits open to the public) (Title III).¹⁷

The ADA bars discrimination against people with disabilities in these areas and requires reasonable modifications (reasonable changes to rules, structures, and equipment) to enable access. In other words, to comport with the ADA, public accommodations must be accessible to persons with covered disabilities. They may not provide an accommodation to a disabled person “that is not equal to that afforded to other individuals” or that is “different or separate from that provided to other individuals” unless a separate benefit is “necessary” to provide an equal opportunity.¹⁸ Reasonable modifications generally include offering “auxiliary aids and services” for communication.¹⁹

A business or nonprofit can rebut a claim for a modification that seems reasonable on its face by showing that, given specific circumstances, the modification “would fundamentally alter the

⁹ 42 U.S.C. § 12101(a)(2).

¹⁰ *Alexander v. Choate*, 469 U.S. 287, 295 (1985).

¹¹ 42 U.S.C. § 12101(a)(5).

¹² STAFF OF H. COMM. ON EDUC. & LAB., 101ST CONG., LEGIS. HISTORY OF PUBLIC LAW NO. 101-336: THE AMERICANS WITH DISABILITIES ACT 381 (Comm. Print 1990).

¹³ *Ibid.*, 381.

¹⁴ 42 U.S.C. § 12102(1)(a).

¹⁵ 42 U.S.C. § 12111.

¹⁶ 42 U.S.C. § 12131.

¹⁷ 42 U.S.C. § 12181.

¹⁸ 42 U.S.C. § 12182(b)(1)(A)(ii)–(iii).

¹⁹ *Ibid.*

nature of such goods, services, facilities, privileges, advantages, or accommodations” or would cause an “undue burden.”²⁰

The ADA has specific standards for existing architecture and for renovations. Establishments need not modify pre-ADA architecture, except for those changes, such as rearranging shelving, that are “readily achievable.”²¹ In contrast, if a public accommodation renovates its pre-ADA buildings, these post-ADA renovations must be designed to make the building accessible “to the maximum extent feasible.”²²

Under the ADA, anyone subject to discrimination may sue for injunctive relief—that is, changes to stop the discrimination and make accommodations accessible.²³ The Attorney General may also sue for damages and civil penalties.²⁴

For businesses and nonprofits, the ADA’s definition of “public accommodation” lists 12 categories of establishments, providing examples for each.²⁵ The categories are places for lodging, food service, entertainment, public gathering, retail, health and personal care, transportation, exhibition, recreation, education, social services, and exercise. In describing the listed businesses, the ADA repeatedly calls them “place[s],” “office[s],” or “establishment[s].”²⁶ Some have concluded this terminology is deliberate; one court opined that “if Congress had wanted to capture business operations rather than places, it would have said ‘accounting firm or law firm,’ rather than using the clunkier phrase ‘office of an accountant or lawyer,’ for example; and it would have said ‘health care practice’ rather than ‘office of a health care provider.’”²⁷

Title III’s emphasis on physical places is even more apparent in comparison with Title II of the ADA, which covers public “services.” Title II requires modifications to local government services—parks, licensing bureaus, education programs, police services, etc.—without reference to where they occur. It covers “any State or local government,” including its departments, agencies, or instrumentalities.²⁸ State and local governments may not exclude people with disabilities from, deny them participation in, or deny them the benefits of any government “services, programs, or activities.”²⁹ Title II does not restrict covered government “services, programs, or activities” by any reference to specific categories, facilities, or amenities.³⁰

The Meaning of “Website” and “Web Content”

The development of the internet in the 1990s enabled businesses to create websites that offered consumers information, services, and a wide range of business activities in virtual spaces (the

²⁰ Ibid.

²¹ 42 U.S.C. § 12182(b)(2)(iv)–(v).

²² 42 U.S.C. § 12183(a)(2).

²³ 42 U.S.C. § 12188(a).

²⁴ 42 U.S.C. § 12188(b).

²⁵ 42 U.S.C. § 12181(7).

²⁶ Ibid.

²⁷ *Winegard v. Newsday LLC*, 556 F. Supp. 3d 173, 177 (E.D.N.Y. 2021). The court claimed that of fifty specific examples in the text, “at least forty-nine indisputably relate to physical places.” Ibid.

²⁸ 42 U.S.C. § 12131.

²⁹ 42 U.S.C. § 12132.

³⁰ Ibid. It appears that most website accessibility litigation arises under Title III. *Price v. City of Ocala*, 375 F. Supp. 3d 1264, 1267 (M.D. Fla. 2019) (“The overwhelming majority of case law addressing ADA website violations involve claims under Title III.”).

business model also known as *e-commerce* or *online business*).³¹ In recent years, a growing number of businesses have moved their services online, and internet users have increasingly relied on websites and other online platforms to access information “for all aspects of daily living.”³² Along with these developments, conceptions of what “websites” and “web content” are, and what purposes they serve, have evolved and expanded since the 1990s. Understanding these terms is necessary for a discussion of whether and how the ADA may apply to them.

While the ADA or other U.S. laws have not provided a specific definition of the commonly used term *website*, the World Wide Web Consortium (W3C) defines a *website* as a collection of interlinked web pages hosted at the same network location, usually identified by a unique internet address called the *domain name* (e.g., CRS.gov).³³ A web page consists of web content consumable or generated by users. *Web content* is the information that a web page contains, such as text, images, sounds, and videos, as well as the underlying computer language codes that organize and present the information.³⁴

Many websites have been created following technical standards and guidelines developed by the W3C, the main international multi-stakeholder community that addresses technical aspects of the World Wide Web (or simply the “web”). Working with hundreds of organizations and the public, W3C has developed hundreds of open standards (called “W3C Recommendations”) addressing functionality, accessibility, security, privacy, and internationalization on the web.³⁵ W3C recommends the deployment of its W3C Recommendations as standards for the web.³⁶

Since the passage of the ADA in 1990 and the advent of the web in the early 1990s, the practical meanings of the terms *website* and *web content* have expanded. Websites have become more interactive, allowing users to consume, create, collaborate, and distribute multimedia content such as audio and video files. The broad availability of websites and online services enables virtual access to many commerce, education, health, and other services.

Increasingly, users access websites and web content through mobile devices (e.g., smartphones and tablets). Since 2018, smartphone ownership in the United States has surpassed desktop and laptop ownership.³⁷ Unlike computer users who visit a website using a web browser installed on their computers,³⁸ smartphone users often view web content through a specially designed mobile application (app). According to an industry estimate, the percentage of users who access the internet via a mobile app will increase from 78% in 2023 to 81% in 2027, while the percentage of users who access the internet via desktop or laptop will decrease from 70% in 2023 to 68% in

³¹ Websites are one of the user-facing online applications developed, operated, and maintained on the internet. In this report, CRS uses the term *internet* to refer to the large, publicly accessible network that connects computing devices and computer networks worldwide.

³² See *Guidance on Web Accessibility and the ADA*, *supra* note 6.

³³ *W3C Glossary Dictionary*, W3C, <https://www.w3.org/2003/glossary/alpha/W/20.html> (last visited Apr. 25, 2024).

³⁴ *W3C Accessibility Standards Overview: Accessibility Guidelines*, W3C, <https://www.w3.org/WAI/standards-guidelines/#wcag2> (Feb. 29, 2024).

³⁵ *About Us: W3C Community*, W3C, <https://www.w3.org/about/> (last visited Apr. 25, 2024).

³⁶ See *W3C Process Document, Section 6.3: The W3C Recommendation Track*, W3C (June 12, 2023), <https://www.w3.org/2023/Process-20230612/#rec-track>.

³⁷ MICHAEL MARTIN, COMPUTER AND INTERNET USE IN THE UNITED STATES: 2018, AMERICAN COMMUNITY SURVEY REPORTS (Apr. 2021), <https://www.census.gov/content/dam/Census/library/publications/2021/acs/acs-49.pdf>.

³⁸ A web browser is a piece of application software that allows a user to perceive and interact with information on a website. See *W3C Glossary Dictionary*, W3C, <https://www.w3.org/2003/glossary/alpha/B/20.html> (last visited Apr. 25, 2024).

2027.³⁹ The scope of web accessibility has thus expanded from traditional desktop-oriented websites to mobile and other smart device apps.

The technical shift from static to interactive websites and from traditional web browsers to mobile apps may further complicate the applicability of ADA requirements. For example, while a website owner or operator may be directly responsible for the accessibility of content it publishes and manages on a static website, it is unclear which party is responsible for the accessibility of user-generated content uploaded to or shared on an interactive website or an online platform. Moreover, web browsers and mobile apps are often developed using different programming languages and have different user interfaces. These technical differences may further complicate any determination of whether and how the ADA should be applied. For example, should a company's website and mobile app be treated the same or differently if they contain the same content? If a company makes its browser-accessed website ADA compliant, does that mean it does not have to make its mobile app compliant, since it has at least one accessible service for users to access? Would a social media service that primarily hosts interactive user-generated content be exempt from the ADA, while a brick-and-mortar business that also operates an online retail service needs to ensure that user-generated product reviews are accessible? The answers to these questions remain unclear.

Judicial Interpretations of “Public Accommodation” and Websites

Title III of the ADA applies to “public accommodations,” that is, businesses and nonprofits open to the public that fall within specified categories.⁴⁰ Those categories appear targeted at historically brick-and-mortar businesses. Many courts, commentators, and agencies have argued that the statutory text, written in a different era as far as web commerce is concerned, leaves doubt about whether and how the statute applies to online spaces.

Over the ADA's 30-year history, courts have split on whether Title III applies to nonphysical spaces such as websites.⁴¹ The issue of Title III's application to nonphysical spaces came up even before the rise of internet commerce, regarding businesses with no brick-and-mortar locations. One circuit suggested, for example, that an insurance plan might be a public accommodation,⁴² while others decided that it was not.⁴³ The Sixth Circuit has also held that an athletic association—including the National Football League—is not a “place of public accommodation” for Title III purposes.⁴⁴

³⁹ *US Internet Users (2023-2027)*, Insider Intelligence/eMarketer, August 2023.

⁴⁰ 42 U.S.C. § 12181.

⁴¹ See *Noah v. AOL Time Warner Inc.*, 261 F. Supp. 2d 532, 543 (E.D. Va. 2003) (describing, in construing analogous law, circuit split applying ADA's Title III to websites), *aff'd*, No. 03-1770, 2004 WL 602711 (4th Cir. Mar. 24, 2004); *Laufer v. Mar-Lyn in Me., LLC*, No. 2:21-CV-00007-GZS, 2021 WL 1993553, at *4 n.5 (D. Me. May 18, 2021) (“The extent to which websites should be viewed as covered by Title III of the ADA is an emerging area of dispute.”).

⁴² *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n*, 37 F.3d 12, 20 (1st Cir. 1994); see also *Tompkins v. United Healthcare of New Eng., Inc.*, 203 F.3d 90, 95 n.4 (1st Cir. 2000) (noting *Carparts'* holding that public accommodations are not limited to physical structures).

⁴³ *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612–13 (3d Cir. 1998); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010–11 (6th Cir. 1997).

⁴⁴ *Stoutenborough v. Nat'l Football League, Inc.*, 59 F.3d 580, 583 (6th Cir. 1995); see also *Sandison v. Mich. High Sch. Athletic Ass'n, Inc.*, 64 F.3d 1026, 1036 (6th Cir. 1995).

In cases considering websites, courts have fallen into three camps.⁴⁵ First, some courts have applied the ADA to websites without restrictions.⁴⁶ One such court reasoned that the ADA’s legislative history suggested “the important quality public accommodations share is that they offer goods or services to the public, not that they offer goods or services to the public at a physical location.”⁴⁷ According to these courts, a plaintiff “must show only that the web site falls within a general category listed under the ADA.”⁴⁸

A second line of cases holds that the statute applies only to physical places and thus does not include websites.⁴⁹ As one court held in dismissing claims against the social media site Facebook, “Facebook operates only in cyberspace, and . . . thus is not a ‘place of public accommodation’”; in support, the court cited Title III’s text barring discrimination “by any person who owns, leases (or leases to) or operates a place of public accommodation.”⁵⁰ Even though Facebook had some physical products in physical stores (e.g., gift cards), it did not own or lease retail property.

A third line of cases has applied the ADA to *some* websites, depending on their connection to physical businesses. Under this line of cases, if a website restricts access to restaurants, hotel reservations, or in-store retail services, the website would fall under the ADA.⁵¹ As the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) put it, “[t]he statute applies to the services *of* a place of public accommodation, not services *in* a place of public accommodation.”⁵² In applying this rule to restaurant chain Domino’s online pizza ordering service, the court determined that “[t]he alleged inaccessibility of Domino’s website and app impedes access to the goods and services of its physical pizza franchises—which are places of public accommodation.”⁵³ In one published opinion, the Eleventh Circuit also suggested, but did not decide, that a website’s “nexus” with a physical business could bring it under the ADA.⁵⁴ In another unpublished opinion, the circuit accepted a “nexus” argument.⁵⁵

⁴⁵ Blake E. Reid, *Internet Architecture and Disability*, 95 IND. L.J. 591, 598 (2020); Chalas v. Pork King Good, 673 F. Supp. 3d 339, 343 (S.D.N.Y. 2023) (acknowledging circuit split and stating that district courts within the Second Circuit are divided).

⁴⁶ E.g., Nat’l Ass’n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 200 (D. Mass. 2012).

⁴⁷ Nat’l Fed’n of the Blind v. Scribd Inc., 97 F. Supp. 3d 565, 573–74 (D. Vt. 2015).

⁴⁸ *Netflix*, 869 F. Supp. 2d at 201.

⁴⁹ Access Now v. Sw. Airlines, 227 F. Supp. 2d 1312, 1317 (S.D. Fla. 2002), *appeal dismissed*, 385 F.3d 1324 (11th Cir. 2004); Young v. Facebook, Inc., 790 F. Supp. 2d 1110, 1115 (N.D. Cal. 2011).

⁵⁰ *Young*, 790 F. Supp. 2d at 1115 (quoting 42 U.S.C. § 12182(a)).

⁵¹ Robles v. Domino’s Pizza, LLC, 913 F.3d 898, 903 (9th Cir. 2019); Nat’l Fed’n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 954 (N.D. Cal. 2006).

⁵² *Robles*, 913 F.3d at 905.

⁵³ *Ibid.*

⁵⁴ Access Now, Inc. v. Sw. Airlines Co., 385 F.3d 1324, 1327 (11th Cir. 2004). Title III requires business owners to provide “full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.” 42 U.S.C. § 12182(a). Courts have relied on this provision to apply the ADA to portions of a larger public accommodation, such as parking lots and bathrooms, that are not independently listed as public accommodations within the statute. Langer v. Kiser, 57 F.4th 1085, 1101 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 823 (2024). See also 28 C.F.R. § 36.104 (2024) (defining “facility” as “all or any portion of buildings, structures, sites, complexes, equipment, rolling stock . . . roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.”).

⁵⁵ Haynes v. Dunkin’ Donuts LLC, 741 F. App’x 752, 754 (11th Cir. 2018). In *Gil v. Winn-Dixie Stores, Inc.*, 993 F.3d 1266, 1281 (11th Cir.), a decision the court later vacated as moot, 21 F.4th 775 (11th Cir. 2021) (per curiam), the court declined to apply a “nexus” theory.

A number of district courts have adopted this third approach,⁵⁶ but many circuit courts have not addressed the question of whether or how the ADA applies to websites, prompting one commentator to characterize case law on website accessibility as “still developing.”⁵⁷ In applying a “nexus” standard, some courts have concluded that a plaintiff has no standing to challenge an inaccessible website unless it interfered with the plaintiff’s access to the physical business. Thus, when a web user claimed she could not access uncaptioned videos on an oral surgery center’s website, but admitted she had no intention of visiting the surgery practice, one court dismissed her claims.⁵⁸ Likewise, an admitted “dreamer and window-shopper” with no intention of patronizing a high-end realty company similarly could not challenge its inaccessible website, according to another court.⁵⁹

Agency Interpretation and Guidance on ADA Application to Websites

Congress has charged the DOJ Attorney General with the enforcement of relevant provisions in the ADA and periodic review of compliance of covered business entities serving the public.⁶⁰ In a statement in an appendix to the current ADA regulations, DOJ states, “Although the language of the ADA does not explicitly mention the internet, the Department has taken the position that [T]itle III covers access to Web sites of public accommodations.”⁶¹ Over the years, DOJ has considered rulemaking and offered guidance about whether the ADA applies to websites, but so far it has not provided specific, binding standards.

Most recently, on March 18, 2022, DOJ issued nonbinding web accessibility guidance.⁶² The guidance makes clear that, in DOJ’s view, the ADA applies to at least some private websites, and addresses how public accommodations can make accessible the goods and services they offer online. Nevertheless, the guidance does not explicitly say whether the ADA reaches all websites, including online-only businesses, nor does it say whether the applicability of the ADA online should depend on a “nexus” with a physical business. The guidance does not contend with the divergent court precedent described above. Instead, the guidance lists several ADA categories of public accommodations, then points out that “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.”⁶³ The guidance thus suggests, but does not explicitly state, that DOJ considers online entities offering goods and services under the categories of public accommodations listed in the guidance to be covered by the ADA. The guidance concludes that “the ADA’s requirements apply to all the goods, services, privileges, or activities offered by

⁵⁶ *E.g.*, *Castillo v. Jo-Ann Stores, LLC*, 286 F. Supp. 3d 870, 881 (N.D. Ohio 2018); *Brintley v. Aeroquip Credit Union*, 321 F. Supp. 3d 785, 793 (E.D. Mich. 2018), *rev’d on other grounds*, 936 F.3d 489 (6th Cir. 2019); *Gomez v. Gen. Nutrition Corp.*, 323 F. Supp. 3d 1368, 1375 (S.D. Fla. 2018).

⁵⁷ J. Gregory Grisham, *Website Inaccessibility: The New Wave of ADA Title III Litigation*, 20 FEDERALIST SOC’Y REV. 66 (Apr. 1, 2019), <https://fedsoc.org/commentary/publications/website-inaccessibility-the-new-wave-of-ada-title-iii-litigation>.

⁵⁸ *Erasmus v. Chien*, No. 1:21-CV-1256 JLT SAB, 2023 WL 184484, at *6 (E.D. Cal. Jan. 13, 2023); *see also Erasmus v. Ryan A. Dunlop, D.M.D., Inc.*, No. 1:21-CV-01236-AWI-SAB, 2022 WL 2805961, at *6 (E.D. Cal. July 18, 2022).

⁵⁹ *Gomez v. Gates Ests., Inc.*, No. C 21-7147 WHA, 2022 WL 458465, at *2 (N.D. Cal. Feb. 15, 2022).

⁶⁰ 42 U.S.C. § 12188(b).

⁶¹ 28 C.F.R. § 36 app. A (2024).

⁶² *Guidance on Web Accessibility and the ADA*, *supra* note 6.

⁶³ *Ibid.*

public accommodations, including those offered on the web.”⁶⁴ Without defining “public accommodation” in the internet context, this language appears to leave open the possibility that DOJ may view web businesses as public accommodations even if they have no connection to a physical business.⁶⁵

These actions are not DOJ’s first efforts to address web accessibility. In 2010, DOJ published an Advance Notice of Proposed Rulemaking for website accessibility, to include *both* Title II and Title III websites. In its proposal, DOJ acknowledged potential differences in how the ADA might reach government websites and private websites.⁶⁶ “There is no doubt that the Web sites of state and local government entities are covered by [T]itle II of the ADA,” the notice stated.⁶⁷ As DOJ recognized, existing regulations already provided that Title II “applies to all services, programs, and activities provided or made available by public entities.”⁶⁸ For private websites, DOJ acknowledged a lack of consensus. “The Department believes that [T]itle III reaches the Web sites of entities that provide goods or services that fall within the 12 categories of ‘public accommodations,’ as defined by the statute and regulations,” DOJ affirmed, despite “remaining uncertainty” in judicial precedent.⁶⁹

In 2017, DOJ withdrew its regulatory proposals for websites, stating that it was “evaluating whether promulgating regulations about the accessibility of Web information and services is necessary and appropriate.”⁷⁰ In 2018, however, Assistant Attorney General Stephen E. Boyd, responding to a congressional inquiry, wrote that DOJ had long applied the ADA to private websites and assured that “the absence of a specific regulation does not serve as a basis for noncompliance.”⁷¹

Website Accessibility Standards

As explained above, courts are divided on whether the parts of the ADA that govern private businesses and nonprofits cover websites, and which websites they cover.⁷² Assuming the ADA

⁶⁴ Ibid.

⁶⁵ While a separate section of this nonbinding guidance also covers local and state government websites under Title II of the ADA, in 2024 DOJ promulgated rules under ADA Title II, which sets forth technical requirements for accessibility of state and local governments’ services, programs, and activities offered on websites and mobile apps. 28 C.F.R. § 35.200. DOJ adopts a widely used industry standard—the W3C’s Web Content Accessibility Guidelines (WCAG)—in the proposed rules, while permitting other approaches offering “equivalent or greater accessibility.” 28 C.F.R. § 35.200(b) (effective June 24, 2024). See *infra* “The Web Content Accessibility Guidelines (WCAG)” for a discussion of WCAG.

⁶⁶ Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460, 43464 (proposed July 26, 2010) (to be codified at 28 C.F.R. pts. 35, 36).

⁶⁷ Ibid.

⁶⁸ 28 C.F.R. § 35.102 (2024).

⁶⁹ Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services, 75 Fed. Reg. at 43464–65.

⁷⁰ Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions, 82 Fed. Reg. 60932, 60932 (proposed Dec. 26, 2017) (to be codified at 28 C.F.R. pts. 35, 36).

⁷¹ Letter from Stephen E. Boyd, Assistant Att’y Gen., to Congressman Ted Budd (Sept. 25, 2018), on SEYFARTH: ADA TITLE III NEWS & INSIGHTS BLOG, <https://www.adatitleiii.com/wp-content/uploads/sites/25/2018/10/DOJ-letter-to-congress.pdf>.

⁷² There is little debate that government websites are required to be accessible, either under the ADA or the Rehabilitation Act. 29 U.S.C. § 794; *Section 508 of the Rehabilitation Act of 1973*, GEN. SERVS. AGENCY, <https://www.section508.gov/manage/laws-and-policies/> (last updated Apr. 2024); 28 C.F.R. § 35.200; see (continued...)

does apply to private websites, the question becomes, “How does a covered entity make its website accessible in a way that comports with the statute?” It is currently unclear what standards the ADA would impose on web architecture. The ADA has specific instructions for how to make architectural barriers, vehicles, licensing examinations, elevators, and a few other areas of concern accessible but, unsurprisingly for the 1990 law, provides no such instructions for websites.⁷³

Beyond the statute itself, there are currently no binding rules of general applicability on what qualifies as an accessible website for a private business or nonprofit under Title III of the ADA. DOJ, in its 2022 guidance, recommended potential accessibility metrics for private business and nonprofit websites but did not mandate any of them.⁷⁴ The guidance offers a one-page summary of how to make a website accessible, emphasizing website providers’ “flexibility in how they comply.”⁷⁵

Basic accessibility features for a website might include text contrast, captions for images, and compatibility with accessible software such as screen readers, which convert visual screen information into synthesized speech.⁷⁶ Screen readers can work only with website information that is properly coded. For example, an arrow button on a website needs an encoded text description to identify its function.⁷⁷ Images, too, need associated text descriptions a screen reader can voice.⁷⁸ Similarly, a file, such as a Microsoft Word document or a Portable Document Format (PDF) file, works with a screen reader only if it is properly formatted.⁷⁹ Accessible documents and websites are designed so that a user can navigate using a keyboard, rather than a mouse, and should also interface with special hardware such as braille pads.⁸⁰ The 2022 DOJ guidance lists specific accessibility features for web providers to consider.⁸¹ These features include color

Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services, 75 Fed. Reg. at 43465; *see also* Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions, 82 Fed. Reg. at 60932.

⁷³ 42 U.S.C. §§ 12182, 12184, 12189, 12183. Other new technologies present similar problems; for instance, lawsuits have challenged the accessibility of point-of-sale cash-back terminals, *Dalton v. Kwik Trip, Inc.*, No. 21-98 (MJD/BRT), 2021 WL 4554362, at *1 (D. Minn. Oct. 5, 2021), and appointment check-in kiosks, *Vargas v. Quest Diagnostics Clinical Lab’ys, Inc.*, No. CV 19-8108-DMG, 2021 WL 5989961, at *3 (C.D. Cal. Oct. 15, 2021).

⁷⁴ *Guidance on Web Accessibility and the ADA*, *supra* note 6; *see also* U.S. Dep’t of Just., “Website Accessibility Under Title II of the ADA” in ADA BEST PRACTICES TOOL KIT FOR STATE & LOCAL GOV’TS, <https://archive.ada.gov/pcatoolkit/chap5toolkit.htm> (last visited Apr. 26, 2024). Observers have lamented the lack of guidance. One court observed, in 2019, that “there is no guidance from the DOJ about what a ‘public place of accommodation’ must do to make its website ADA compliant.” *Price v. Escalante-Black Diamond Golf Club LLC*, No. 5:19-CV-22-OC-30PRL, 2019 WL 1905865, at *4 (M.D. Fla. Apr. 29, 2019). *See also* *Price v. City of Ocala*, 375 F. Supp. 3d 1264, 1270 (M.D. Fla. 2019) (acknowledging that courts disagree over what counts as compliance, “largely due to a complete lack of rules and regulations being promulgated by the Department of Justice despite being aware of this issue for years.”).

⁷⁵ *Guidance on Web Accessibility and the ADA*, *supra* note 6.

⁷⁶ *See* *Orozco v. Garland*, 60 F.4th 684, 687 (D.C. Cir. 2023); *Price*, 2019 WL 1905865, at *4 (“Recently there have been an explosion of cases—under both Title II and III—alleging that websites violate the ADA. Usually, they arise in the context of websites either failing to be compatible with screen reader software or failing to have closed captioning for videos.”).

⁷⁷ *Leiterman v. Johnson*, 60 F. Supp. 3d 166, 170 (D.D.C. 2014).

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*; *Screen Readers*, STATE OF NEVADA ADA WEBSITE, <https://ada.nv.gov/Resources/ScreenReaders/> (last visited Apr. 26, 2024); *Andrews v. Blick Art Materials, LLC*, 286 F. Supp. 3d 365, 374 (E.D.N.Y. 2017); *Carmen Willings, Braille Technology, TEACHING STUDENTS WITH VISUAL IMPAIRMENTS*, <https://www.teachingvisuallyimpaired.com/braille-technology.html> (last visited Apr. 26, 2024).

⁸¹ *Guidance on Web Accessibility and the ADA*, *supra* note 6.

contrast in text; text alternatives (descriptions of visual features that a screen reader can announce); captions for visual access to audio content; labels and other formatting for online forms; keyboard navigation; and a way to report accessibility issues. The DOJ guidance emphasizes that its summary “is not a complete list of things to consider.”⁸²

An appendix to current ADA Title III regulations contains a statement that an entity with an inaccessible website “also may meet its legal obligations by providing an accessible alternative for individuals to enjoy its goods or services, such as a staffed telephone information line.”⁸³ According to the statement, an alternative “must provide an equal degree of access in terms of hours of operation and range of options and programs available. For example, if retail goods or bank services are posted on an inaccessible Web site that is available 24 hours a day, 7 days a week to individuals without disabilities, then the alternative accessible method must also be available 24 hours a day, 7 days a week.”⁸⁴ It is unclear whether this statement still reflects DOJ’s position, however. DOJ’s 2022 guidance did not list this method as acceptable, and regulations for state and local government websites were accompanied by a statement that “the Department no longer believes 24/7 staffed telephone lines can realistically provide equal opportunity to people with disabilities.”⁸⁵

Outside of ADA regulations and guidance, a handful of public and private web accessibility standards have emerged in other contexts that could be applied to business websites under the ADA, and they have become more similar over the years.⁸⁶ For example, the federal government has developed rules and standards for the airline industry (under the Air Carrier Access Act and its regulations), as well as for federal government websites under Section 508 of the Rehabilitation Act, 29 U.S.C. § 794d.⁸⁷ DOJ has long provided technical assistance to federal agencies on website accessibility.⁸⁸

In its 2022 guidance regarding public accommodations, DOJ endorses both the long-standing, private Web Content Accessibility Guidelines (WCAG) and the federal government’s Section 508 website standards, although the guidance does not mandate either standard for nonfederal providers.⁸⁹

⁸² Ibid.

⁸³ 28 C.F.R. § 36 app. A.

⁸⁴ Ibid.

⁸⁵ Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities, 89 Fed. Reg. 31320, 31355 (Apr. 24, 2024) (to be codified at 28 C.F.R. pt. 35).

⁸⁶ *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898, 903 (9th Cir. 2019).

⁸⁷ 49 U.S.C. § 41705; 14 C.F.R. § 382.43(c)(1) (2024); 29 U.S.C. § 794(d); 36 C.F.R. § 1194, app. D (2024); *see also* 29 C.F.R. § 38.15(a)(5)(ii) (2024) (governing accessibility requirements for certain federally funded entities); Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 40066, 40130, 40193 (May 9, 2024) (to be codified at 45 C.F.R. § 84.84) (adopting WCAG standards for covered health care websites and applications).

⁸⁸ *Achieving the Promises of the Americans with Disabilities Act in the Digital Age—Current Issues, Challenges, and Opportunities*, Hearing Before the Subcomm. on the Const., C.R., and C.L. of the H. Comm. on the Judiciary, 111th Cong. 13–14 (2010) (statement of Samuel R. Bagenstos, Principal Deputy Assistant Att’y Gen.).

⁸⁹ *Guidance on Web Accessibility and the ADA*, *supra* note 6; *W3C Accessibility Standards Overview*, *supra* note 34. In an appendix to existing regulations, DOJ cites WCAG as a resource, stating: “Additional guidance is available in the Web Content Accessibility Guidelines . . . which are developed and maintained by the Web Accessibility Initiative, a subgroup of the World Wide Web Consortium.” 28 C.F.R. § 36 app. A. (2024). In its rule for state and local government websites under Title II of the ADA, DOJ mandated WCAG, incorporating that standard by reference. 28 C.F.R. § 35.200(b) (effective June 24, 2024).

The Web Content Accessibility Guidelines (WCAG)

The Web Content Accessibility Guidelines are an important potential source of accessibility standards. Courts and federal entities already use them to some extent. Starting in 1999, the Web Accessibility Initiative (WAI) under the W3C developed several guidelines and technical specifications, including WCAG, “designed to make websites more accessible to people with disabilities.”⁹⁰ WCAG represents a set of international, stable, and referenceable technical standards that the W3C recommends website developers and operators adopt for web accessibility.⁹¹ WCAG standards can apply to static, interactive, multimedia, and mobile-based content.⁹²

A web page that meets or satisfies WCAG requirements is said to *conform* to WCAG standards.⁹³ The current version of WCAG (WCAG version 2) has three levels of conformance, or “success criteria”—Levels A, AA, and AAA.⁹⁴ Web pages satisfying all the Level A success criteria meet the minimum level of WCAG conformance, while those satisfying all the Levels A to AAA success criteria meet the highest level of conformance.⁹⁵ The W3C recommends that website developers include a conformance claim with web content in standard machine-readable forms (for example, embedding metadata containing such claims in a website’s HyperText Markup Language [HTML] code). Such practices are designed to help search engines find and identify accessible web pages and allow web browsers to adjust the presentation of accessible web content according to the conformance level (for example, for a website with conformance Level A, a browser will be able to display a text description after an image to meet the requirement to provide “text alternatives,” which serve the equivalent purpose, for any nontext content).⁹⁶

WCAG standards and success criteria are organized under four principles that “lay the foundation necessary for anyone to access and use web content.” **Table 1** summarizes each principle and how it can be measured to be successfully implemented.

Table 1. Four Principles of Web Content Accessibility in WCAG 2.1

Principle	Concept	Measures
Perceivable	Users must be able to perceive the information presented on a web page.	<ul style="list-style-type: none"> • Provide text alternatives for nontext content • Provide captions and other alternatives for multimedia • Create content that can be presented in different ways without losing meaning • Make it easier for users to see and hear content

⁹⁰ DAVID J. SCHAFFER & KELLY BROOKS SIMONEAUX, *WEB ACCESSIBILITY AND LAYERED APPROACHES: A SEARCH FOR A SCALABLE SOLUTION TO WEB ACCESSIBILITY* 8 (2022); *W3C Accessibility Standards Overview*, *supra* note 34.

⁹¹ *How WAI Develops Accessibility Standards Through the W3C Process: Milestones and Opportunities to Contribute*, W3C (Nov. 2, 2020), <https://www.w3.org/WAI/standards-guidelines/w3c-process/>.

⁹² *W3C Accessibility Standards Overview*, *supra* note 34.

⁹³ *Understanding Conformance*, W3C (June 20, 2023), <https://www.w3.org/WAI/WCAG21/Understanding/conformance>.

⁹⁴ *Understanding Conformance Requirements*, W3C (June 20, 2023), <https://www.w3.org/WAI/WCAG21/Understanding/conformance#conformance-requirements>. DOJ’s rule for ADA Title II websites requires WGAC 2.2 A and AA compliance. 28 C.F.R. § 35.200(b).

⁹⁵ *Understanding Conformance Requirements*, W3C (June 20, 2023), <https://www.w3.org/WAI/WCAG21/Understanding/conformance#conformance-requirements>.

⁹⁶ *Ibid.* See also *Web Content Accessibility Guidelines (WCAG) 2.2*, W3C Recommendation (October 5, 2023), <https://www.w3.org/TR/WCAG22/>.

Principle	Concept	Measures
Operable	Users must be able to interact with and navigate through the web page.	<ul style="list-style-type: none"> • Make all functionality available from a keyboard • Give users enough time to read and use content • Do not design content that is known to cause seizures or physical reactions • Provide ways to help users navigate and locate content • Make it easier to use input technologies other than keyboard
Understandable	Users must be able to understand the information on the web page and the operation of its user interface.	<ul style="list-style-type: none"> • Make text readable and understandable • Make content appear and operate in predictable ways • Help users avoid and correct mistakes
Robust	Users must be able to access the content through a variety of web technologies.	<ul style="list-style-type: none"> • Maximize compatibility with current and future user technologies

Sources: *Introduction to Understanding WCAG*, Understanding the Four Principles of Accessibility, W3C (June 20, 2023), <https://www.w3.org/WAI/WCAG21/Understanding/intro#understanding-the-four-principles-of-accessibility>; *WCAG 2.1 at a Glance*, W3C (June 5, 2018), <https://www.w3.org/WAI/standards-guidelines/wcag/glance/>.

Although DOJ has not mandated WCAG for private business and nonprofit websites under Title III of the ADA, it has repeatedly incorporated WCAG standards into settlement agreements.⁹⁷ Other agencies have adopted WCAG standards to various degrees. For example, the Department of Health and Human Services applies WCAG to health information technology, and the Department of Transportation uses them in regulations applying disability access requirements in the Air Carrier Access Act.⁹⁸ Department of Labor regulations under the Workforce Innovations and Opportunity Act require that grantees’ information technology be accessible “consistent with modern accessibility standards, such as Section 508 Standards (36 C.F.R. part 1194) and W3C’s Web Content Accessibility Guidelines (WCAG) 2.0 AA.”⁹⁹

⁹⁷ See, e.g., Press Release, U.S. Dep’t of Justice, Settlement Agreement Under the Americans with Disabilities Act Between the United States of America and the Kroger Co. (Jan. 27, 2022), <https://www.justice.gov/opa/pr/justice-department-secures-agreement-make-online-covid-19-vaccine-registration-accessible>; Press Release, U.S. Dep’t of Justice, Settlement Agreement Under the Americans with Disabilities Act Between the United States of America and Hy-Vee, Inc. (Feb. 3, 2015), https://archive.ada.gov/hy-vee_sa.pdf. DOJ has also incorporated WCAG in settlements under the ADA’s Title I, governing employment, when employers fail to make job application websites accessible. See Press Release, U.S. Dep’t of Justice, Settlement Agreement Between the United States of America and the City of Dekalb, Illinois (Feb. 3, 2015), https://archive.ada.gov/dekalb_il_sa.html. Separately, DOJ has recommended WCAG as a resource for state and local government websites, culminating in a proposed rule mandating WCAG 2.1 as the standard for ADA’s Title II. 28 C.F.R. § 35.200(b).

⁹⁸ 45 C.F.R. § 170.204 (2024); 14 C.F.R. § 382.43 (requiring WCAG compliance for airline websites).

⁹⁹ 29 C.F.R. § 38.15 (2024).

Many industry insiders advise clients to adopt WCAG standards and consider WCAG compliance a reliable indication of ADA compliance.¹⁰⁰ Both domestic and international developers have adopted the guidelines,¹⁰¹ as have many national and local governments and universities.¹⁰²

Section 508 of the Rehabilitation Act

Another federal law, Section 508 of the Rehabilitation Act, provides an example of how to impose potential website accessibility standards. It is not targeted at website technology specifically, but requires that federal information technology resources be accessible, giving users with disabilities access to and use of information and data “comparable to the access to and use of the information and data” by those without disabilities.¹⁰³ The statute also requires federal agencies to acquire accessible technology for their workplaces. Section 508 applies beyond websites to all “information technology,” including hardware, software, and any system for storing, analyzing, transmitting, or displaying data or information.¹⁰⁴ As under the ADA, Section 508 rules do not require accessibility if it would pose an undue burden or fundamentally alter the technology’s nature.¹⁰⁵ For example, the government faces an undue burden where, in acquiring technology, it finds no conforming product or service commercially available.¹⁰⁶ The government need not update older systems (acquired or altered before January 18, 2018) that do not comply with current accessibility standards.¹⁰⁷

The U.S. General Services Administration provides technical assistance and oversight to ensure compliance with Section 508.¹⁰⁸ The statute calls on the U.S. Access Board, an independent

¹⁰⁰ Jeremy White, Matthew Cin & Brian Long, *INSIGHT: Covid-19 Causing a Surge in E-Commerce—Is Your Website Accessible?*, BLOOMBERG LAW (June 9, 2020), <https://news.bloomberglaw.com/us-law-week/insight-covid-19-causing-a-surge-in-e-commerce-is-your-website-accessible>.

¹⁰¹ DAVID J. SCHAFER & KELLY BROOKS SIMONEAUX, *WEB ACCESSIBILITY AND LAYERED APPROACHES: A SEARCH FOR A SCALABLE SOLUTION TO WEB ACCESSIBILITY* 9 (2022); Minh Vu, Kristina Launey & John Egan, *The Law on Website and Mobile Accessibility Continues to Grow at a Glacial Pace Even as Lawsuit Numbers Reach All-Time Highs*, 48 *LAW PRAC.* 44 (2022), https://heinonline.org/HOL/Page?collection=usjournals&handle=hein.journals/lwpra48&id=42&men_tab=srchresults.

¹⁰² *Andrews v. Blick Art Materials, LLC*, 286 F. Supp. 3d 365, 381 (E.D.N.Y. 2017).

¹⁰³ 29 U.S.C. § 794(d)(a)(1)(A) (2022); *Section 508 of the Rehabilitation Act of 1973*, GEN. SERVS. AGENCY (Nov. 2022), <https://www.section508.gov/manage/laws-and-policies/>; CRS In Focus IF12093, *The Accessibility of Federal Information and Data: A Brief Overview of Section 508 of the Rehabilitation Act*, by Natalie R. Ortiz (2022). For many years, limited available precedent did not recognize a private right of action to enforce Section 508 in court. *Leiterman v. Johnson*, 60 F. Supp. 3d 166, 178 (D.D.C. 2014); *Latham v. Brownlee*, No. SA-03-CA-0933-FB, 2005 WL 578149, at *9 (W.D. Tex. Mar. 3, 2005). There was, as a result, little judicial interpretation of its standards. In 2023, the D.C. Circuit, the first appellate court to rule on the issue, concluded that an employee could bring Section 508 claims challenging inaccessible workplace technology. *Orozco v. Garland*, 60 F.4th 684, 692 (D.C. Cir. 2023) (recognizing “a private right of action to any individual with a disability, including a federal employee, who first files an administrative complaint about inaccessible technology”).

¹⁰⁴ See 36 C.F.R. § 1194 app. A at E103.4 (2024) (“Information and Communication Technology” includes “Information technology and other equipment, systems, technologies, or processes, for which the principal function is the creation, manipulation, storage, display, receipt, or transmission of electronic data and information, as well as any associated content. Examples of ICT include, but are not limited to: Computers and peripheral equipment; information kiosks and transaction machines; telecommunications equipment; customer premises equipment; multifunction office machines; software; applications; Web sites; videos; and, electronic documents.” “Information Technology” “[s]hall have the same meaning as the term ‘information technology’ set forth in 40 U.S.C. 11101(6).”).

¹⁰⁵ 36 C.F.R. § 1194 app. A at E202.6.

¹⁰⁶ 36 C.F.R. § 1194 app. A at E202.7.

¹⁰⁷ 36 C.F.R. § 1194 app. A at E202.2. Section 508 does not apply to national security systems. *Ibid.*, E202.3.

¹⁰⁸ *Section 508*, GEN. SERVS. AGENCY, <https://www.section508.gov/> (last visited Apr. 30, 2024). Federal agencies are (continued...)

federal agency, to set up disability access standards in consultation with core federal agencies.¹⁰⁹ The Board issued its first information technology accessibility standards in 2000 and has released revisions, the latest in 2018.¹¹⁰

In its most recent standards, the U.S. Access Board sought to harmonize its requirements with WCAG and European criteria.¹¹¹ Current regulations endorse the WCAG standards, with some specific exceptions.¹¹² The changes may defuse the criticisms of some that prior Section 508 rules were outdated and, when compared with WCAG, held the federal government to a lower standard.¹¹³

Litigation and Judicial Interpretations of Accessibility Standards

As explained above, courts have split on whether Title III of the ADA, which regulates private businesses and nonprofits, applies to nonphysical spaces like websites.¹¹⁴ Even when courts apply the law to websites, there is no uniform way for courts to decide what makes a website ADA compliant given the partial and generally nonbinding standards described above.¹¹⁵

According to some observers, this state of affairs has provoked excessive lawsuits.¹¹⁶ Advocates for businesses have referred to what they view as a “cottage industry of demands and litigation directed toward the owners of websites and mobile applications,” even by users who are not genuine customers.¹¹⁷ Plaintiffs filed at least 2,258 accessibility suits against websites in 2018, by

required to monitor and test their information technology, assess 508 compliance, and provide data for regular compliance reports to Congress and the President. *See, e.g.,* U.S. DEPT. OF JUST. & U.S. GEN. SERV. ADMIN., SECTION 508 REPORT TO THE PRESIDENT AND CONGRESS: ACCESSIBILITY OF FEDERAL ELECTRONIC AND INFORMATION TECHNOLOGY (2023), <https://www.justice.gov/crt/page/file/1569331/download>.

¹⁰⁹ *About*, U.S. ACCESS BD., <https://www.access-board.gov/about/> (last visited Apr. 29, 2024).

¹¹⁰ 36 C.F.R. § 1194 app. D (2000); *About the ICT Accessibility 508 Standards and 255 Guidelines*, U.S. ACCESS BOARD, Information and Communication Technology (<https://www.access-board.gov>) (last visited Apr. 29, 2024).

¹¹¹ *Section 508 of the Rehabilitation Act of 1973*, GEN. SERVS. AGENCY, <https://www.section508.gov/manage/laws-and-policies/> (last updated Apr. 2024); *Why Healthcare Practitioners Need Accessible Websites*, ACCESSLY (Oct. 4, 2021), <https://accessly.io/healthcare-practitioners-accessible-websites/>.

¹¹² 36 C.F.R. § 1194 app. A at E202, E207.

¹¹³ Minh Vu & Kristina Launey, *Proposed Accessibility Standards for Federal Government Websites Highlights Double Standard Justice Department Seeks to Impose on Public Accommodations*, SEYFARTH: ADA TITLE III NEWS & INSIGHTS BLOG (Feb. 23, 2015), <https://www.adatitleiii.com/2015/02/proposed-accessibility-standards-for-federal-government-websites-highlights-double-standard-justice-department-seeks-to-impose-on-public-accommodations/>. Some have also criticized federal agencies for “widespread problems with Section 508 compliance.” MAJORITY STAFF OF S. SPECIAL COMM. ON AGING, 117TH CONG., UNLOCKING THE VIRTUAL FRONT DOOR: AN EXAMINATION OF FEDERAL TECHNOLOGY’S ACCESSIBILITY FOR PEOPLE WITH DISABILITIES, OLDER ADULTS AND VETERANS 42 (2022).

¹¹⁴ Blake Reid, *Internet Architecture and Disability*, 95 IND. L.J. 591, 598 (Apr. 15, 2020), <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=11373&context=ilj>.

¹¹⁵ *Price v. Escalante-Black Diamond Golf Club LLC*, No. 5:19-CV-22-OC-30PRL, 2019 WL 1905865, at *4 (M.D. Fla. Apr. 29, 2019) (“Courts have . . . disagreed about what features a website must have to comply with the ADA.”).

¹¹⁶ *2021 Year End Report: ADA Digital Accessibility Lawsuits*, USABLENET (2021), <https://f.hubspotusercontent30.net/hubfs/3280432/Remediated-2021-Year-End-Report-FINAL.pdf>; Sarah Zehentner, *The Rise of ADA Title III: How Congress and the Department of Justice Can Solve Predatory Litigation*, 86 BROOK. L. REV. 701 (Sept. 22, 2021), <https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=2269&context=blr>.

¹¹⁷ Michael R. Christian & Sydney Sears, *Alexa, Does My Website Comply with the ADA?*, IDAHO STATE BAR (Oct. 28, 2019), <https://isb.idaho.gov/blog/alexa-does-my-website-comply-with-the-ada/>; *Price v. City of Ocala*, 375 F. Supp. 3d 1264, 1275 (M.D. Fla. 2019) (“Many ADA website cases involve testers ferreting out inaccessible portions of a website, and then claiming they have been harmed solely by being unable to access that portion of the website.”).

one observer’s count.¹¹⁸ Another reported 4,055 suits in 2021 and stated that 10 law firms filed three-quarters of these lawsuits.¹¹⁹

Most of these suits settle and, as a practical matter, courts may dismiss suits by web users who are not genuine customers for lack of standing.¹²⁰ When these cases do go forward, some courts struggle to decide what constitutes an ADA violation. This analysis led one district court to call on “Congress, the Attorney General, and the Department of Justice to take action and to set minimum web accessibility standards for the benefit of the disabled community, those subject to Title III, and the judiciary.”¹²¹

In contrast, other courts have recognized certain advantages in flexible rules: “the ADA and its implementing regulations are intended to give public accommodations maximum flexibility in meeting the statute’s requirements,” as one court put it.¹²² In that court’s view, “while no specific auxiliary aid or service is required in any given situation, whatever auxiliary aid or service the public accommodation chooses to provide must be effective.”¹²³ The Ninth Circuit, in remanding a case about Domino’s Pizza restaurants’ online ordering service, cited the ADA’s text in concluding that “courts are perfectly capable” of deciding whether websites provide “auxiliary aids and services” enabling “full and equal enjoyment” of the restaurant’s services.¹²⁴ As a result, the court concluded that the application of the ADA to the facts of the case was “well within [its] competence.”¹²⁵ In another setting, however, the same circuit identified difficulties in open-ended ADA requirements, expressing the view that “courts are ill-equipped to . . . make what amount to engineering, architectural, and policy determinations as to whether a particular design feature is feasible and desirable.”¹²⁶

¹¹⁸ Kristina M. Launey, Minh N. Vu & Susan Ryan, *Number of Federal Website Accessibility Lawsuits Nearly Triple, Exceeding 2250 in 2018*, SEYFARTH: ADA TITLE III NEWS & INSIGHTS BLOG (Jan. 31, 2019), <https://www.adatitleiii.com/2019/01/number-of-federal-website-accessibility-lawsuits-nearly-triple-exceeding-2250-in-2018/>.

¹¹⁹ *2021 Year End Report: ADA Digital Accessibility Lawsuits*, USABLENET (2021), <https://f.hubspotusercontent30.net/hubfs/3280432/Remediated-2021-Year-End-Report-FINAL.pdf>.

¹²⁰ *Andrews v. Blick Art Materials, LLC*, 286 F. Supp. 3d 365, 384 (E.D.N.Y. 2017); *Griffin v. Dep’t of Lab. Fed. Credit Union*, 912 F.3d 649, 653 (4th Cir. 2019). *See also Price v. Escalante-Black Diamond Golf Club LLC*, No. 5:19-CV-22-OC-30PRL, 2019 WL 1905865, at *4 (M.D. Fla. Apr. 29, 2019) (“Courts have struggled to apply traditional principles of standing to these website cases.”). Some courts have permitted ADA testers, who have no intention of using a hotel’s services, to sue a hotel for failure to include accessibility information on online booking sites. Certain information is required by ADA regulations and, these courts reason, the testers are entitled to the information itself regardless of travel plans. *Laufer v. Naranda Hotels, LLC*, 60 F.4th 156, 158 (4th Cir. 2023) (finding standing and acknowledging circuit split); *Laufer v. Acheson Hotels, LLC*, 50 F.4th 259, 263, 276 (1st Cir. 2022) (same), *cert. granted*, 143 S. Ct. 1053 (2023), and *vacated and remanded*, 601 U.S. 1, 3 (2023) (acknowledging circuit split, dismissing case as moot). *But see Harty v. W. Point Realty, Inc.*, 28 F.4th 435, 443 (2d Cir. 2022) (finding no standing in similar case).

¹²¹ Order Granting Defendant’s Alternative Motion to Dismiss or Stay at 12, *Robles v. Domino’s Pizza LLC*, No. CV 16-6599 (C.D. Cal. Mar. 20, 2017).

¹²² *Reed v. CVS Pharmacy, Inc.*, No. CV 17-3877-MWF (SKX), 2017 WL 4457508, at *5 (C.D. Cal. Oct. 3, 2017); *see also Murphy v. Bob Cochran Motors, Inc.*, No. 1:19-CV-00239, 2020 WL 6731130, at *13 (W.D. Pa. Aug. 4, 2020), *report and recommendation adopted*, No. 1:19-CV-239-SPB, 2020 WL 5757200 (W.D. Pa. Sept. 28, 2020).

¹²³ *Reed*, 2017 WL 4457508, at *4.

¹²⁴ *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898, 911 (9th Cir. 2019).

¹²⁵ *Robles*, 913 F.3d at 910–11.

¹²⁶ *George v. Bay Area Rapid Transit*, 577 F.3d 1005, 1012–13 (9th Cir. 2009) (quoting *Indep. Living Res. v. Or. Arena Corp.*, 982 F. Supp. 698, 746 (D. Or. 1997)).

While courts do not generally rely on WCAG to assess liability, they do frequently turn to it as a potential remedy.¹²⁷ A federal district court in Florida found “*highly* persuasive the number of cases adopting WCAG 2.0 Success Level AA as the appropriate standard to measure accessibility.”¹²⁸ While the Ninth Circuit did not reach the issue in the Domino’s case, it stated that the “court can order compliance with WCAG 2.0 as an equitable remedy.”¹²⁹ Another court acknowledged arguments that WCAG could be “a sufficient condition, but not a necessary condition, for . . . compliance, and therefore . . . a potential remedy.”¹³⁰

Many parties adopt these standards in settling cases. A New York federal district court explained, in approving such a settlement, that WCAG is “an appropriate standard to judge . . . compliance with any accessibility requirements of the ADA.”¹³¹ In the court’s view, WCAG is “nearly universally accepted.”¹³² That same court indicated that it would modify the settlement if DOJ promulgated a final ADA Title III regulation on website accessibility.¹³³

Legislative Options and Considerations for Congress

Congress may have several options to address ADA applicability to websites and website accessibility standards. First, Congress may permit or require DOJ and other federal agencies to make rules on web accessibility without amending the ADA. Congress may alternatively opt for legislation clarifying that the ADA’s requirements apply to all public-facing web services, or to certain types of web services. When addressing the scope of ADA applicability, Congress may consider, for example, whether and how any new legislation would cover

- web content beyond traditional websites, such as those delivered through apps run on mobile and smart devices;¹³⁴
- user-generated content and, if so, whether the web service provider or the user is responsible for making the content accessible;¹³⁵

¹²⁷ *Ariza v. Casablanca Mattress & Furniture Gallery, LLC*, No. 22-CV-23759, 2023 WL 246689, at *4 (S.D. Fla. Jan. 18, 2023); *Access Now, Inc. v. Blue Apron, LLC*, No. 17-CV-116-JL, 2017 WL 5186354, at *10 (D.N.H. Nov. 8, 2017).

¹²⁸ *Gomez v. Gen. Nutrition Corp.*, 323 F. Supp. 3d 1368, 1379 n.3 (S.D. Fla. 2018).

¹²⁹ *Robles*, 913 F.3d at 907.

¹³⁰ *Blue Apron*, 2017 WL 5186354, at *7.

¹³¹ *Andrews v. Blick Art Materials, LLC*, 286 F. Supp. 3d 365, 370 (E.D.N.Y. 2017); *see also* *Ortega v. Wm. B. Reily & Co.*, No. 21-CV-10293-JW, 2022 WL 3700147, at *3 (S.D.N.Y. Aug. 26, 2022).

¹³² *Andrews*, 286 F. Supp. 3d at 386.

¹³³ *Ibid.*, 370.

¹³⁴ DOJ’s regulation for state and local government websites under ADA’s Title II, for example, covers web content and mobile applications, including third-party software a government entity uses to provide services. 28 C.F.R. § 35.200(b)(1) (effective June 24, 2024). The regulation defines “mobile applications” as “software applications that are downloaded and designed to run on mobile devices, such as smartphones and tablets.” *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities*, 89 Fed. Reg. 31320, 31343, 31337 (Apr. 24, 2024) (to be codified at 28 C.F.R. pt. 35). It defines “web content” as “the information and sensory experience to be communicated to the user by means of a user agent, including code or markup that defines the content’s structure, presentation, and interactions.” *Ibid.*

¹³⁵ Congress has exempted user-generated content in other contexts. *See* CRS Report R46751, *Section 230: An Overview*, by Valerie C. Brannon and Eric N. Holmes (2023). DOJ’s Title II rules exempts user-generated content and some linked third-party content. 28 C.F.R. § 35.201 (effective June 24, 2024).

- artificial intelligence- (AI-) or other machine-generated content and, if so, whether the developer of a generative AI model or any distributor of such content is responsible for making the content accessible; and
- all existing websites, web content, and applications, or only new or updated iterations.¹³⁶

If imposing retroactive requirements, legislators may wish to consider an appropriate implementation period. In its recent regulations for state and local government websites, for example, DOJ requires many government entities to reach compliance within two years of the final rule, with smaller entities granted three years to make any needed changes.¹³⁷ Unique questions of venue and standing may arise in the website context as well, given the internet’s interstate reach.¹³⁸

In recent Congresses, Members have introduced bills that would have mandated new accessibility requirements. For instance, the Websites and Software Applications Accessibility Act, S. 2984, introduced in September 2023, called for DOJ and the Equal Employment Opportunity Commission to issue accessibility regulations for web services.¹³⁹ The bill would have covered employers, local governments, and public accommodations, as well as website and application providers who supply websites these entities use.¹⁴⁰ The Online Accessibility Act, H.R. 1100, introduced in 2021, would have required disability access in “consumer facing” websites and applications.¹⁴¹

Given the lack of generally applicable, legally binding standards for website accessibility, Congress may consider whether to clarify through legislation what such standards should be. Congress may choose to adopt consensus-based WCAG or a future successor as a uniform federal technical standard, or choose to not endorse any particular standard at all considering the evolution of web technologies.¹⁴² Congress may also choose to codify a subset of WCAG standards, such as its four principles of web accessibility, and allow enforcing agencies or internet stakeholders to develop and adopt standards in line with these principles. Congress may also consider policy incentives to facilitate the development, adoption, and deployment of any practicable and sustainable standards and specifications. It may also choose to legislate entity

¹³⁶ DOJ’s Title II regulations, for example, phase in compliance for smaller entities and exempt archived content and some preexisting electronic documents. 28 C.F.R. §§ 35.200(b), 35.201. In addition to entity size, Congress could consider whether to expand any legislative efforts under ADA’s Title III to include changes to Title II or to other statutes that address disability access in other contexts, including the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, the Rehabilitation Act of 1973, 29 U.S.C. 701, *et. seq.*, and the Congressional Accountability Act, 2 U.S.C. 1301 *et seq.* ¹³⁷ 28 C.F.R. § 35.200(b).

¹³⁸ *Price v. Escalante-Black Diamond Golf Club LLC*, No. 5:19-CV-22-OC-30PRL, 2019 WL 1905865, at *4 (M.D. Fla. Apr. 29, 2019) (acknowledging judicial disagreement on standing issues when it comes to websites).

¹³⁹ Websites and Software Applications Accessibility Act, S. 2984, 118th Cong. § 5 (2023). *See also* H.R. 5813 118th Cong. § 5 (2023).

¹⁴⁰ S. 2984, 118th Cong. §§ 3, 4 (2023). *See also* H.R. 5813 118th Cong. §§ 3, 4 (2023).

¹⁴¹ H.R. 1100, 117th Cong. (2021).

¹⁴² As DOJ observed in adopting WCAG 2.1, a regulation’s incorporation by reference is limited to existing publications and standards. DOJ cannot mandate that the regulation automatically incorporate future WCAG versions. *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities*, 89 Fed. Reg. 31320, 31349 (Apr. 24, 2024) (to be codified at 28 C.F.R. pt. 35) (citing 1 C.F.R. § 51.1(f) (2024)).

size-specific¹⁴³ or sector-specific accessibility requirements, for example in the employment, public services, transportation, broadband, education, health care, and financial services sectors.

Congress has considered options for accessibility standards. For instance, the Websites and Software Applications Accessibility Act, S. 2984 (118th Congress), used some of WCAG’s language to describe accessibility requirements, without explicitly incorporating WCAG.¹⁴⁴ The Online Accessibility Act, H.R. 1100 (117th Congress), stated that WCAG compliance would satisfy access requirements, although a private website provider could also choose an equivalent “alternative means of access.”¹⁴⁵ Other bills include Sami’s Law, H.R. 4686 (116th Congress), which would have required certain transportation-related websites to meet WCAG standards.¹⁴⁶

The bills described above, had they become law, would not have been the first statutes to incorporate WCAG. In amendments taking effect in 2024, 20 U.S.C. § 1090 requires that the Department of Education make its Free Application for Federal Student Aid, a form often used online, “available in formats accessible to individuals with disabilities and compliant with the most recent Web Content Accessibility Guidelines, or successor guidelines.”¹⁴⁷

Congress may also consider technical challenges, such as whether accessibility changes pose security concerns.¹⁴⁸ In addition, they may design different standards for new and existing websites, or require only changes that can be automated.

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¹⁴³ See *Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance*, 89 Fed. Reg. 40066, 40128 (May 9, 2024) (to be codified at 45 C.F.R. pt. 84) (noting HHS sought comment on how proposed web access regulations would affect smaller entities).

¹⁴⁴ *Websites and Software Applications Accessibility Act*, S. 2984, 118th Cong. § 3. As another example, the *ADA Compliance for Customer Entry to Stores and Services (ACCESS) Act*, H.R. 241, 118th Cong. § 6 (2023), called for a DOJ study on use of WCAG or other means to allow users with disabilities a reasonable accommodation.

¹⁴⁵ H.R. 1100, 117th Cong. § 601 (2021).

¹⁴⁶ H.R. 4686, 116th Cong. § 8 (2020).

¹⁴⁷ *Consolidated Appropriations Act of 2021*, Pub. L. No. 116-260, 134 Stat. 3179 (2020); 20 U.S.C. § 1090.

¹⁴⁸ *Why Website Accessibility Overlay Widgets & Plugins Fail Compliance*, ACCESSIBILITY.WORKS (JAN. 19, 2022), <https://www.accessibility.works/blog/avoid-accessibility-overlay-tools-toolbar-plugins/>.

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