ACCESSIBILITY IN THE DIGITAL AGE — WHY THE UNITED STATES NEEDS A NEW APPROACH TO THE AMERICANS WITH DISABILITIES ACT

William J. Seguin[*]

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[*] William ("Bill") Seguin is a student at the Benjamin N. Cardozo School of Law. With prior work experience as a business technology researcher and consultant, Bill has dedicated time during his law school career working for the Housing Justice Division of the Legal Aid Society of New York City, and as a member of the Kathryn O. Greenberg Immigration Justice Clinic. He would like to thank his partner, friends, and family for their love, support, and unending patience.

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I. INTRODUCTION

The rise of the Internet has reshaped the contours of economies,[1] elections,[2] and cultures across the globe.[3] Predictions for the next decade indicate an even greater interplay between humans and technology.[4] The growth of the technology sector ("tech sector" or "big tech") has not come without negative consequences though. Inadequate data privacy protections endanger customers' personal information;[5] acquisitions and anticompetitive practices cultivate monopolistic markets;[6] and the hyperbolic growth of

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[1] The FAANGM (Facebook, Apple, Amazon, Netflix, Google and Microsoft) stocks' market capitalization on October 22, 2021, was about $9.5 trillion and comprised 24.5% of the S&P. Compare this to market capitalization around $1.2 trillion and 8% of the S&P around 2013. Edward Yardeni & Joe Abbot, *Stock Market Briefing: FAANGMs*, YARDENI RSCH. INC. 1 (Dec. 23, 2022), https://www.yardeni.com/pub/faangms.pdf.

[2] Thomas Fujiwara, Karsten Müller, & Carlo Schwarz, *The Effect of Social Media on Elections: Evidence from the United States*, PRINCETON U. (Oct. 25, 2022), http://www.princeton.edu/~fujiwara/papers/SocialMediaAndElections.pdf.

[3] JOSE VAN DIJCK, THE CULTURE OF CONNECTIVITY: A CRITICAL HISTORY OF SOCIAL MEDIA 4 (2013);

> In December 2011, 1.2 billion users worldwide–82 percent of the world's internet population over age 15–logged on to a social media site, up from 6 percent in 2007. Within less than a decade, a new infrastructure for online sociality and creativity has emerged, penetrating every fiber of culture today.

Id.; see also Social Media Fact Sheet, PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/social-media/ (between Dec. 20, 2008, and Feb. 8, 2021, the share of U.S. adults who say they use at least one social media has increased from twenty-six percent to seventy-two percent, respectively).

[4] Bernard Marr, *These 25 Technology Trends Will Define The Next Decade*, FORBES (Apr. 20, 2020, 12:18 AM), https://www.forbes.com/sites/bernardmarr/2020/04/20/these-25-technology-trends-will-define-the-next-decade/?sh=6e7d07db29e3; *see also* Russ Juskalian, Antonio Regalado, Mike Orcutt, Adam Piore, David Rotman, Neev V. Patel, Gideon Lichfield, Karen Hao, Angela Chen, & James Temple, *10 Breakthrough Technologies*, MIT TECH. REV. (Feb. 26, 2020), https://www.technologyreview.com/10-breakthrough-technologies/2020/.

[5] Michael Hill & Dan Swinhoe, *The 15 Biggest Data Breaches of the 21st Century*, CSO (Nov. 8, 2022, 2:00 AM), https://www.csoonline.com/article/2130877/the-biggest-data-breaches-of-the-21st-century.html.

[6] Celia Kang, *Lawmakers Taking Aim at Big Tech, Push Sweeping Overhaul of Antitrust*, N.Y. TIMES (June 29, 2021), https://www.nytimes.com/2021/06/11/technology/big-tech-antitrust-bills.html.

cryptocurrencies has been accompanied by volatility and speculation.[7] Governments around the world responded to these developments by imposing regulations on tech companies.[8] For example, in 2018, the European Union enacted the General Data Protection Regulation ("GDPR"), giving internet users increased access to their personal data stored by companies.[9] The United States has yet to implement anything like GDPR, but American policymakers and pundits are aware of the dangers of unregulated tech growth, with some pondering future tech regulations.[10] In 2020, the Congressional Subcommittee on Antitrust, Commercial, and Administrative Law recommended several measures to "restore competition in the Digital Economy," "strengthen antitrust laws," and "strengthen antitrust enforcement."[11] These measures are aimed at making online markets fairer and more competitive, but Congress has yet to bring attention to a critical source of unfairness: the lack of "digital accessibility." "Digital accessibility" is a concept that promotes making online content perceivable, operable, understandable, and robust.[12] Without these measures, individuals with visual, auditory, cognitive, or other disabilities cannot access online content without significant difficulty, cutting them off from the Digital Economy entirely.[13] If Congress wants to improve the state of the Digital Economy for the country as a whole, it must also address the problem of digital inaccessibility.

While Congress has not addressed accessibility in the digital world, it has passed legislation concerning accessibility in the physical world. In 1991, it passed the Americans with Disabilities Act (the "Act" or the "ADA"), which prohibited "public accommodations" from discriminating against people with disabilities.[14] Since then, the ADA has required everyday

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[7] Thomas Franck, *Senators Demand Cryptocurrency Regulation Guidance from SEC Chair Gary Gensler*, CNBC (Sept. 14, 2021, 4:52 PM), https://www.cnbc.com/2021/09/14/cryptocurrency-regulation-sec-chair-gary-gensler-grilled-by-senators.html.

[8] The European Union is also considering the Digital Services Act and Digital Markets Act which would make tech giants responsible for the content on their platforms. *See* Silvia Amaro, *How Europe Became the World's Top Tech Regulator*, CNBC (Mar. 25, 2021, 8:44 AM), https://www.cnbc.com/2021/03/25/big-tech-how-europe-became-the-worlds-top-regulator.html.

[9] *Id.; see also* General Data Protection Regulation Art. 15.

[10] Sara Morrison & Shirin Ghaffary, *The Case Against Big Tech*, VOX (Dec. 8, 2021, 5:30 AM), https://www.vox.com/recode/22822916/big-tech-antitrust-monopoly-regulation; *see also* STAFF OF S. COMM. OF THE JUDICIARY, 116TH CONG., INVESTIGATION COMPETITION IN DIGIT. MKTS. (Comm. Print 2020).

[11] STAFF OF S. COMM. OF THE JUDICIARY, INVESTIGATION COMPETITION IN DIGIT. MKTS., at 317-19, 330-37, 337-341.

[12] *WCAG 2.1 at a Glance,* W3C WEB ACCESSIBILITY INITIATIVE (WAI) (June 5, 2018), https://www.w3.org/WAI/standards-guidelines/wcag/glance/.

[13] *How People with Disabilities Use the Web,* W3C WEB ACCESSIBILITY INITIATIVE (WAI) (May 15, 2017), https://www.w3.org/WAI/people-use-web/.

[14] 42 U.S.C. §§ 12101-12213 (2008).

establishments like movie theaters, offices, and hotels to comply with building codes that govern the dimensions and layouts of parking spaces, kitchens, bathrooms, and more.[15] These standards strive to remove architectural barriers and provide reasonable modifications that increase access to public life.[16] While the ADA has successfully created a more accessible physical world for those with disabilities, the Act has failed to create an accessible *digital* world. The Act explicitly covers "public accommodations" that fall into one of twelve categories,[17] but Congress passed up the opportunity to add websites or digital applications ("apps") to this list when it last amended the ADA in 2008.[18]

In the years since Congress' last amendment to the ADA, the state of public life and public accommodations has transformed, spurred by the unrelenting growth of digital technology. Humans are building a digital world, and technology is breaking physical bounds like never before.[19] The retail industry exemplifies the extent of this digital transformation; in 2000, only one percent of retail sales occurred online, this grew to a modest five percent by 2012, but has since more than doubled with over fourteen percent of 2021 retail sales—totaling $787 billion—happening online.[20] In addition to websites and mobile apps, technological innovation is extending the concept of reality; augmented reality games like *Pokémon Go* enhance the real world by overlaying digital images,[21] and virtual reality ("VR") experiences create fully digital worlds, projected through special VR

[15] *See* 2010 ADA STANDARDS FOR ACCESSIBLE DESIGN §§ 208, 212, 213.

[16] Congress highlighted its aims in introducing these standards when it acknowledged how the state of inaccessible design left many individuals with disabilities out of the "the economic and social mainstream of American life." S. REP. No. 101-116 at 19 (1989) (Conf. Rep.); *see also* Megan Schires, *A Simple Guide to Using the ADA Standards for Accessible Design Guidelines*, ARCH DAILY (June 6, 2017), https://www.archdaily.com/872710/a-simple-guide-to-using-the-ada-standards-for-accessible-design-guidelines.

[17] 42 U.S.C. § 12181(7) (1990).

[18] ADA Amendments Act of 2008, Pub. L. No. 110-135, 122 Stat. 3553.

[19] Martin Mühleisen, *The Long and Short of the Digital Revolution*, IMF FIN. & DEV. 5 (2018).

[20] U.S. DEP'T COM., QUARTERLY RETAIL E-COMMERCE SALES 4TH QUARTER 2020, U.S. CENSUS BUREAU NEWS 2 (Feb. 19, 2021, 10:00 AM), https://www2.census.gov/retail/releases/historical/ecomm/20q4.pdf; U.S. DEP'T COM., QUARTERLY RETAIL E-COMMERCE SALES 4TH QUARTER 2010 2 (Feb. 17, 2011, 10:00 AM), https://www2.census.gov/retail/releases/historical/ecomm/10q4.pdf; U.S. CENSUS BUREAU, RETAIL E-COMMERCE SALES IN FOURTH QUARTER 2000 WERE $8.7 BILLION, UP 67.1 PERCENT FROM FOURTH QUARTER 1999, CENSUS BUREAU REPORTS, U.S. DEP'T COM. NEWS 2 (Feb. 16, 2001, 10:00 AM), https://www2.census.gov/retail/releases/historical/ecomm/00q4.pdf.

[21] Nick Wingfield & Mike Isaac, *Pokémon Go Brings Augmented Reality to a Mass Audience*, N.Y. TIMES (July 11, 2016), https://www.nytimes.com/2016/07/12/technology/pokemon-go-brings-augmented-reality-to-a-mass-audience.html.

headsets.[22] Tech industry titans like Meta, Nvidia, and Roblox anticipate these experiences to evolve into a virtual world entirely of its own; a Matrix-esque simulation where we work, play, shop, and more.[23] Marketing executives have enthusiastically dubbed this vision the "Metaverse,"[24] but the flashy phrase belies the profound importance of its impact, representing a "broad . . . shift in how we interact with technology."[25] In 2021, real estate sales for digital property in the Metaverse topped $500 million.[26] Barbados plans to open an embassy in this virtual world.[27] The relationship between humans and technology has changed fundamentally since the ADA was enacted and will continue to change as new markets, communities, and opportunities appear online. People with disabilities will be foreclosed from enjoying equally in the fruits of these advances if the definition of "public accommodation" stays rooted in the 1990s.

This Note will discuss what "digital accessibility" is, and how the ADA has been applied to web accessibility claims. The first section will provide a background of the ADA and its principles for protecting "public accommodations," and draw parallels to the discriminatory experiences people with disabilities face online.[28] The next section of this Note will discuss the conflicting interpretations of "public accommodation" in the U.S. Circuit Courts of Appeal, how these interpretations affect digital accessibility claims brought under the ADA, the issues courts have with defining "accessibility," and the problems that arise from this lack of clarity.[29] The final section will propose an approach to address the digital accessibility gap by, first, adopting an interpretation of "public accommodation" in a way that is inclusive of digital spaces, and second, adopting the Web Content

[22] For an example of how organizations use VR for training, *see* Jeremy Bailenson, *Is VR the Future of Corporate Training?*, HARV. BUS. REV. (Sept. 18, 2020), https://hbr.org/2020/09/is-vr-the-future-of-corporate-training.

[23] Eric Ravenscraft, *What Is the Metaverse, Exactly?*, WIRED (Apr. 25, 2022, 7:00 AM), https://www.wired.com/story/what-is-the-metaverse/.

[24] Recently, the social media platform business Facebook, changed its name to Meta. Mark Zuckerberg's founders letter explains one vision of what the "Metaverse" will be. *See* Mark Zuckerberg, *Founder's Letter, 2021*, META (Oct. 28, 2021), https://about.fb.com/news/2021/10/founders-letter/.

[25] Ravenscraft, *supra* note 23.

[26] Robert Frank, *Metaverse Real Estate Sales Top $500 Million, and Are Projected to Double This Year*, CNBC (Feb. 1, 2022), https://www.cnbc.com/2022/02/01/metaverse-real-estate-sales-top-500-million-metametric-solutions-says.html.

[27] Jim Wyss, *Barbados Is Opening a Diplomatic Embassy in the Metaverse*, BLOOMBERG (Dec. 14, 2021, 8:00 AM), https://www.bloomberg.com/news/articles/2021-12-14/barbados-tries-digital-diplomacy-with-planned-metaverse-embassy.

[28] *See infra* section II.

[29] *See infra* section III.

Accessibility Guidelines (hereinafter "WCAG") as a set of standards defining accessibility.[30]

II. INTRODUCING THE ADA

To understand the relationship between the ADA and digital accessibility lawsuits, it helps to first understand the history of the Act, how it removes barriers to accessibility in physical places of accommodation, and the impacts of those measures. Following this background, this section dives into the problems of digital accessibility and how discriminatory design online can be as harmful as it is in the physical world.

A. The ADA is a Broad Mandate to Bring People with Disabilities into "Public Life"

In 1989, the Senate issued a report on the state of disability rights in the country, recognizing the scale of the problems faced by individuals with disabilities and finding "a compelling need to provide a *clear and comprehensive* national mandate for the elimination of discrimination against individuals with disabilities."[31] The Senate Committee that authored the report hoped the proposed legislation would "[integrate] persons with disabilities into the economic and social mainstream of American life,"[32] and established its desire to "provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."[33] The committee also recognized "a need to ensure that the Federal Government plays a central role in enforcing these standards on behalf of individuals with disabilities."[34]

The ADA itself is also written in an expansive way, declaring the right of people with disabilities to "fully participate *in all aspects* of society."[35] Outlawed discrimination could appear in many forms, "including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, . . . failure to make modifications to existing facilities . . . and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities."[36] To stop this widespread discrimination, Congress penned the ADA with five titles that span across a large swath of public life: Title I–Employment,[37] Title II–Public

[30] *See infra* section IV.

[31] S. REP. NO. 101-116, at 19 (1989) (Conf. Rep.) (emphasis added).

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] 42 U.S.C. § 12101(a)(1) (2008) (emphasis added).

[36] 42 U.S.C. § 12101(a)(5).

[37] 42 U.S.C. § 12111 *et seq.*

Services,[38] Title III–Public Accommodations and Services Operated By Private Entities,[39] Title IV–Telecommunications,[40] and Title V–Miscellaneous.[41] Digital accessibility claims under the ADA have historically come under Title III.[42]

For a claim to succeed under Title III of the ADA, the defendant establishment must be subject to the law. Congress carefully contemplated the definition of "public accommodation," thereby defining what types of businesses it sought to regulate.[43] After deliberations, it settled on the following list:

> (7) Public accommodation
>
> The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce—
>
> (A) 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;
>
> (B) a restaurant, bar, or other establishment serving food or drink;
>
> (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
>
> (D) an auditorium, convention center, lecture hall, or other place of public gathering;
>
> (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
>
> (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or

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38 42 U.S.C. § 12131 *et seq.* (1990).

39 42 U.S.C. § 12181.

40 47 U.S.C. § 225; 47 U.S.C. § 611.

41 42 U.S.C. § 12201 *et seq*. (2009).

42 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, 46 (Jan. 1, 2022), https://www.americanbar.org/groups/law_practice/publications/law_practice_magazine/2022/jf22/vu-launey-egan/; *see also* Jason Taylor, *2021 Year End Report – App & Web Accessibility Lawsuits Break Records*, USABLENET (Dec. 21, 2021, 9:49 AM), https://blog.usablenet.com/2021-lawsuit-report-trends-and-findings.

43 S. REP. NO. 101-116, at 59-60 (1989) (Conf. Rep.).

> lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
>
> (G) a terminal, depot, or other station used for specified public transportation;
>
> (H) a museum, library, gallery, or other place of public display or collection;
>
> (I) a park, zoo, amusement park, or other place of recreation;
>
> (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
>
> (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
>
> (L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.[44]

This list is comprehensive: it covers businesses in all sectors and encompasses many aspects of day-to-day life. For claims where a defendant business falls squarely into one or more of these categories, the question of whether a defendant is a "public accommodation" is easy to answer. In situations where a public accommodation is not expressed in the statute's list, Congress did indicate "that the 'other similar' terminology should be construed liberally consistent with the intent of the legislation that people with disabilities should have equal access to the array of establishments that are available to others who do not currently have disabilities."[45]

B. The Impact of Title III Has Caused Fundamental Change at the Societal Level

The passage of the ADA fundamentally changed the United States. It expanded Americans with disabilities' access to public accommodations, transportation, healthcare, and housing.[46] It also helped increase public awareness about disability issues.[47] Title III, specifically, has played an integral role in shaping the spaces where people live, work, and play. The ADA Standards of Accessible Design (hereinafter "Standards of Design"),

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[44] 42 U.S.C. § 12181(7) (2018).

[45] S. REP. NO. 101-116, at 59.

[46] Lex Frieden, *The Impact of the ADA in American Communities,* U. TEX. HEALTH SCIENCE CTR. HOUSTON 17 (July 23, 2015), http://southwestada.org/html/publications/general/20150715%20ADA%20Impact%20Narrative%20(Rev-Final%20v2).pdf.

[47] *Id.*

issued by the Department of Justice (hereinafter "DOJ"), lay out the architectural specifications that public accommodations must follow in order to comply with the ADA.[48] These cover a diverse range of settings, from hotel rooms and amusement parks,[49] to stairways, and parking spaces.[50] The Act has also ushered in more subtle, but still significant, changes like test-taking accommodations or auxiliary aids in movie theaters for people who struggle to see the screen.[51] The ADA is a powerful force pushing for embedded inclusivity into American society. Accessible design is now the norm in stores, restaurants, hotels, and movie theaters.[52] By drawing attention to the "discriminatory effects" of design on society, the ADA set inclusivity and equality as cornerstones of public life in the United States.[53]

C. Technological Advancement Redefined Public Life, Increasing the Importance of Digital Accessibility

With the passage of the ADA, Congress sought to remove barriers that keep people with disabilities from participating "*in all aspects* of society."[54] This notion of accessibility was readily understood in the context of the physical world. It is easy to see how the absence of a ramp would make it difficult for a person with a physical disability to go to their job or buy groceries. What do these barriers look like in the digital world, though? And how are people with disabilities hurt by inaccessible digital design?

The state of the Internet today is unrecognizable from that of 1990s. In 1995, forty-two percent of U.S. adults had never heard of the Internet, and an additional twenty-one percent only had a vague concept of what the Internet was—they knew it had something to do with computers, but that was about

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[48] The most recent changes to these Standards of Design were incorporated in 2010. These are read together with the previous 2004 regulations paired with 36 C.F.R. part 1191, appendices B and D. *See* 2010 ADA STANDARDS FOR ACCESSIBLE DESIGN, U.S. DEP'T JUST. (Sept. 15, 2010), https://www.ada.gov/law-and-regs/design-standards/2010-stds/.

[49] 2010 ADA STANDARDS FOR ACCESSIBLE DESIGN §§ 224, 234.

[50] *Id.* at §§ 210, 208.

[51] Nell Clark, Lilly Quiroz, Milton Guevara, James Doubek, & Matt Kwong, *In Their Own Words: How the Americans with Disabilities Act Changed People's Lives*, NPR (July 27, 2020, 5:02 AM), https://www.npr.org/2020/07/27/895651325/americans-with-disabilities-act-examining-its-impact-3-decades-later.

[52] Kate Reggev, *ADA-Compliant Design Paving the Way for Accessible Design*, CLEVER (Aug. 4, 2020), https://www.architecturaldigest.com/story/ada-compliant-design-is-paving-the-way-for-accessible-design.

[53] 42 U.S.C. § 12101(a)(5) (2008).

[54] 42 U.S.C. § 12101(a)(1) (emphasis added).

it.[55] By 2000, only half of U.S. adults said they used the Internet.[56] By 2011, the Internet transformed from a stationary to an "on the go" resource, with thirty-five percent of U.S. adults owning "smartphones."[57] Growth has accelerated since. In 2021, ninety-three percent of U.S. adults had used the Internet and eighty-five percent owned a smartphone.[58] The ubiquity of technology has created new companies. Online platforms like Amazon, Apple, Facebook, and Google notably "play an important role in our economy and society as the underlying infrastructure for the exchange of communications, information, and goods and services."[59]

Today, it takes no stretch of the imagination to say that the Internet is a place where individuals perform the functions of everyday life. Many of the spaces described in Section 12181(7) of the ADA now have digital equivalents where people can view exhibitions and performances, meet and hold public gatherings, shop, obtain professional services, display art, recreate, learn, and obtain social services.[60] Title III and the aims of the ADA are clear; the definition of "public accommodation" created in 1990 represented a broad swath of public life and was meant to be interpreted liberally—for the ADA to adapt to modern times, this definition is due for an update that aligns with the realities of the digital age.

D. Digital Accessibility Focuses on Making Web Content Perceivable, Operable, Understandable, and Robust

Digital accessibility problems are wide ranging and depend on the nature of a person's disability. For example, if a website does not allow a

[55] Susannah Fox & Lee Rainie, *Part 1: How the internet has woven itself into American life*, PEW RSCH. CTR. (Feb. 27, 2014), https://www.pewresearch.org/internet/2014/02/27/part-1-how-the-internet-has-woven-itself-into-american-life/.

[56] *Internet/Broadband Fact Sheet,* PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/internet-broadband/.

[57] For the purposes of this data point, "smartphone" means a cell phone that has internet connectivity. *Mobile Fact Sheet,* PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/mobile/.

[58] *Id.*; *Internet/Broadband Fact Sheet, supra* note 56.

[59] STAFF OF S. COMM. OF THE JUDICIARY, 116TH CONG., INVESTIGATION COMPETITION IN DIGIT. MKTS. 10 (Comm. Print 2020).

[60] The listed examples align with descriptions of public accommodations under 42 U.S.C. §§ 12181(7)(C), (D), (E), (F), (H), (I), (J), and (K) respectively. *See, e.g., Here Are All the Livestreams & Virtual Concerts to Watch During Coronavirus Crisis (Updating),* BILLBOARD (Jan. 26, 2021), https://www.billboard.com/music/pop/coronavirus-quarantine-music-events-online-streams-9335531/; *Conventions*, EVENTBRITE https://www.eventbrite.com/d/online/conventions/ (last visited Feb. 22, 2022); AMAZON, https://www.amazon.com (last visited Feb. 22, 2022); LEGALZOOM, https://www.legalzoom.com (last visited Feb. 22, 2022); DIGITAL MUSEUM OF DIGITAL ART, https://dimoda.art (last visited Feb. 22, 2022); *Casino*, DRAFTKINGS, https://casino.draftkings.com/?page=1 (last visited Feb. 22, 2022); COURSERA, https://www.coursera.org (last visited Feb. 22, 2022); BETTERHELP, https://www.betterhelp.com (last visited Feb. 22, 2022).

user to navigate the site with a keyboard, it may make it difficult for people with physical disabilities to input information into a search bar.[61] Other users, however, may not be able to use a keyboard at all and may instead need a website to be compatible with tools that support voice-recognition and hands-free interaction tools.[62] In other circumstances, people with visual impairments may need website compatibility with text-to-speech tools or rely on written descriptions of pictures that describe an image.[63]

With so many disabilities to recognize and potential barriers to accommodate, it may seem difficult to know where to begin in creating accessible content. Thankfully, the World Wide Web Consortium Web Accessibility Initiative (hereinafter "W3C WAI"), an organization that provides strategies, standards, and resources to help increase web accessibility, has created a framework to evaluate digital accessibility and standards of accessible design.[64] W3C WAI describes accessibility as an experience where "people with disabilities can equally perceive, understand, navigate, and interact with websites and tools[,]" and "contribute equally without barriers."[65] The way to reduce these barriers is to ensure that digital experiences are perceivable, operable, understandable, and robust.[66] The standards, known as WCAG, are widely respected and updated regularly.[67] The most recent version, WCAG 2.2, was released in September 2022.[68]

III. THE FEDERAL GOVERNMENT HAS FAILED TO EFFECTIVELY ADDRESS THE PROBLEM OF DIGITAL ACCESSIBILITY

The ADA is already influencing the design of public spaces and making progress towards removing barriers in the physical world.[69] The Act acknowledges that "unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably

[61] *See Tools and Techniques*, W3C WEB ACCESSIBILITY INITIATIVE (WAI) (May 15, 2017), https://www.w3.org/WAI/people-use-web/tools-techniques/.

[62] *Id.*

[63] *Id.*

[64] "Web accessibility" and "digital accessibility" are used interchangeably. *See WCAG 2.1 at a Glance, supra* note 12.

[65] *Accessibility, Usability, and Inclusion*, W3C WEB ACCESSIBILITY INITIATIVE (WAI) (May 6, 2016), https://www.w3.org/WAI/fundamentals/accessibility-usability-inclusion/.

[66] *See WCAG 2.1 at a Glance*, *supra* note 12.

[67] *WCAG 2 Overview*, W3C WEB ACCESSIBILITY INITIATIVE (WAI) (Nov. 1, 2022), https://www.w3.org/WAI/standards-guidelines/wcag/.

[68] *Web Content Accessibility Guidelines (WCAG) 2.2*, W3C WEB ACCESSIBILITY INITIATIVE (WAI) (Sept. 6, 2022), https://www.w3.org/TR/WCAG22/.

[69] Reggev, *supra* note 52.

famous[.]"[70] Congress has contemplated the broad nature of the ADA,[71] and recognized that the Act's interpretation was "intended to keep up with technological advancement" in order to avoid the continuing impacts of disability discrimination.[72] The U.S. Supreme Court, too, has recognized that the ADA "as a whole is intended to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[73] However, when people with disabilities seek the ADA's protection for website accessibility issues, their claims are usually unsuccessful and the courts struggle to recognize the seriousness of the Web's accessibility problems.

This failure to meaningfully eliminate accessibility barriers online is caused by two issues. First, the interpretation of "public accommodation" adopted by U.S. courts does not align with modern reality. Second, the lack of legislative or administrative agency adopted standards creates an unworkable uncertainty around digital accessibility. The combined consequences have tangible impacts on web design that keep experiences inaccessible and leave businesses uncertain of how to proceed with their own accessibility efforts. This section will describe these two issues and the resulting problems.

A. Courts Have Differing Interpretations of "Public Accommodation" When it Comes to Digital Inaccessibility Claims

Courts adjudicating digital accessibility claims brought under the ADA interpret the ADA's definition of "public accommodation" and must decide whether a website or mobile application could qualify. This crucial decision determines whether a website or mobile application is subject to the ADA's requirements.[74] Several of these cases have reached different U.S. Circuit Courts of Appeals. These decisions give insight into a three-way split between jurisdictions that: (1) are open to applying the ADA to websites;[75] (2) limit the ADA's definition of "public accommodation" to physical

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[70] 42 U.S.C. § 12101(a)(8) (2009).

[71] 42 U.S.C. § 12101(b).

[72] H.R. Rep. No. 101-485 pt. 2, at 108 (1990).

[73] Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 589 (1999) (internal quotations omitted).

[74] Robles v. Domino's Pizza, LLC, 913 F.3d 898, 904 (9th Cir. 2019) ("We review de novo the district court's interpretation and construction of a federal statute—here, the court's application of the ADA to websites and apps"); Gil v. Winn-Dixie Stores Inc., 993 F.3d 1266 (11th Cir. 2021), *vacated*, 2021 U.S. App. LEXIS 38489, *vacating en banc as moot* (11th Cir. 2021).

[75] These are the First, Second and Seventh U.S. Circuit Courts of Appeal. *See* Carparts Distribution Ctr. v. Automotive Wholesaler's Ass'n, 37 F.3d 12 (1st Cir. 1994); *see also* Doe v. Mutual of Omaha, 179 F.3d 557 (7th Cir. 1999); *see also* Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28 (2d Cir. 1999); *see also* Nat'l Ass'n of the Deaf v. Netflix, Inc., 869 F.Supp.2d 196 (D. Mass. 2012).

places;[76] and (3) require a nexus approach between an online barrier and a physical place public accommodation for the ADA to apply.[77] This Note will refer to these approaches, respectively, as: (1) the Inclusive Approach; (2) the Narrow Approach; and (3) the Nexus Approach.

1. The Inclusive Approach

The First, Fourth, and Seventh Circuit Courts of Appeal adopted an expansive interpretation of "public accommodation" under the ADA with regard to digital accessibility, allowing websites and mobile applications to be scrutinized.[78] This approach was made possible by cases that determined that goods and services acquired online or by mail do fall under the ADA's definition of "public accommodation."[79] Led by the First Circuit's decision in the 1994 case *Carparts Distribution Ctr. v. Automotive Wholesaler's Ass'n*, these Circuit Courts have held 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."[80] In this case, an employee diagnosed with Human Immunodeficiency Virus ("HIV") was excluded from the conventional $1 million lifetime benefits associated with his employer's health plan.[81] Instead, the plan limited a customer's coverage for "AIDS-related illnesses"[82] to $25,000 over a customer's lifetime.[83] To reach its conclusion, the First Circuit found that "Congress clearly contemplated that 'service establishments'" listed under 42 U.S.C. § 12181(7)(f) shall "include providers of services which do not require a person to physically enter an actual physical structure."[84] The court

[76] This approach is followed by the Third and Sixth circuits, and *maybe* the Eleventh Circuit. *See* Ford v. Schering-Plough Corp., 145 F.3d 60, (3d Cir. 1998); Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006 (6th Cir. 1997); *Gil*, 993 F.3d at 1266, *vacated*, 2021 U.S. App. LEXIS 38489, *vacating en banc as moot*.

[77] This approach is followed by the Ninth Circuit and *maybe* the Eleventh Circuit. *See Robles,* 913 F.3d at 898; *see also Gil*, 993 F.3d at 1266, *vacated*, 2021 U.S. App. LEXIS 38489, *vacating en banc as moot*.

[78] *Title III of the Americans with Disabilities Act and Website Compliance,* AM. BAR ASS'N (Feb. 22, 2022), https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2022/february-2022/title-iii-americans-disabilities-act-website-compliance/.

[79] *Carparts Distribution Ctr.,* 37 F.3d at 12; *Netflix, Inc.*, 869 F.Supp.2d at 196.

[80] *Carparts Distribution Ctr.,* 37 F.3d at 19.

[81] *Id*. at 14.

[82] "AIDS" is an acronym for Acquired Immunodeficiency Syndrome, a condition that develops in HIV patients after the virus has progressed to a point where it has caused severe damage to the immune system. *See HIV/AIDS: Overview*, MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/hiv-aids/symptoms-causes/syc-20373524 (last visited Jan. 4, 2021).

[83] *Carparts Distribution Ctr*., 37 F.3d at 14.

[84] *Id*. at 19.

also recognized how limiting the ADA's interpretation of "public accommodation" would lead to erroneous results, saying:

> Many goods and services are sold over the telephone or by mail with customers never physically entering the premises of a commercial entity to purchase the goods or services. To exclude this broad category 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.[85]

The *Carparts* decision has been used to extend the protections of the ADA into the context of digital accessibility. In *National Association of the Deaf v. Netflix*, the Federal District Court of Massachusetts reiterated its support for *Carparts* by finding that the ADA could apply to Netflix when videos did not contain closed captioning that would assist a hard-of-hearing plaintiff.[86] The plaintiff in *Netflix* survived a motion to dismiss by likening the company's services to a "service establishment,"[87] "place of exhibition or entertainment,"[88] or a "sales or rental establishment."[89] The court recognized that these physical places listed in the ADA may also take on a digital form.[90] The court also found that the ADA does not only require access to places of public accommodation but extends to the services "of" a public accommodation, not only services "at" or "in" a public accommodation.[91] In short, Inclusive Approach jurisdictions understand that the ADA was enacted to address discrimination in all aspects of society.[92] If society has "moved online," the ADA should make the move as well, rather than hewing to an interpretation that keeps the ADA limited to the physical world.

2. Narrow Approach

In contrast to *Carparts,* the Narrow Approach only applies ADA's Title III public accommodation protections in situations where barriers limit

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85 *Id.* at 20.

86 Netflix is a video streaming platform that only exists online. *See What is Netflix?,* NETFLIX, https://help.netflix.com/en/node/412 (last visited Jan. 4, 2021); *see also* Nat'l Ass'n of the Deaf v. Netflix, Inc., 869 F.Supp.2d 196 (D. Mass. 2012).

87 42 U.S.C. § 12181(7)(F) (1990).

88 42 U.S.C. § 12181(7)(C).

89 *Netflix, Inc.*, 869 F.Supp.2d at 201; see also the statutory definition of "sales or rental establishment," under 42 U.S.C. § 12181(7)(E).

90 *Netflix, Inc.*, 869 F.Supp.2d at 201.

91 The importance of applying the ADA to services "of" a public accommodation, see *infra* § III(A)(3); *see also id.*

92 *See supra* II(A).

access to physical spaces and does not recognize websites as a "public accommodation." This approach, followed by the Third and Sixth Circuits, has grown in popularity after the Eleventh Circuit Court of Appeal's decision in *Gil v. Winn-Dixie*.[93] The Narrow Approach was originally introduced by the Sixth Circuit's decisions in *Stoutenborough v. National Football League,*[94] and *Parker v. Metropolitan Life*.[95]

In *Stoutenborough*, the plaintiff brought a claim under the ADA challenging the National Football League's (hereinafter "NFL") rule that prohibited live local television broadcasts when the stadium hosting the game was not sold out, claiming that the radio-only alternative broadcast left hearing impaired people without a way to enjoy the game.[96] The court refused to extend the ADA's definition of "public accommodation" to a television broadcast, holding that "the prohibitions of Title III are restricted to 'places' of public accommodation, disqualifying the National Football League, its member clubs, and the media defendants."[97] This conclusion was based on federal regulations stating, "a 'place' is 'a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the' twelve 'public accommodation' categories."[98] These regulations also define "facility" as, "all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located."[99] With no mention of nonphysical places in the statute or regulations, the court concluded its analysis.

Parker reinforced *Stoutenborough*. Filed by an employee of the Schering Plow Company, the plaintiff in *Parker* brought a claim asking the court "to determine whether Title III of the ADA prohibits an employer from providing to its employees a long-term disability plan . . . which contains longer benefits for employees who become disabled due to a physical illness than for those who become disabled due to a mental illness."[100] The terms of the long-term disability insurance policy offered benefits for physically disabled employees until age sixty-five, while limiting the benefits for employees with mental or nervous disorders to twenty-four months, unless at

[93] The decision in *Gil* has since been vacated as moot. For further discussion of this case see *infra* III(A)(4). Gil v. Winn-Dixie Stores Inc., 993 F.3d 1266 (11th Cir. 2021), *vacated*, 2021 U.S. App. LEXIS 38489, *vacating en banc as moot* (11th Cir. 2021).

[94] Stoutenborough v. Nat'l Football League, 59 F.3d 580 (6th Cir. 1995).

[95] Parker v. Metropolitan Life Ins., 121 F.3d 1006 (6th Cir. 1997).

[96] *Stoutenborough*, 59 F.3d at 582.

[97] *Id.* at 583.

[98] *Id.* (citing 28 C.F.R. § 36.104).

[99] 28 C.F.R. § 36.104 (2011).

[100] *Parker,* 121 F.3d at 1008.

the end of the twenty-four month period they were hospitalized or received inpatient care for the mental condition.[101] The Sixth Circuit, sitting *en banc,* recognized that "Title III specifically prohibits, *inter alia*, the provision of unequal or separate benefits by a place of public accommodation,"[102] and that "an insurance office is a public accommodation as expressly set forth in § 12181(7)."[103] The court found, however, that this disability insurance policy was not a good or service offered by a place of public accommodation, stating "[t]he public cannot enter the office of MetLife or Schering–Plough and obtain the long-term disability policy that plaintiff obtained. Parker did not access her policy from MetLife's insurance office. Rather, she obtained her benefits through her employer."[104] To the dissenting justices on the *Parker* court, this gave the impression that the plaintiff was "not covered because she got her coverage from MetLife through the employer instead of walking into a MetLife office and buying it."[105] In an effort to rebut this accusation, the majority defended its stance in a footnote, writing:

> The policy Parker obtained is not covered by Title III because Title III covers only physical places. We have expressed no opinion as to whether a plaintiff must physically enter a public accommodation to bring suit under Title III as opposed to merely accessing, by some other means, a service or good provided by a public accommodation.[106]

This reply, however, does not make sense. The plaintiff in *Parker* did exactly what the footnote suggested; she challenged a discriminatory policy that limited the benefits she could receive from a good or service provided by a public accommodation.[107] The majority was unclear on what "other means" a plaintiff could use to access a physical space that would permit a suit under Title III,[108] and the dissent denounced the footnote as a "post hoc effort[] by the court to do an about face and march off in a different direction, or at least bury its head in the sand."[109]

The holdings of *Stoutenborough* and *Parker* leave little opportunity for a digital accessibility claim to survive to judgement. As a result, the overwhelming majority of web accessibility claims avoid circuits that have

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[101] *Id.*
[102] *Id.* at 1010 (citing 42 U.S.C. §§ 12182(b)(1)(A)(i)-(iii)).
[103] *Id.*
[104] *Id.* at 1011.
[105] *Id.* at 1020 (C.J. Merritt dissenting).
[106] *Id.* at 1010 n.3.
[107] *Id.* at 1008.
[108] *Id.* at 1010 n.3.
[109] *Id.* at 1020 (C.J. Merritt dissenting).

adopted the Narrow Approach.[110] Nevertheless, there are federal district court decisions that have created an opportunity for digital accessibility claims to succeed, as in the case of *Castillo v. Jo-Ann Stores*.[111] In *Castillo*, an Ohio district court denied the defendant's motion to dismiss, and held that a blind plaintiff, who could not use store locater feature on the Jo-Ann fabric and crafts store website, had a cognizable claim under Title III.[112] The court distinguished *Parker* and *Stoutenborough*, noting that neither involved a website, and that their holdings did not apply to the factual circumstances of internet accessibility cases.[113]

3. The Nexus Approach Tries to Find the Middle Ground Between Inclusive and Narrow

Somewhere between the Inclusive Approach and the Narrow Approach lies the Nexus Approach, which requires "some connection between the good or service complained of and an actual physical place."[114] Similar to *Parker* and *Carparts*, the Nexus Approach evolved from cases examining whether an insurance policy could fall under the purview Title III of the ADA. In the case of *Weyer v. Twentieth Century Fox Film*, the plaintiff, Helen Weyer, enrolled in long-term disability insurance plan that provided physically disabled employees with benefits until age sixty-five, while beneficiaries with other types of disabilities like mental illness only received benefits for twenty-four months.[115] In its interpretation of 42 U.S.C. § 12181(7), the Ninth Circuit Court of Appeals recognized that the listed 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 or services."[116] This finding, paired with the principle of *noscitur a sociis,*[117] "requires that the term 'place of public accommodation' be interpreted within the context of the accompanying words."[118] With further support from the *Parker* decision in the Sixth Circuit, the Ninth Circuit held that "an insurance

[110] In fact, over eighty-five percent of web accessibility claims are brought in only three states: California, New York, and Florida. *See* Vu, Launey, & Egan, *supra* note 42.

[111] Castillo v. Jo-Ann Stores, 286 F. Supp. 3d 870, 875-78 (N. D. Ohio 2018).

[112] *Id.*

[113] *Id.*

[114] Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114 (9th Cir. 2000).

[115] *Id.* at 1107-08.

[116] *Id.* at 1114.

[117] *Noscitur a sociis* is a canon of construction holding that the meaning of an unclear word or phrase, especially one in a list, should be determined by the words immediately surrounding it. *See Noscitur a sociis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[118] *Weyer*, 198 F.3d at 1114.

company administering an employer-provided disability policy is not a 'place of public accommodation' under Title III."[119]

The *Weyer* decision set the stage for another key digital accessibility case, *National Federation of the Blind v. Target,* which emerged out of District Court for the Northern District of California.[120] Facing a motion to dismiss, the plaintiff in *National Federation of the Blind* argued that Target.com was not compatible with screen readers,[121] which denied blind patrons from "full and equal access to Target stores."[122] Similar to *Parker*, the *National Federation of the Blind* court accepted the fundamental assumption that "[u]nder Ninth Circuit law, a 'place of public accommodation,' within the meaning of Title III, is a physical place."[123] It pointed out, however, that "[t]he [ADA] applies to the services *of* a place of public accommodation, not services *in* a place of public accommodation," and held that "[t]o limit the ADA to discrimination in the provision of services occurring on the premises of a public accommodation would contradict the plain language of the statute."[124] While the court limited its decision to the motion to dismiss and did not reach the merits of the plaintiff's claim, the *National Federation of the Blind* decision did acknowledge the possibility of extending the ADA's regulations to websites. It noted that "Target treats Target.com as an extension of its stores," and "a broader application of the ADA to the website may be appropriate if upon further discovery it is disclosed that the store and website are part of an integrated effort."[125]

While prior decisions like *Weyer* and *National Federation of the Blind* only alluded to the possibility of a nexus between a physical public accommodation and an intangible barrier like an inaccessible website, these ponderings became a reality in the case of *Robles v. Domino's Pizza*.[126] In this case, the plaintiff, Guillermo Robles, brought a claim under the ADA alleging that Domino's website and mobile application were incompatible with his screen reader, leaving him unable to utilize the company's online ordering function.[127] Robles sought injunctive relief to make the site

[119] *Id.* at 1115.

[120] Nat'l Federation of the Blind v. Target Corp., 452 F. Supp. 2d 946, (N.D. Cal. 2006).

[121] A screen reader is an assistive technology, primarily used by people with vision impairments. It converts text, buttons, images, and other screen elements into speech or braille. *See* Daniel Göransson, *What is a Screen Reader?* (Nov. 15, 2019), https://axesslab.com/what-is-a-screen-reader/.

[122] Nat'l Federation of the Blind v. Target Corp., 452 F. Supp. 2d 946, 950 (N.D. Cal. 2006).

[123] *Id.* at 952 (citing *Weyer*, 198 F.3d at 1114).

[124] *Id.* at 953.

[125] *Id.* at 956.

[126] *Id.* at 952-56. *See also* Robles v. Domino's Pizza, 913 F.3d 898 (9th Cir. 2019).

[127] *Robles* 913 F.3d at 902.

accessible, but his claim was dismissed in district court.[128] On appeal, the Ninth Circuit noted that customers "use the website and app to locate a nearby Domino's restaurant and order pizzas for at-home delivery or in-store pickup. This nexus between Domino's website and app and physical restaurants—which Domino's does not contest—is critical to our analysis."[129] The court also recognized the important functions the website performed, "[facilitating] access to the goods and services of a place of public accommodation—Domino's physical restaurants."[130] As a result, the court held that "the ADA applies to Domino's website and app, which connect customers to the goods and services of Domino's physical restaurants."[131] While this may sound like a victory for digital accessibility, the need to tie a digital experience to the physical world does not satisfy the ADA's objective to eliminate discrimination in all aspects of society.[132] As more experiences occur exclusively online, the digital discrimination gap will continue to exclude people with disabilities.[133] The nexus requirement will leave these individuals without a viable claim for digital-only discrimination.

4. Gil v. Winn Dixie and the Uncertain Stance of the Eleventh Circuit

For years, the Eleventh Circuit Court of Appeals followed the Nexus Approach when adjudicating digital accessibility cases.[134] This changed during the six-year saga of *Gil v. Winn-Dixie*.[135] It all started when a visually impaired plaintiff, Juan Carlos Gil, brought suit under the ADA. Gil regularly visited the Winn Dixie grocery store to refill his prescriptions and purchase necessities.[136] Upon hearing that the store's website enabled customers to refill prescriptions online and access links to manufacturer coupons, Gil attempted to use it himself.[137] The website, however, was not compatible with any of Gil's screen reader software programs, denying him access to about ninety percent of the website's content.[138] In his complaint, Gil alleged that "the website itself was a place of public accommodation under the ADA, and that the website had a direct nexus to Winn Dixie grocery

[128] *Id.* at 898.
[129] *Id*. at 905.
[130] *Id.*
[131] *Id.* at 905–06.
[132] *See supra* § II(A).
[133] *See supra* § II(B).
[134] Rendon v. Valleycrest Productions, Ltd., 294 F.3d 1279 (11th Cir. 2002).
[135] Gil v. Winn-Dixie Stores, Inc., 993 F.3d 1266 (11th Cir.), *opinion vacated on reh'g*, 21 F.4th 775 (11th Cir. 2021).
[136] *Id.* at 1270.
[137] *Id.*
[138] *Id.* at 1271 (explained further in footnote 3 of the opinion).

stores and on-site pharmacies."[139] The site's inaccessibility, Gil continued, "violated the ADA," by failing to provide "full and equal enjoyment of the services, facilities, privileges, advantages and accommodations provided by and through its website www.winndixie.com."[140] At a bench trial in the District Court for the Southern District of Florida, Gil won a favorable judgement, resulting in an injunction.[141] It required Winn-Dixie to make its website accessible in accordance with WCAG 2.0 and to adopt a publicly available Web Accessibility Policy.[142]

On appeal, the Eleventh Circuit Court of Appeals reversed the District Court's decision, and went further by declining the Nexus Approach altogether, holding that the "plain language of Title III," limits public accommodations to "actual, physical spaces."[143] This stance attracted attention because it escalated a growing three-way circuit split, leaving the Ninth Circuit as the only follower of Nexus Approach. This also had a profound impact in reducing the number of ADA Web Accessibility lawsuits filed in Florida (a state within the Eleventh Circuit).[144] But, the drama did not stop there. In December 2021, the Eleventh Circuit, sat *en banc* for Gil's appeal, but by then, Winn-Dixie had already made its website accessible.[145] In turn, the *en banc* Eleventh Circuit vacated its prior opinion and underlying judgement, dismissed the appeal, and remanded to the district court to dismiss the case as moot.[146] In March 2022, Winn-Dixie's appeal for an *en banc* rehearing was denied.[147] In short, the *Gil* decision does not hold any precedential weight, and the Eleventh Circuit has not yet formally adopted the Narrow Approach.[148] However, *Gil's* chaotic jurisprudential journey highlights the limitations of the Nexus Approach, which does not provide enough clarity to be effective. With the remaining choices of Narrow or Inclusive interpretations of "public accommodation," the Inclusive interpretation is the only remaining choice that aligns with the spirit of the ADA.[149]

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[139] *Id.* (internal quotations omitted).

[140] *Id.* (internal quotations omitted).

[141] *Id.* (internal quotations omitted).

[142] *Id.* at 1273-74 (internal quotations omitted).

[143] *Id.* at 1273-74, 1276-77 (the Eleventh Circuit declined to adopt a "nexus" standard, finding no basis for it in the statute or in precedent).

[144] Taylor, *supra* note 42.

[145] Minh Vu, *Gil v. Winn-Dixie: It's Not Over Yet*, SEYFARTH SHAW (Jan. 20, 2022), https://www.adatitleiii.com/2022/01/gil-v-winn-dixie-its-not-over-yet/.

[146] Gil v. Winn-Dixie Stores, 21 F.4th 775 (11th Cir. 2021).

[147] *See* Vu, *supra* note 145; *see also* Joyce Hanson, *11th Circ. Denies Winn-Dixie's Bid For Rehearing In ADA Case*, LAW360 (Mar. 3, 2022, 9:54 PM), https://www.law360.com/articles/1470533/11th-circ-denies-winn-dixie-s-bid-for-rehearing-in-ada-case.

[148] *See* Vu, *supra* note 145*; see also* Hanson, *supra* note 147.

[149] *See supra* §§ III(A)(1) and (2).

B. The Lack of Federally Adopted Standards Add to the Court-Induced Confusion Around Digital Accessibility

The problems created by an inconsistent interpretation of "public accommodation" are magnified by another source of confusion: the lack of federally adopted standards to define "accessible digital design." The DOJ, which plays a crucial role in creating accessibility standards like the ADA Standards for Accessible Design,[150] has not provided much insight into its suggestions for digital accessibility,[151] despite the fact that the agency is certainly aware of the problems digital inaccessibility poses. In fact, the DOJ contemplated adopting standards in 2010 when it posted an Advanced Notice of Proposed Rulemaking ("ANPR").[152] Ultimately, it never adopted any standard after the notice was withdrawn in 2017.[153]

In 2018, Congress joined the cacophony of confusion, asking Attorney General Jeff Sessions and the DOJ to take action, finding that "unresolved questions about the applicability of the ADA to websites as well as the Department's abandonment of the effort to write a rule defining website accessibility standards, has created a liability hazard that directly affects businesses in our states and the customers they serve."[154] In its response letter, the DOJ refused to act, stating that the absence of "specific technical requirements for websites," means "public accommodations have flexibility in how to comply with the ADA's general requirements of nondiscrimination

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150 *See* 2010 ADA STANDARDS FOR ACCESSIBLE DESIGN, *supra* note 48.

151 Lauren Stuy, *No Regulations and Inconsistent Standards: How Website Accessibility Lawsuits Under Title III Unduly Burden Private Businesses*, 69 CASE W. RES. L. REV. 1079, 1081, n. 5 (2019) (Since the ADA's passage, the DOJ has consistently stated that the ADA's accessibility requirements apply to websites belonging to private companies); *see, e.g.,* Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearing Before the H. Subcomm. on the Constitution of the H. Comm. on the Judiciary, 106th Cong. 2 (2000) (statement of Rep. Canady, Chairman, Subcommittee on the Constitution) ("It is the opinion of the Department of Justice currently that the accessibility requirements of the Americans with Disabilities Act already apply to private Internet Web sites and services."); *see also* Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43,460, 43,465 (proposed July 26, 2010) (to be codified at 28 C.F.R. pt. 35) ("The Department believes that title 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.").

152 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 (Jul. 26, 2010) (to be codified at 28 C.F.R. parts 35 and 36).

153 Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions, 82 Fed. Reg. 60932-01 (Dec. 26, 2017) (to be codified at 28 C.F.R. pts. 35, 36).

154 Letter from Members of Congress to Jeff Sessions, Att'y Gen. of the U.S., U.S. Dep't Just. (June 20, 2018), https://www.adatitleiii.com/wp-content/uploads/sites/121/2018/06/ADA-Final-003.pdf [https://perma.cc/6HHK-MSJN].

and effective communication."[155] It concluded its letter by putting the responsibility back on the legislature, suggesting Congress has the ability to provide greater clarity on the issue.[156]

C. The Combination of Judicial, Executive, and Legislative Confusion Around Digital Accessibility Requires Action

The circuit split on the interpretation of Title III "public accommodations" sows confusion for businesses that do not know if their websites need to be accessible. The DOJ's flexible approach to digital accessibility has worsened the confusion. This indecisiveness has real consequences, the first being the deplorable state of web accessibility online. WebAIM, a web accessibility organization run by Institute for Disability Research, Policy, and Practice at Utah State offers a free online tool called WAVE.[157] This tool allows users to identify the most common web page accessibility errors.[158] WebAIM also runs an annual analysis of the million most visited websites and scans them for accessibility errors.[159] These studies illustrate the size and severity of the digital accessibility problem.[160] In 2021, ninety-seven percent of web pages contained an accessibility error, with an average number of fifty-one errors per page.[161] The problem grows as webpages become more complex. The same WebAIM study found that the average homepage in the million most visited websites was made of over 887 HTML elements.[162] Most of these errors fall into only a few categories: low contrast text (86.4% of homepages), missing alternative text for images (60.6% of homepages), missing form input labels, empty links, missing document language, and empty buttons.[163] In many instances of digital inaccessibility, the problems are staring us in the face.

A dynamic where the same website is subject to Title III in State A and unregulated in neighboring State B is incompatible with the structure of the Internet and detached from logic. Websites are syndicated: their content is made available to the widest possible audience. When a person in the U.S. types "www.amazon.com" into their browser, it will take them to one

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[155] Letter from Seven Boyd, Assistant Attorney General, Dep't of Just., to Ted Budd, Congressman (Sept. 25, 2018), https://images.cutimes.com/contrib/content/uploads/documents/413/152136/adaletter.pdf.

[156] *Id.*

[157] *Web Accessibility Evaluation Guide,* WEBAIM (last updated Sept. 29, 2021), https://webaim.org/articles/evaluationguide/#tools.

[158] *Id.*

[159] *The WebAIM Million,* WEBAIM (Apr. 30, 2021), https://webaim.org/projects/million/.

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *Id.*

website, rather than tailoring a California-specific or Florida-specific web experience. If the websites do not distinguish between jurisdictional borders, why should the laws that govern them? The condition of today's fractured landscape with three different definitions of "public accommodation" and infinite ways to comply with the DOJ's "flexible standards" leaves companies unsure about how seriously to consider digital accessibility.

Beyond federal law, companies are also trying to understand how they are affected by state laws demanding digital accessibility. Laws like California's Unruh Civil Rights Act guarantee "full and equal accommodations, advantages, facilities, privileges, or services *in all business establishments of every kind whatsoever*."[164] If an online business based in Ohio wishes to make its site available to California residents, must the site be accessible? Could a California court obtain jurisdiction in such cases to enforce its own state policy? Litigation has shown that these questions are exceedingly difficult for courts to answer.[165] Without consistent definitions, understandable scope, or clear standards, companies often default to websites that are easiest to build and risk the legal backlash.[166] This approach offloads the costs of inaccessibility on people with disabilities who pay with their loss of enjoyment and opportunities.

When lawsuits ensue, the confusion around digital accessibility makes claims hard to settle, increasing legal costs and inflicting an administrative burden that translates onto court dockets.[167] In 2021, over ten lawsuits per day were filed under the ADA in which the subject was a website, mobile app, or video content—totaling over 4,000 for the year.[168] This is a thirteen percent increase year-over-year, and a seventy-five percent increase from the number of claims filed in 2018.[169] These numbers are impressive, but they do not reflect a groundswell of home-grown digital accessibility claims. In reality, ten law firms filed over seventy-five percent of the ADA digital accessibility claims in 2021.[170] These firms at times will use "tester" plaintiffs who scan the Internet with digital accessibility testing tools and identify errors.[171] With free tools like WebAim's WAVE and more robust

[164] CAL. CIV. CODE § 51 (West 2022) (emphasis added).

[165] Annie Soo Yeon Ahn, *Clarifying the Standards for Personal Jurisdiction in Light of Growing Transactions on the Internet: The Zippo Test and Pleading of Personal Jurisdiction*, 99 MINN. L. REV. 2325, 2343-48 (June 2015).

[166] Plaintiffs bringing Title III accessibility claims under the ADA are subject to restrictions on remedies encoded in 42 U.S.C. § 12188.

[167] *See* Taylor, *supra* note 42.

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] Ken Nakala, *Testing The Limits Of Standing*, CONVERGE ACCESSIBILITY (Nov. 20, 2020), https://convergeaccessibility.com/2020/11/20/testing-the-limits-of-standing/.

proprietary digital accessibility scanning tools, like accessiBe, AudioEye, and UsableNet gaining momentum, the scrutiny placed on websites around digital accessibility has never been higher.[172] As scrutiny and claim counts continue to grow, the split between the circuits' interpretation of the ADA will be more confounding and less tolerable.

If plaintiffs do succeed in convincing a court that a website constitutes a "public accommodation," the lack of standards leaves courts and companies unsure of what to do next. Even courts in jurisdictions that recognize websites as places of public accommodations have not yet broached this issue.[173] Without a benchmark to explain what improvements need to be made, how will businesses know when they have created an accessible website? It is time to move to a different, more future-fit approach to digital accessibility that will make the digital world open to all.

IV. ADDRESSING DIGITAL ACCESSIBILITY REQUIRES A TWO-PRONGED APPROACH

The problems with digital accessibility are layered. The court's inability to consistently interpret Title III and the lack of federally adopted digital accessibility standards are critical failures that result in confusion and persisting inaccessibility. Addressing one issue without addressing the other would render any reform futile. There is no good in calling a website a "public accommodation" if there are no minimum standards to define accessibility. Similarly, a comprehensive set of standards fashioned by the DOJ would be useless if websites were not subject to Title III of the ADA. Fixing these problems requires addressing both issues at the same time. First, courts must adopt the Inclusive Approach when deciding whether a website is a "public accommodation" under ADA § 12181(7).[174] It will then be necessary to implement a federally recognized set of standards to define accessible digital design. These measures will help to create a new era of the Internet, where accessibility is at its heart, to the benefit of users and businesses alike.

A. Adopt the Inclusive Interpretation of "Public

[172] *See accessiBe is Changing the World - 1,000 Steps at a Time*, ACCESSIBE, https://accessibe.com/company (last visited Feb. 23, 2022); *see also Setting the Standard for Digital Accessibility*, AUDIOEYE, https://www.audioeye.com/about-us (last visited Feb. 23, 2022); *see also Who We Are*, USABLENET, https://usablenet.com/about-us (last visited Feb. 23, 2022).

[173] *See* Robles v. Domino's Pizza, 913 F.3d 898, 911 (9th Cir. 2019) (Where the court ruled on an appeal of a decision made on a motion to dismiss, concluding that Robles had a cognizable claim decided on appeal of decision on motion to dismiss concluding that Robles had a claim); *see also* Nat'l Ass'n of the Deaf v. Netflix, Inc., 869 F.Supp.2d 198 (D. Mass. 2012) (defendant has filed a motion for judgment on the pleadings, arguing that Plaintiffs have failed to allege sufficient facts for a claim under the ADA).

[174] 42 U.S.C. § 12181(7).

Accommodation"

A crucial first step to fix the digital inaccessibility problem in the United States is to recognize the reality of the situation and the problems that inaccessibility causes online.[175] In light of these problems, it is necessary to uphold Congress' original intent when drafting the ADA and adhere to the text of the statute that encourages equal participation "in all aspects of society" by permitting websites and digital experiences to qualify as public accommodations.[176] This could be accomplished in a few different ways: by interpreting the ADA in line with cases like *Netflix, Inc.*;[177] or Congress amending the ADA.

First, a federal circuit court or other court not bound by existing precedent could follow the interpretation of the ADA demonstrated in *Netflix, Inc.*. Recall how the court adopted plaintiffs' interpretation of the ADA when likening the streaming platform to a "service establishment," "place of exhibition" or "video rental store."[178] This interpretation is in line with the spirit of the Act because it examines the role an establishment plays in public life. It has the added benefit of ignoring the convoluted rationalizations that come with the Narrow Approach, which engages in a nonsensical discussion of physical access instead of a productive discussion of function.[179] Further, this approach does not struggle with the onerous task of deciding whether there is a nexus between an online good or service and a physical place of public accommodation.[180] When cases like *Gil* cause judicial convulsions around the country and confusion abounds, it makes sense for the Supreme Court to intervene and fix the current circuit split.

Second, Congress could change how courts interpret Title III by adding websites to the list of places of public accommodations, which has not been updated since 1991.[181] Rather than adding a thirteenth item to the list of public accommodations, Congress could "future-proof" the statutory language by making a provision stating that the ADA's interpretation of public accommodation will change and adapt as new technologies and experiences impact the nature of public life. This would make it expressly clear to courts to look at Section 12181(7) as a representation of an average American's public life instead of a discrete list. As stated previously, this

[175] *See infra* § II(C).
[176] 42 U.S.C. § 12101(a)(1) (emphasis added); *see infra* § II(A).
[177] *Netflix, Inc.,* 869 F.Supp.2d at 196.
[178] *Id*. at 201.
[179] *See supra* § III(A)(2).
[180] *See supra* § III(A)(3).
[181] 42 U.S.C. § 12181(7).

would not be the first time Congress has sought clarity regarding digital accessibility.[182]

Regardless of which branch of government implements it, an inclusive interpretation of "public accommodation" will provide clarity on the question of *whether a website should be subject to ADA accessibility regulations*. This will assert the importance of digital accessibility and provide an opportunity to rethink the importance of digital design, but this is only the first step. To remedy the problem of digital inaccessibility, there must also be standards that describe *what accessibility looks like.*

B. Adopt Federal Standards of Digital Accessibility Design

Once lawmakers recognize digital accessibility under the ADA as a place of public accommodation, it will become necessary to provide clarity on standards for accessible digital design that are issued and updated by the DOJ. Fortunately, the DOJ would not have to create these standards from scratch. In fact, it could simply pick up where it left off in the rulemaking process between 2010 and 2017.[183] A less labor-intensive alternative could be to make the WCAG the standard for web accessibility.[184] This would carry an added benefit, since these standards are regularly updated by a committee of experts that ensure the standards update along with technology and specify different levels compliance.[185] However, the easiest approach by far is for the DOJ to simply carry over the web accessibility standards that it already created under Section 508 of the Rehabilitation Act, which requires federal agencies to develop, procure, and maintain accessible communications technologies.[186]

Critics may argue that imposing such standards would be far too burdensome on companies, but as evidenced by the existing array of standards, there is no shortage of information to update companies on these requirements.[187] The WCAG guidelines are free for everyone. Free scanning tools like WebAIM's WAVE give all businesses the ability to identify the most common web errors and identify needed improvements without the

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182 *See supra* § III(C).

183 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 (July 26, 2010) (to be codified at 28 C.F.R. parts 35 and 36); Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions, 82 Fed. Reg. 60932-01 (Dec. 26, 2017) (to be codified at 28 C.F.R. pts. 35, 36).

184 *WCAG 2 Overview*, *supra* note 67.

185 *Id.*

186 The Rehabilitation Act of 1973, 29 U.S.C. § 794(d) (2018).

187 *Guidance on Web Accessibility and the ADA*, U.S. DEP'T JUST. (Mar. 18, 2022), https://beta.ada.gov/resources/web-guidance/#web-accessibility-for-people-with-disabilities-is-a-priority-for-the-department-of-justice.

need to hire an outside consultant or auditor. *Gil* also demonstrates the small relative burden that Winn Dixie would face in making its site accessible. By its own estimate, it would cost $250,000 for its site to become compliant with WCAG 2.0,[188] which pales in comparison to the $9 billion in annual revenue made by Winn-Dixie's parent company, Southeastern Grocers.[189] It is also important to note that this single $250,000 payment would address digital inaccessibility problems across *all* of its 419 stores—and growing—across five states.[190] The state of digital accessibility law encourages this approach of ignoring accessibility until a lawsuit is filed, and thereafter, the aim is to either settle quickly or fall into compliance to avoid the added cost of litigation.[191] This does not engender an environment in which companies are willing to prioritize accessibility. Instead, it encourages companies to ignore the problem and make it go away as quickly as possible. Arguments that accessibility places an undue burden on businesses are misplaced and gloss over the true cost borne by individuals with disabilities.

Rather than burdening companies, establishing digital accessibility standards could provide tangible benefits. First, there is a strong business case for companies to embrace digital accessibility.[192] Estimates show that people with disabilities make up a market of over one billion individuals who control $1.2 trillion in annual disposable income.[193] Second, digital accessibility initiatives can also help improve brand image and provide a host of ancillary benefits to Internet users.[194] These ancillary benefits are the result of a phenomenon that is known as the "curb-cut effect," where accessibility initiatives provide enormous benefits to more people than just those with disabilities. The name of the effect comes from the slopes cut into sidewalks at street crossings.[195] While it is an accessibility measure

[188] Gil v. Winn-Dixie Stores Inc., 993 F.3d 1266, 1273, n. 6 (11th Cir. 2021), *vacated*, 2021 U.S. App. LEXIS 38489, *vacating en banc as moot* (11th Cir. 2021).

[189] Russell Redman, *Southeastern Grocers Bolsters Store Base in 2021,* SUPERMARKET NEWS (Jan. 3, 2022), https://www.supermarketnews.com/retail-financial/southeastern-grocers-bolsters-store-base-2021.

[190] Russell Redman, *Southeastern Grocers Primes Winn-Dixie for Expansion*, SUPERMARKET NEWS (May 7, 2021), https://www.supermarketnews.com/retail-financial/southeastern-grocers-primes-winn-dixie-expansion.

[191] After unfavorable decisions in *Robles* and *Netflix,* both defendants chose to settle or quickly fall into compliance. *See* National Ass'n of the Deaf v. Netflix, Inc., 869 F.Supp.2d 196 (D. Mass. 2012); *see also* Robles v. Domino's Pizza, 913 F.3d 898, 911 (9th Cir. 2019); *see also* Minh N. Vu, *Robles v. Domino's Settles After Six Years of Litigation*, SEYFARTH SHAW (June 10, 2022), https://www.adatitleiii.com/2022/06/robles-v-dominos-settles-after-six-years-of-litigation/.

[192] Gina Bhawalkar, *Digital Accessibility Enters the Spotlight as a Business Priority*, FORRESTER (Apr. 9, 2021), https://www.forrester.com/blogs/digital-accessibility-enters-the-spotlight-as-a-business-priority/.

[193] *Id.*

[194] *Id.*

[195] *Id.*

implemented for the people with physical disabilities,[196] how many people pulling a suitcase or pushing a stroller have been thankful for those curb cuts? By implementing actual standards, the effects of the ADA would benefit a population greater than the disabled community. There are a large number of people who become temporarily disabled or whose senses become impaired as they age.[197] Implementing systemic improvements and federal standards would make digital experiences more simple, intuitive, and organized for all.[198]

Adopting comprehensive standards would also cement digital accessibility as a fundamental component of web design. Without federal standards, cases like *Gil* and *Robles* view digital accessibility as an auxiliary aid or accommodation to a conventional experience; an extra step added to make an experience more accessible.[199] The nature of digital accessibility, however, is foundational. The digital world is built just like the real world, but instead of bricks and mortar, developers use lines of code. This environment will be more fundamentally accessible and efficient by approaching digital architecture in the same way as physical architecture. This approach to digital accessibility will provide uniformity, clarity, and predictability to allow the construction of a digital world that is as open and accessible as our physical one. Reuse is rampant in computer science. For example, "open source" software development platforms like GitHub and RedHat allow multiple software developers to author and improve upon an application's source code and access vast repositories of premade features.[200] Websites are increasingly made in a way that cobble these different pieces of premade code together and put them onto the same user interface. Open-source development is surging in popularity. The open-source developer community, GitHub, already has over ninety-four million users.[201] Acquisitions by giants like Microsoft and IBM hint at increasing chances that open source and reuse is ready to go mainstream.[202] If the federal government

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[196] 2010 ADA STANDARDS FOR ACCESSIBLE DESIGN, *supra* note 48.

[197] Bhawalkar, *supra* note 192; *see also* Gina Bhawalkar, *The Billion-Customer Digital Accessibility Opportunity*, FORRESTER (June 27, 2018), https://www.forrester.com/blogs/the-billion-customer-digital-accessibility-opportunity/.

[198] Angela Glover Blackwell, *The Curb-Cut Effect*, STAN. SOC. INNOVATION REV. (2017), https://ssir.org/articles/entry/the_curb_cut_effect.

[199] Gil v. Winn-Dixie Stores Inc., 993 F.3d 1266, 1282 (11th Cir. 2021), *vacated*, 2021 U.S. App. LEXIS 38489, *vacating en banc as moot* (11th Cir. 2021); Robles v. Domino's Pizza, 913 F.3d 898, 911 (9th Cir. 2019).

[200] *See What is Open Source?*, RED HAT (Oct. 24, 2019), https://www.redhat.com/en/topics/open-source/what-is-open-source; *see also* GITHUB, https://github.com/ (last visited Feb. 23, 2022).

[201] *The Ever Growing Developers Community*, GITHUB, https://octoverse.github.com/2022/developer-community (last visited Feb. 23, 2022).

[202] *Microsoft to Acquire GitHub for $7.5 Billion*, MICROSOFT (June 4, 2018), https://news.microsoft.com/2018/06/04/microsoft-to-acquire-github-for-7-5-billion/; *IBM Closes*

implements digital accessibility standards, these specifications can be coded into these repositories and used by millions. Even better, accessibility updates would only need to happen in one place to be implemented across all areas where that code was reused.[203] In this way, implementing federal standards could embed accessibility as a fundamental component of digital design.

V. CONCLUSION

In 2021, the ADA turned thirty years old, but its interpretation and enforcement are still rooted in the 1990s. This has made the ADA incompatible with the realm of digital accessibility. The Internet plays an integral role in American public life and has fundamentally changed lives. It has allowed for great opportunities and growth but has also brought a host of new accessibility problems not contemplated by Congress in its establishment of the ADA. As a result, people with disabilities are cut off from the opportunities of technological advancement. Title III of the ADA, which protects places of public accommodation, would typically address discrimination of this nature and has been helpful in the physical world. However, courts are divided on whether the interpretation of "public accommodation" should include websites and digital experiences. Additionally, the lack of federally adopted standards of digital accessibility aggravate the confusion.

Breaking free of this paradigm—where digital inaccessibility is tolerated—will require a shift in mindset regarding web accessibility. While these changes may seem bold, they reflect the world as it is today. The push towards digitization is accelerating to create a new Digital Economy. The United States is at a juncture where it can choose between one of two directions. It may invite people with disabilities to join in on society's technological advances, or it may repeat history and ignore the problem of digital accessibility until it is woefully late. Bringing standardization and clarity to the area of digital accessibility law under the ADA Title III would be of a great benefit to society at large.

Landmark Acquisition of Red Hat for $34 Billion; Defines Open, Hybrid Cloud Future, RED HAT (July 9, 2019), https://www.redhat.com/en/about/press-releases/ibm-closes-landmark-acquisition-red-hat-34-billion-defines-open-hybrid-cloud-future.

[203] *What is Open Source?, supra* note 200; GITHUB, *supra* note 200.