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## Website Compliance with the ADA: The Demand for Legislation and Defenses for Defendants

Victoria Scaglione

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## NOTES

### WEBSITE COMPLIANCE WITH THE ADA: THE DEMAND FOR LEGISLATION AND DEFENSES FOR DEFENDANTS

#### INTRODUCTION

The days of referring to the Encyclopedia Britannica are long gone. The advent of the electronic age has spurred the advanced proliferation of information where news and events are instantaneous and become aged within moments. Internet usage has become highly prevalent within the daily lives of students, employees, and shoppers worldwide.<sup>1</sup> Statistically speaking, nearly 4.13 billion people worldwide use the internet to some extent,<sup>2</sup> and approximately 85.8% of the entire United States population, which is just shy of 285 million people, have used the internet as well.<sup>3</sup> Currently, there are greater than 400 million websites in operation.<sup>4</sup> On any given day, Americans spend an average of 5.9 hours on their laptops, computers, smart phones, or other streaming devices.<sup>5</sup> Unfortunately, while the majority may enjoy freely scrolling through social media, binge watching Netflix, or checking their emails, millions of Americans suffer from a visual or auditory disability that hinders their access to numerous

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1. Lee Rainie, *The Internet at School*, PEW RSCH. CTR. (Aug. 2, 2005), <https://www.pewinternet.org/2005/08/02/the-internet-at-school/> (analyzing that 78% of students use the internet while at school).

2. J. Clement, *Number of internet users worldwide from 2005 to 2019 (in millions)*, STATISTA (Jan. 7, 2020), <https://www.statista.com/statistics/273018/number-of-internet-users-worldwide/>.

3. J. Clement, *Number of internet users in the United States from 2015 to 2025 (in millions)*, STATISTA (July 14, 2020), <https://www.statista.com/statistics/325645/usa-number-of-internet-users/>; J. Clement, *Internet user penetration in the United States from 2015 to 2025*, STATISTA (July 14, 2020), <https://www.statista.com/statistics/590800/internet-usage-reach-usa/>.

4. *Web Accessibility Lawsuits: What's the Current Landscape?*, ESSENTIAL ACCESSIBILITY (May 6, 2020), <https://www.essentialaccessibility.com/blog/web-accessibility-lawsuits/>.

5. Rob Marvin, *Tech Addiction By the Numbers: How Much Time We Spend Online*, PCMAG (June 11, 2018), <https://www.pcmag.com/article/361587/tech-addiction-by-the-numbers-how-much-time-we-spend-online>.

websites.<sup>6</sup> As a result, the number of lawsuits filed in the United States by individuals with visual and hearing impairments against website owners for violating the Americans with Disabilities Act of 1990 (hereinafter “ADA”) has reached an all-time high.<sup>7</sup>

Title III of the ADA proscribes discrimination on the basis of disability “in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.”<sup>8</sup> Although the United States circuit courts are split on the decision of applying the term “place of public accommodation” to websites, the United States Department of Justice (hereinafter “DOJ”), along with the First, Second, and Seventh Circuits, have all held that the accessibility requirements of Title III apply to websites.<sup>9</sup> For the visually or auditorily impaired to use websites, specialized software is often required, such as screen or Braille reading technology.<sup>10</sup> Additionally, some disabled users may need to use toggle switches or voice input instead of a keyboard, or may need to magnify a website in order to read its contents.<sup>11</sup> If the disabled user cannot use these methods due to noncompliance by the website owner, they cannot access the website in the same manner as a nondisabled user. Typical examples

6. See Debbie Clason, *Hearing loss statistics at a glance*, HEALTHY HEARING (Nov. 30, 2019), <https://www.healthyhearing.com/report/52814-Hearing-loss-statistics-at-a-glance> (“According to Johns Hopkins Cochlear Center for Hearing and Public Health, approximately 38.2 million Americans (14.3 percent) report some degree of hearing loss.” Further, “[a]pproximately 2-3 of every 1,000 children in the United States are born with a detectable hearing loss in one or both ears.”); see also *Global Data on Visual Impairments 2010*, WORLD HEALTH ORG. (2012), <https://www.who.int/blindness/GLOBALDATAFINALforweb.pdf>; *Visual impairment statistics including population, causes, education and employment*, PERKINS, [https://askhowe.perkins.org/sites/default/files/Visual\\_Impairment\\_Statistics.pdf](https://askhowe.perkins.org/sites/default/files/Visual_Impairment_Statistics.pdf) (Sept. 2017) (In the United States, approximately 7,358,400 people have visual impairments. Further, “[o]f the estimated 36 million total worldwide population of blind individuals, slightly more than 7 million worldwide under the age of 50 are blind.”).

7. Adam Michaels, *ADA Website Accessibility Litigation Presents High Risk to Retailers*, HAND BALDACHIN ASSOCS. LLP (Aug. 1, 2019), <https://hballp.com/ada-website-accessibility-litigation-presents-high-risk-to-retailers/>.

8. Americans with Disabilities Act, 42 U.S.C. § 12182(a).

9. See Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460, 43463 (stating that the DOJ believes that Title III reaches websites that provide goods or services and fall within the twelve categories of “public accommodations.”); see also *Carparts Distrib. Ctr. Inc. v. Auto. Wholesaler’s Ass’n of New England*, 37 F.3d 12, 19 (1st Cir. 1994); Lewis Wiener & Alexander Fuchs, *Trending: ADA Website Accessibility Lawsuits*, LAW360 (Dec. 15, 2016, 12:46 PM), <https://www.law360.com/articles/871491/trending-ada-website-accessibility-lawsuits>; *Nat’l Fed’n of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565, 567 (D. Vt. 2015).

10. Wiener & Fuchs, *supra* note 9; Gavin Appleby et al., *The Wave of Website and Other ADA Accessibility Claims – What You Should Know*, LITTLER 2 (Feb. 22, 2016), [https://www.littler.com/files/2016\\_2\\_the\\_wave\\_of\\_website\\_and\\_other\\_ada\\_accessibility\\_claims.pdf](https://www.littler.com/files/2016_2_the_wave_of_website_and_other_ada_accessibility_claims.pdf).

11. See sources cited *supra* note 10.

of website non-compliance with the ADA are through barriers such as the lack of alternative text (hereinafter “alt-text”) on graphics, improper labels on form controls, improper table markup, lack of adequate keyboard accessibility, inaccessible image maps, and a lack of captions.<sup>12</sup> However, “not all publicly available websites are ADA compliant because they, among other things, fail to incorporate screen reader technology.”<sup>13</sup> This lack of compliance has been met with an increase in ADA litigation.<sup>14</sup>

The uptick in litigation is a direct result of the ADA’s failure to define and prescribe specific accessibility standards for website owners to achieve compliance.<sup>15</sup> Indeed, “[w]hile businesses have clear guidance as to what those standards mean in the physical world, the ADA is silent on how, exactly, those standards translate to the digital world. In the absence of such clear standards, businesses are exposed to continuous liability for failure to comply with website accessibility.”<sup>16</sup> Although it is not enforced within the text of the ADA, the general trend for website compliance has been in accordance with the Web Content Accessibility Guidelines 2.0 (hereinafter “WCAG 2.0”).<sup>17</sup> The WCAG 2.0 defines how website owners can make their sites more accessible to the disabled.<sup>18</sup> It sets forth four goals for website compliance, stating that the website must be: (1) perceivable; (2) operable; (3) understandable; and (4) robust.<sup>19</sup> Further, the WCAG 2.0 guidelines set forth numerous requirements for website owners to abide by, such as using alt-text, audio controls, certain headings and labels, and they even require website owners to use certain specific colors in their website display.<sup>20</sup> The WCAG 2.0 also has differing levels of conformance, which list “success criteria.”<sup>21</sup> The DOJ

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12. Michaels, *supra* note 7.

13. Wiener & Fuchs, *supra* note 9.

14. Michaels, *supra* note 7.

15. *Id.*

16. Lauren Stuy, Comment, *No Regulations and Inconsistent Standards: How Website Accessibility Lawsuits Under Title III Unduly Burden Private Businesses*, 69 CASE W. L. REV. 1079, 1080 (2019).

17. See Michaels, *supra* note 7.

18. *Web Content Accessibility Guidelines (WCAG) 2.0*, W3C (Dec. 11, 2008), <https://www.w3.org/TR/WCAG20/> (“Accessibility involves a wide range of disabilities, including visual, auditory, physical, speech, cognitive, language, learning, and neurological disabilities.”).

19. *Understanding the Web Content Accessibility Guidelines*, MDN WEB DOCS, [https://developer.mozilla.org/en-US/docs/Web/Accessibility/Understanding\\_WCAG](https://developer.mozilla.org/en-US/docs/Web/Accessibility/Understanding_WCAG) (Mar 23, 2019).

20. *Web Content Accessibility Guidelines (WCAG) 2.0*, *supra* note 18.

21. Jason P. Brown & Robert T. Quackenboss, *The Muddy Waters of ADA Website Compliance May Become Less Murky in 2019*, HUNTON ANDREWS KURTH: L. BLOG (Jan. 3, 2019), <https://www.huntonlaborblog.com/2019/01/articles/public-accommodations/muddy-waters-ada-website-compliance-may-become-less-murky-2019/> (“Further, there are differing levels of conformance within WCAG 2.0, the ‘Success Criteria’: Level A (WCAG 2.0 A), the minimum level of

and the courts have relied on the WCAG 2.0, AA Conformance, which is one level shy of the maximum level of conformance.<sup>22</sup>

In recent years, the number of lawsuits filed regarding website inaccessibility in violation of the ADA has been exponential.<sup>23</sup> To combat the immense rise in litigation, not only does the DOJ or Congress need to define specific accessibility standards with which to comply, but there needs to be strong enforcement by the DOJ or Congress of these set standards in order to promote compliance.<sup>24</sup> When creating these standards, it is imperative to consider the lasting effects on smaller, less developed websites, while taking into account the undue burden defense.<sup>25</sup> Further, the holding in *Diaz v. Kroger Co.*, which deemed an ADA lawsuit moot when the defendant made their website compliant prior to litigation, must be recognized and enforced within the standards set by Congress or the DOJ.<sup>26</sup>

## I. THE AMERICANS WITH DISABILITIES ACT OF 1990: WEBSITES AS PLACES OF PUBLIC ACCOMMODATION

### A. Title III

The ADA prohibits discrimination against individuals with disabilities in order to ensure that they are provided the same rights and opportunities as those without disabilities.<sup>27</sup> Title III of the ADA states

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conformance; Level AA (WCAG 2.0 AA), the level generally relied on by the DoJ and the courts; Level AAA (WCAG 2.0 AAA), the maximum level of conformance; and a conforming alternative version of a non-conforming page that satisfies a[t] least one of the above levels in full.”).

22. *Id.*

23. See Alison Frankel, *A ray of hope for ADA website defendants? N.Y. judge tosses case for mootness*, REUTERS (June 6, 2019), <https://www.reuters.com/article/us-otc-ada/a-ray-of-hope-for-ada-website-defendants-ny-judge-tosses-case-for-mootness-idUSKCN1T72P5> (“In 2018, disabled plaintiffs filed more than 2,250 suits in federal court alleging that corporate websites were insufficiently accessible to them, in violation of the Americans with Disabilities Act.”); see also Daniel S. Silverman et al., *Website Accessibility Claims on the Rise*, VENABLE LLP (Aug. 13, 2019), <https://www.venable.com/insights/publications/2019/08/website-accessibility-claims-on-the-rise> (“According to some estimates, the number of website accessibility lawsuits filed in federal court nearly tripled from 2017 to 2018, with no indication of slowing down in 2019.”).

24. See Elizabeth Sheerin, Note, *Inaccessible Websites Are Discriminating Against the Blind: Why Courts, Websites, and the Blind Are Looking to the Department of Justice for Guidance*, 92 ST. JOHN’S L. REV. 573, 599, 600-01 (2018) (“The DOJ was given the authority to issue regulations to enforce the provisions of the ADA.”); Stuy, *supra* note 16, at 1093.

25. See Sheerin, *supra* note 24, at 581-82, 600-01.

26. See *Diaz v. Kroger Co.*, No. 18 Civ. 7953, 2019 WL 2357531, at \*5 (S.D.N.Y. June 4, 2019).

27. *What is the Americans with Disabilities Act (ADA)?*, ADA NAT’L NETWORK, <https://adata.org/learn-about-ada> (Oct. 2020).

that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”<sup>28</sup> These protections expand to practically all public and private places.<sup>29</sup> Typically, the ADA is perceived to be legislation that assists disabled persons at physical locations.<sup>30</sup> Traditional examples of accommodations originally provided by the act include wheelchair accessibility or Braille for the blind or visually impaired.<sup>31</sup> Yet, in recent years, it has been held that the ADA extends to the digital realm, forcing website owners to comply with accessibility guidelines.<sup>32</sup>

Although the language of the ADA does not explicitly mention internet accessibility, Title III of the ADA provides protection to the disabled in places of public accommodation.<sup>33</sup> The statute states that places of public accommodation include physical locations such as hotels, inns, motels, restaurants and bars, theaters and concert halls, bakeries and grocery stores, parks, and other physical locations.<sup>34</sup> In fact, the ADA sets forth a more expansive list, including twelve categories that qualify as places of public accommodation, including:

(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;

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28. 42 U.S.C. § 12182(a).

29. *See id.* § 12181(7).

30. Michaels, *supra* note 7.

31. *Id.*; Lloydw, *ADA Compliance and Your Website: Here's What You Need to Know*, C3 MEDIA, <https://www.c3medianetwork.com/ada-compliance-and-your-website/> (last visited Oct. 6, 2020).

32. *See* Lloydw, *supra* note 31.

33. Michaels, *supra* note 7.

34. 42 U.S.C. § 12181(7).

(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 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.<sup>35</sup>

When it was originally enacted, the ADA failed to include websites as “places of public accommodation,” as the age of technology was just at its inception.<sup>36</sup> As online resources became heavily used and relied upon, disagreement arose regarding whether websites serve as “places of public accommodation.”<sup>37</sup> This is evidenced by the split in decisions amongst circuit courts.<sup>38</sup> Several circuits have held that “places of public accommodation” are limited solely to physical locations, such as a store, or instances where there is a sufficient nexus between a website and a physical location.<sup>39</sup> For example, the Ninth Circuit has held that Title III of the ADA is not applicable to several types of websites, especially those

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35. *Id.*

36. Wiener & Fuchs, *supra* note 9.

37. *Id.*

38. *Id.*

39. *Id.*

without a sufficient nexus to a physical location.<sup>40</sup> However, the First and Seventh Circuits have held that websites are places of public accommodation, even when a physical location is nonexistent.<sup>41</sup> Further, the Seventh Circuit has held that no nexus is needed and websites are held to be “places of public accommodation” with or without any physical entity attached to it.<sup>42</sup> Similarly, the Second Circuit concluded that websites are places of public accommodation.<sup>43</sup>

In order to bring a claim for discrimination under Title III of the ADA, a plaintiff must demonstrate “(1) that she is disabled within the meaning of the ADA, (2) that the defendant owns, leases, or operates a place of public accommodation, and (3) that the defendant discriminated against her by denying her a full and equal opportunity to enjoy the services the defendant provides.”<sup>44</sup> Therefore, to bring a claim for discrimination based on website noncompliance, a plaintiff must show that they are disabled within the meaning of the ADA, that the website serves as a place of public accommodation, and that the website operator discriminated against the plaintiff on the basis of disability by denying them full and equal opportunity to enjoy the defendant’s website.<sup>45</sup>

### *B. Title II and the Rehabilitation Act of 1973*

Lawsuits for lack of website accessibility are also brought under Title II of the ADA.<sup>46</sup> Title II “applies to state and local government entities”

40. See, e.g., *Jancik v. Redbox Automated Retail, LLC*, No. SACV 13-1387-DOC, 2014 U.S. Dist. LEXIS 67223, at \*8-9 (C.D. Cal. May 14, 2014) (finding that a website was not a place of public accommodation, as there was not a sufficient nexus between the website and physical location); *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017, 1023-24 (N.D. Cal. 2012) (finding that websites are not places of public accommodation because they are not a physical place); *Ouellette v. Viacom*, No. CV 10-133-M-DWM-JCL, 2011 WL 1882780, at \*4-5 (D. Mont. Mar. 31, 2011); see also *Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312, 1319-21 (S.D. Fla. 2002) (referenced by the courts in the above mentioned cases for the proposition that an internet website by itself is not considered an actual place under the ADA).

41. See *Carparks Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New England*, 37 F.3d 12, 19 (1st Cir. 1994) (reasoning that it would be unfair to protect someone under the ADA who comes to a physical location for a service, but not those who use the same service online or through the phone); *Wiener & Fuchs*, *supra* note 9 (noting that the Seventh Circuit does not require a physical location for a website to be deemed a place of public accommodation).

42. See *Wiener & Fuchs*, *supra* note 9.

43. See *Nat’l Fed’n of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565, 570 (D. Vt. 2015).

44. *Id.* (quoting *Camarillo v. Carrols Corp.*, 518 F.3d 153, 156 (2d Cir. 2008)).

45. See *Nat’l Fed’n of the Blind*, 97 F. Supp. 3d at 567.

46. See Kim Krause Berg, *Website Accessibility & the Law: Why Your Website Must Be Compliant*, SEJ (Jan. 9, 2019), <https://www.searchenginejournal.com/website-accessibility-law/285199/>; see also Silverman et al., *supra* note 23 (“In addition to the ADA, many websites are also subject to state accessibility laws. Most states have their own public accommodation statutes and



and protects disabled individuals from “discrimination on the basis of disability in services, programs, and activities provided by state and local government entities.”<sup>47</sup> Additionally, Title II applies to public universities.<sup>48</sup> These entities are “required to ‘take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others.’”<sup>49</sup>

Along with Title II, Section 504 of the Rehabilitation Act of 1973 “prohibits entities that receive federal funding from discriminating against individuals with disabilities. In January 2018, updated Section 508 regulations specifically adopted WCAG version 2.0, Level AA as the web accessibility standard.”<sup>50</sup> Section 508 of the Rehabilitation Act mandates that federal agencies develop and maintain information and communications technology (hereinafter “ICT”) that is accessible to disabled individuals.<sup>51</sup> Section 508’s reference to ICT includes technology such as online training and websites.<sup>52</sup> Essentially, under Section 508, federal employees that are disabled should be able to use accessible computers, phones, and equipment within their offices, as well as access online trainings.<sup>53</sup> Further, Section 508 ensures equal access for disabled individuals when it comes to applying for a job with the federal government.<sup>54</sup> Therefore, violation of this statute for lack of accessibility has served as another route for plaintiffs to bring discrimination claims.<sup>55</sup>

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accessibility obligations. Many mirror the ADA, but some provide additional protections and obligations beyond Title III. For example, although California courts interpret Title III to apply only to those websites with a nexus to a physical location, they interpret California’s Unruh Act more broadly, as applying to ‘all business establishments of every kind whatsoever.’ State statutes may also provide for additional remedies not available under Title III, including statutory damages.”).

47. Berg, *supra* note 46.

48. Elizabeth Bowersox, *Municipalities and universities new targets in ADA website accessibility lawsuits*, JDSUPRA (Mar. 1, 2019), <https://www.jdsupra.com/legalnews/municipalities-and-universities-new-65775/>.

49. *Id.* (citing 28 C.F.R. § 35.160(a)(1) (1998)).

50. *Id.*

51. *What is Section 508?*, EPA, <https://www.epa.gov/accessibility/what-section-508> (last visited Oct. 28, 2020).

52. *Id.*

53. *Id.*

54. *Id.*

55. *See How to Comply with Section 508: Guide to Getting There*, ESSENTIAL ACCESSIBILITY (Feb. 4, 2020), <https://www.essentialaccessibility.com/blog/508-compliance/> (“Anyone can file a demand letter when your entity isn’t in compliance with Section 508. If the situation escalates, your business may face a web accessibility lawsuit.”).

Several local governments, as well as private and public universities have been faced with website inaccessibility lawsuits under the ADA.<sup>56</sup> For example, towards the end of 2018, fifty universities were facing lawsuits for lack of accessibility to screen reading software. All of the lawsuits were brought by the same visually impaired plaintiff after he gained knowledge of the universities in a college fair.<sup>57</sup> Accessibility “is the responsibility of the creator or publisher of the online content.”<sup>58</sup> The only standards for website compliance currently are Section 508 regulations, which apply to federal, state, and local government websites.<sup>59</sup> As plaintiffs’ firms are now focused on bringing accessibility suits against municipalities, county governments, and universities, it is important that all state and local government entities make their websites compliant with the ADA.<sup>60</sup>

### C. Title I

Further, the influx of litigation regarding website compliance with Title I of the ADA has come as a warning to employers, especially those with online job portals where applicants can browse and apply for open positions.<sup>61</sup> Title I of the ADA prohibits discrimination in job application procedures based on disability.<sup>62</sup> The term “discrimination” defined in Title I of the ADA includes:

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable

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56. Bowersox, *supra* note 48.

57. *Id.*

58. *Id.*

59. Berg, *supra* note 46.

60. Bowersox, *supra* note 48.

61. Gregory Hurley et al., *Is Your Online Job Application Accessible To The Visually Impaired? The Newest Website Accessibility Claims*, SHEPPARDMULLIN: LAB. & EMP. L. BLOG (Mar. 28, 2018), <https://www.laboremploymentlawblog.com/2018/03/articles/americans-with-disabilities-act-ada/accessibility-screen-reading-software/>.

62. *Id.*

accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity. . . .<sup>63</sup>

Therefore, based on these definitions, the DOJ has suggested that companies that fail to apply screen reading technology to online job postings could be in violation of Title I of the ADA.<sup>64</sup> Under Title I, employers must provide disabled individuals with “equal opportunity to benefit from the full range of employment-related opportunities available to others.”<sup>65</sup> Importantly, the ADA defines “employer” as one who “[e]ngage[s] in an industry affecting commerce,” and “[e]mploys [fifteen] or more full-time employees each work day. . . [f]or at least [twenty] or more calendar weeks in the year.”<sup>66</sup> Accordingly, plaintiffs with visual or auditory impairments could sue employers for violations of the ADA if they are denied employment opportunities because of their inability to view and apply for available positions.<sup>67</sup> Therefore, in order to avoid liability, businesses and potential employers should ensure that online job postings are compatible with screen reading technology, so that they are not inadvertently denying employment opportunities to potential disabled applicants.<sup>68</sup>

## II. EXAMPLES OF WEBSITE INACCESSIBILITY CLAIMS

To provide clarity as to how plaintiffs raise website accessibility claims, it is necessary to look at recent examples of litigation regarding this matter. For example, in the Ninth Circuit case, *Robles v. Domino's Pizza, LLC*, the plaintiff, a blind man, alleged violations of the ADA and California's Unruh Civil Rights Act (hereinafter “UCRA”), claiming that the defendant failed to design, maintain, and operate its website and

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63. 42 U.S.C. § 12112(b)(5)-(6).

64. Hurley et al., *supra* note 61.

65. Paul Chaney, *Does Your Small Business Need to be ADA Compliant?*, SMALL BUS. TRENDS (May 10, 2016), <https://smallbiztrends.com/2016/05/small-business-ada-guidelines.html>.

66. *Id.*

67. Hurley et al., *supra* note 61.

68. *Id.*

mobile app in a way that was accessible to the disabled.<sup>69</sup> The plaintiff uses screen-reading software that vocalizes website information to him.<sup>70</sup> The defendant is a popular pizza chain that operates both a website and a mobile app, where customers can order several food products for either at-home delivery or in-store pickup.<sup>71</sup> The plaintiff allegedly could not order pizza off the defendant's website or app because of its failure to incorporate screen reading technology.<sup>72</sup>

Plaintiff brought suit for violation of the UCRA and ADA, seeking an injunction to force the defendant to comply with the WCAG 2.0 on both its website and mobile app.<sup>73</sup> In response, defendant moved for summary judgment claiming that the ADA did not apply to its online content, and that applying the ADA to its website and app would violate its due process rights.<sup>74</sup> Importantly, the defendant invoked the primary jurisdiction doctrine.<sup>75</sup> The district court granted the defendant's motion to dismiss, and the plaintiff subsequently appealed.<sup>76</sup> On appeal, the circuit court found that the ADA does in fact apply to the defendant's website and app.<sup>77</sup> The ADA states that a place of public accommodation, "like Domino's, engages in unlawful discrimination if it fails to 'take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services.'"<sup>78</sup> The DOJ has held that these auxiliary aids and services include "accessible electronic and information technology" or "other effective methods of making visually delivered materials available to individuals who are blind or have low vision."<sup>79</sup> Therefore, the court found that the ADA does mandate that places of public accommodation need auxiliary

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69. *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 902 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 122 (2019).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 902-03.

75. *Id.* at 903 ("Domino's alternatively invoked the primary jurisdiction doctrine, which permits a court to dismiss a complaint pending the resolution of an issue before an administrative agency with special competence.").

76. *Id.* ("The district court . . . concluded that imposing the WCAG 2.0 standards on Domino's 'without specifying a particular level of success criteria and without the DOJ offering meaningful guidance on this topic . . . fl[ew] in the face of due process.'").

77. *Id.* at 904.

78. *Id.* (quoting 42 U.S.C. § 12182(b)(2)(A)(iii)).

79. *Id.* at 904-05.

aids and services so that visual materials are accessible to the blind, including Domino's website and mobile app.<sup>80</sup>

Regarding the defendant's due process claim, the court held that the defendant received fair notice that its website and mobile app needed to be in compliance with the ADA.<sup>81</sup> However, the defendant argued that because the DOJ did not issue regulations describing set standards for website compliance, the defendant did not have fair notice of what the ADA specifically requires companies to do in order to be accessible online.<sup>82</sup> The court held that although there is a lack of specific regulations set by the DOJ, this does not eliminate the defendant's statutory duty.<sup>83</sup> The court reasoned that the Constitution does not require Congress or the DOJ to specifically set out how the defendant needs to fulfill this statutory duty.<sup>84</sup> Lastly, the court reversed the district court's acceptance of the primary jurisdiction doctrine, as it found that undue delay was inevitable.<sup>85</sup> Ultimately, this case held that businesses cannot avoid ADA litigation, despite the fact that the DOJ hasn't issued guidelines on how to make websites or mobile apps accessible.<sup>86</sup>

Another example is *Gil v. Winn Dixie Stores, Inc.*, which was the first case regarding this matter to go to trial.<sup>87</sup> It was also the first time that a judge mandated that a business comply with the WCAG 2.0

80. *Id.* at 905.

81. *Id.* at 906.

82. *Id.* at 907.

83. *Id.* at 908 ("While we understand why Domino's wants DOJ to issue specific guidelines for website and app accessibility, the Constitution only requires that Domino's receive fair notice of its legal duties, not a blueprint for compliance with its statutory obligations.").

84. *Id.* at 909.

85. *Id.* at 910-11 (rejecting the primary jurisdiction doctrine defense, as litigation would be delayed until the DOJ set compliance standards).

86. Kyle Jancek & Jeff Dennis, *Is Your Website Accessible and Are You Liable if it Isn't?*, NEWMEYER DILLION (Dec. 19, 2019), <https://www.newmeyerdillion.com/publications/is-your-website-accessible-and-are-you-liable-if-it-isnt/>; see also Jennifer J. Axel & Adam Merrill, *Warning: Websites and Apps Must Comply with the ADA*, POLSINELLI (Feb. 18, 2019), <https://www.polsinelliattwork.com/blog/2019/2/18/warning-websites-and-apps-must-comply-with-the-ada> ("Note that the *Robles* decision may lead to more litigation regarding whether an employer's website and/or mobile apps are ADA-compliant."); *Ninth Circuit Reverses Robles v. Dominos Pizza LLC, Holds ADA Title III Suits Don't Violate Due Process Rights*, LEVEL ACCESS, <https://www.levelaccess.com/ninth-circuit-reverses-robles-v-dominos-pizza-llc-holds-ada-title-iii-suits-dont-violate-due-process-rights/> (last visited Oct. 28, 2020) ("The decision is likely to have an impact on courts far beyond the Ninth Circuit. By ruling definitively against Domino's due process defense, the Ninth Circuit has established a precedent that will likely be referenced by courts across the country when defendants raise similar arguments. As a result, we will likely see a stronger push from business organizations for web accessibility guidelines from the DOJ.").

87. Brown & Quackenboss, *supra* note 21.

guidelines.<sup>88</sup> The plaintiff, Juan Carlos Gil, sued the defendant, Winn-Dixie Stores, Inc., for injunctive relief under Title III of the ADA.<sup>89</sup> In *Gil*, the plaintiff, who is legally blind, uses screen reading software in order to access information on the internet.<sup>90</sup> He alleged that the defendant's website failed to incorporate screen reading technology and therefore denied him equal enjoyment of accommodations provided by the defendant's website.<sup>91</sup> Defendant filed a motion for judgment on the pleadings, claiming that websites did not fall under the scope of "places of public accommodation" and therefore did not violate the ADA.<sup>92</sup>

The U.S. District Court for the Southern District of Florida held that the defendant's website violated the ADA because it was not accessible to disabled customers.<sup>93</sup> Consequently, the court issued injunctive relief, ordering the defendant to conform to the WCAG 2.0 guidelines.<sup>94</sup> Importantly, the court, when examining the claim, looked at the circuit split as to whether websites are places of public accommodation; specifically, it looked at precedent set in the Eleventh Circuit.<sup>95</sup> Courts in the Eleventh Circuit have held that the ADA does not apply to websites that are "wholly unconnected to a physical location."<sup>96</sup> The court reached its ultimate decision because it found that the plaintiff sufficiently alleged a nexus between the defendant's website and physical locations.<sup>97</sup>

As demonstrated, the two cases above involved individuals that are disabled within the meaning of the ADA and were denied equal access to online resources.<sup>98</sup> Both cases posed important questions needing clarification, such as whether websites are places of public accommodation, and what compliance standards should websites be required to maintain.<sup>99</sup> As a result, the public is looking towards the DOJ for answers.<sup>100</sup>

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88. *Id.*

89. *Gil v. Winn Dixie Stores, Inc.*, 242 F. Supp. 3d 1315, 1316 (S.D. Fla. 2017).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Brown & Quackenboss*, *supra* note 21.

94. *Id.*

95. *Gil*, 242 F. Supp. 3d at 1318-1320.

96. *Id.* at 1320.

97. *Id.* at 1321.

98. *See supra* text accompanying notes 69-97.

99. *See supra* text accompanying notes 69-97.

100. *See generally* Alison Frankel, *Business groups urge Supreme Court to wade into ADA website litigation fray*, REUTERS (July 16, 2019), <https://www.reuters.com/article/us-otc-ada/business-groups-urge-supreme-court-to-wade-into-ada-website-litigation-fray-idUSKCN1UB2O3> ("In the absence of action from DOJ, plaintiffs' lawyers have filled in the void, becoming through litigation and settlement the de facto regulators of website compliance with the ADA.").

### III. THE REGULATORY ROLE OF THE DEPARTMENT OF JUSTICE

The DOJ, which was charged with regulatory oversight and enforcement with respect to Titles II and III of the ADA, has not yet devised federal regulations that address the issue of “website compliance” within the ADA’s parameters.<sup>101</sup> The DOJ, also known as the Justice Department, is responsible for carrying out laws enacted by Congress while guaranteeing that constitutional and civil rights of the American public are protected.<sup>102</sup> Additionally, the DOJ has regulatory oversight of several federal law enforcement agencies, such as the Federal Bureau of Investigation (hereinafter “FBI”) and the Drug Enforcement Administration (hereinafter “DEA”).<sup>103</sup> The mission of the DOJ is to “enforce the law and defend the interests of the United States . . . [while] ensuring fair and impartial administration of justice for all Americans.”<sup>104</sup>

The DOJ issued an Advanced Notice of Proposed Rulemaking (hereinafter “ANPR”) in July of 2010, explaining that it sought to make amendments to Title III of the ADA to now include accessibility requirements for websites.<sup>105</sup> However, the ANPR failed to set forth such guidelines and the DOJ later withdrew the ANPR in 2017.<sup>106</sup> As a result, the House of Representatives and the Senate urged Jeff Sessions, the Attorney General at the time, to prompt the DOJ to take a stance on the issue of website compliance.<sup>107</sup>

In response, the DOJ “explained that the ‘absence of a specific regulation’ does not justify noncompliance with a statute’s requirements.”<sup>108</sup> Therefore, website owners must still comply with the goals and requirements of the ADA, despite the fact that there is no regulation explicitly describing what a website must and must not contain.<sup>109</sup> The text of the ADA explicitly states, “[t]he Department [of Justice] has issued guidance on the ADA as applied to the Web sites of public entities, which includes the availability of standards for Web site

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101. U.S. DEP’T OF JUSTICE, AMERICANS WITH DISABILITIES ACT: TITLE III REGULATIONS (Sept. 15, 2010), [https://www.ada.gov/regs2010/titleIII\\_2010/titleIII\\_2010\\_regulations.pdf](https://www.ada.gov/regs2010/titleIII_2010/titleIII_2010_regulations.pdf).

102. Robert Longley, *About the U.S. Department of Justice (DOJ)*, THOUGHTCO., <https://www.thoughtco.com/about-the-us-department-of-justice-doj-3319874> (Jan. 3, 2020).

103. *Id.*

104. *Id.*

105. Stuy, *supra* note 16, at 1092.

106. *Id.*; see also Amanda Robert, *A Tangled Web: ADA Questions Remain over Web Accessibility Cases and the Lack of DOJ Regulations*, 105 ABA J. 16 (2019) (“The DOJ announced plans to propose web accessibility regulations in 2010 but withdrew those plans in December 2017.”).

107. Stuy, *supra* note 16, at 1093.

108. *Id.*

109. *Id.* at 1094.

accessibility.”<sup>110</sup> The text then states that, “[a]dditional guidance is available in the Web Content Accessibility Guidelines (WCAG). . . which are developed and maintained by the Web Accessibility Initiative, a subgroup of the World Wide Web Consortium (W3C®).”<sup>111</sup> Additionally, the ADA asserts that a non-compliant or inaccessible website may still meet its legal obligations under the ADA if it provides an alternative service that is accessible, “such as a staffed telephone information line.”<sup>112</sup>

Though the DOJ and several courts have relied upon and endorsed the requirements laid out in the WCAG 2.0 AA, the DOJ has failed to prescribe this, or any other minimum criteria, as the accessibility standard for private sector websites.<sup>113</sup> Additionally, the DOJ has also failed to provide any explanation as to how businesses are supposed to maintain compliance in order to moot future lawsuits post compliance.<sup>114</sup> In September of 2018, six senators sent a letter to the DOJ urging them to clarify the issue of website accessibility requirements.<sup>115</sup> The DOJ responded later that month, claiming that they were “still evaluating whether issuing specific web accessibility standards was necessary and appropriate.”<sup>116</sup> The DOJ followed this disappointing response with an explanation that it may waive technical requirements and instead announce a standard of “flexibility,” claiming that “public accommodations have flexibility in how to comply with the ADA’s general requirements of nondiscrimination and effective communication. . . [and] noncompliance with a voluntary technical standard for website accessibility does not necessarily indicate noncompliance with the ADA.”<sup>117</sup> Most recently, as of July 30, 2019, seven members of Congress addressed a letter to Attorney General William Barr, claiming that the DOJ’s standard of “flexibility” was unclear and failed to provide further guidance.<sup>118</sup> William Barr replied

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110. See U.S. DEP’T OF JUSTICE, *supra* note 101, at 196.

111. *Id.*

112. *Id.*

113. Samuel D. Levy & Martin S. Krezalek, *A Call for Regulation: The DOJ Ignored Website Accessibility Regulation and Enterprising Chaos Ensued*, N.Y. L.J. (Nov. 9, 2018, 2:35 PM), <https://www.law.com/newyorklawjournal/2018/11/09/a-call-for-regulation-the-doj-ignored-website-accessibility-regulation-and-enterprising-chaos-ensued/>.

114. *Id.*

115. *Id.* (including Senators Charles Grassley and John Cornyn).

116. *Id.*

117. *Id.*

118. Heather Goldman et al., *Senate Members Ask DOJ to Take Action as Number of Website Accessibility Lawsuits Continues to Rise*, BRYAN CAVE LEIGHTON PAISNER (Aug. 13, 2019), <https://www.bclp.com/en/insights/senate-members-ask-doj-to-take-action-as-number-of-website-accessibility-lawsuits-continues-to-rise>.



that he was studying the issue and would consult with Congress to formulate a solution.<sup>119</sup>

Further, in June 2018, a bipartisan congregation of 103 members from the House of Representatives also wrote a letter to Attorney General Jeff Sessions, which urged the DOJ to “state publicly that private legal action under the ADA with respect to websites is unfair and violates basic due process principles in the absence of clear statutory authority and issuance by the department of a final rule establishing website accessibility standards.”<sup>120</sup> Although many have turned to the DOJ for clarification on website accessibility standards, Congress also has the power to set such standards through the legislative process.<sup>121</sup> Additionally, even though the 103 members of Congress that endorsed the June 2018 letter to the DOJ “acknowledged [their] own responsibility to provide legal clarity through the legislative process, they implored the DOJ to provide ‘even basic direction on compliance’ and to ‘help resolve the situation as soon as possible.’”<sup>122</sup>

Regarding Title II, in June 2003, the DOJ published guidance for state and local governments regarding how to make their websites accessible, titled “Accessibility of State and Local Government Websites to People with Disabilities.”<sup>123</sup> Then, in 2015, the DOJ set forth a document titled “Statement of Regulatory,” which addressed the idea that it was impractical to separate government websites (under Title II) and public websites (Title III).<sup>124</sup> However, action was never taken on this sentiment, as lawsuits are still filed according to whether they fall under the category of Title II websites or Title III websites.<sup>125</sup> Additionally, in 2016, the DOJ issued a Supplemental Advance Notice of Proposed Rulemaking (hereinafter “SANPR”) titled “Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of

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[retaillawbclp.com/senate-members-ask-doj-to-take-action-as-number-of-website-accessibility-lawsuits-continues-to-rise/](https://retaillawbclp.com/senate-members-ask-doj-to-take-action-as-number-of-website-accessibility-lawsuits-continues-to-rise/).

119. *Id.*

120. See Minh N. Vu & Samuel Sverdlov, *Members of Congress Urge DOJ to Declare That Private Website Accessibility Lawsuits Violate Due Process*, SEYFARTH (June 21, 2018), <https://www.adatitleiii.com/2018/06/member-of-congress-urge-doj-to-declare-that-private-website-accessibility-lawsuits-violate-due-process/>. The letter was headed by Congressmen Ted Budd and J. Luis Correa; it pushed for the DOJ to provide clarity and guidance regarding website accessibility.

*Id.*

121. *Id.*

122. *Id.*

123. Berg, *supra* note 46.

124. *Id.*; see also U.S. Department of Justice, *Statement of Regulatory* (2015), [https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201510/Statement\\_1100.html](https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201510/Statement_1100.html).

125. Berg, *supra* note 46.

State and Local Government Entities.”<sup>126</sup> This document was removed and archived.<sup>127</sup>

The onslaught of litigation regarding website noncompliance with the ADA proves that regulations issued by the DOJ are necessary and appropriate.<sup>128</sup> As a result, the DOJ must provide these necessary regulations, so that website owners may avoid “‘sue-and-settle’ lawsuits” by making their websites compliant, and with that, maintain compliance in order to moot future lawsuits post compliance.<sup>129</sup> Further, setting such a standard will likely bring clarity to the aforementioned circuit split regarding whether websites are places of public accommodation, thus bringing uniformity among the courts.<sup>130</sup> If no action is taken within the DOJ, the public should look towards Congress to take action by setting compliance standards through the legislative process.<sup>131</sup>

#### IV. APPLICATION OF THE WEB CONTENT ACCESSIBILITY GUIDELINES 2.0 (WCAG 2.0)

Even though the DOJ has failed to set appropriate standards for website compliance with the ADA, courts have held that the WCAG 2.0 Level AA guidelines were an acceptable standard to determine compliance with the ADA.<sup>132</sup> The Web Content Accessibility Guidelines (hereinafter “WCAG”) were formulated by the World Wide Web Consortium, also known as the W3C.<sup>133</sup> The W3C is an international

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126. *Id.*

127. *Id.*

128. Levy & Krezalek, *supra* note 113 (“The unprecedented surge of ADA website accessibility lawsuits has demonstrated that it is appropriate and necessary for the DOJ to promulgate regulations—including, in no uncertain terms, identifying specific technical standards for websites to be ADA compliant.”).

129. *Id.*

130. Lewis S. Wiener & Amy Xu, *Websites as Public Accommodations: The Circuit Split on Whether Websites Constitute Places of Public Accommodation*, PARTNERING PERSPS., Spring 2016, at 4, 7, <https://us.eversheds-sutherland.com/NewsCommentary/Articles/187781/Websites-as-Public-Accommodations-The-Circuit-Split-on-Whether-Websites-Constitute-Places-of-Public-Accommodation> (“Currently, circuit courts have not presented a consistent standard to determine whether websites are considered a place of public accommodation. However, an advance notice of proposed rulemaking and recent settlement agreements strongly suggest that the DOJ will adopt an expansive perspective to ensure that website accessibility for blind and visually impaired individuals is covered under the ADA.”).

131. Vu & Sverdlov, *supra* note 120.

132. Stuy, *supra* note 16, at 1094-97; *see also* Michaels, *supra* note 7 (“Developed by World Wide Consortium’s Web Accessibility Initiative, WCAG 2.0 AA has become the de facto international standard for website accessibility among web developers, as well as the accessibility standard for federal agency websites.”).

133. *See* U.S. DEP’T OF JUSTICE, *supra* note 101.

organization that works closely with the public to create standards for the web, including guidelines such as the WCAG.<sup>134</sup> As previously mentioned, the WCAG 2.0 generally sets forth four standards in order for a website to be compliant. The website must be: (1) perceivable; (2) operable; (3) understandable; and (4) robust.<sup>135</sup> To be perceivable, internet users must be able to perceive the website's content "using one or more of their senses."<sup>136</sup> To be operable, internet users must be able to control the user interface elements, such as the mouse and keyboard.<sup>137</sup> Further, the internet user must be able to understand the content of the website.<sup>138</sup> Lastly, to be robust, the website must be developed using web standards that are accessible across different internet browsers.<sup>139</sup> "If a disabled user cannot perceive a website's content, cannot operate a website's controls, cannot understand the content as presented, or cannot access the website's content because the content is incompatible with the user's accessibility tools, the Web is not an accessible place for all users."<sup>140</sup>

Further, there are three different levels of conformance within the WCAG 2.0, which lists success criteria.<sup>141</sup> These include: Level A (hereinafter "WCAG 2.0 A"), which is the minimum level of conformance, Level AA (hereinafter "WCAG 2.0 AA"), and Level AAA (hereinafter "WCAG 2.0 AAA"), which is the maximum level of conformance.<sup>142</sup> However, website owners are also allowed to use an alternative to these three versions, so long as the website format complies to one of the three levels completely.<sup>143</sup> Websites must be in full conformance throughout its entirety and will not be deemed in conformance if part of the website fails to conform.<sup>144</sup>

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134. Amihai Miron, *3 Steps To Get Ahead Of ADA Web Accessibility Issues*, LAW360 (Feb. 12, 2019, 3:55 PM), <https://www.law360.com/articles/1127409/3-steps-to-get-ahead-of-ada-web-accessibility-issues>.

135. *Understanding the Web Content Accessibility Guidelines*, *supra* note 19; *see also* Michaels, *supra* note 7.

136. *Understanding the Web Content Accessibility Guidelines*, *supra* note 19.

137. *Id.*

138. *Id.*

139. *Id.*

140. Zachary Parker, *Defending Against the Undefined: Commercial Websites' Violations of the Americans with Disabilities Act*, 85 UMKC L. REV. 1079, 1090 (2017).

141. Brown & Quackenboss, *supra* note 21.

142. *Id.*

143. *Id.*

144. *Id.*

Typically, the DOJ and the courts rely on the second level, Level AA.<sup>145</sup> But, what exactly does this entail? Simply put, Level A requirements give website owners greater flexibility when implementing changes to their websites, while Level AAA requirements are much stricter.<sup>146</sup> For an example on how exactly these requirements differ, one could look towards WCAG 2.0 Guideline 2.3 regarding seizures.<sup>147</sup> The WCAG 2.0 Level A under this rule requires a “Three Flashes or Below Threshold,” which states that under this standard “[w]eb pages do not contain anything that flashes more than three times in any one second period, or the flash is below the general flash and red flash thresholds.”<sup>148</sup> However, WCAG 2.0 AAA requires a “Three Flashes” standard, which states that under the standard “[w]eb pages do not contain anything that flashes more than three times in any one second period.”<sup>149</sup> As seen from this one rule within the WCAG 2.0, the higher standard leaves much less space for compliance.<sup>150</sup> The W3C has warned that the WCAG 2.0 AAA may not be an appropriate standard for the DOJ to adopt, as it is impossible for certain websites or blogs to satisfy all of the necessary criteria.<sup>151</sup> In June of 2018, the W3C released additional updated guidelines in the WCAG 2.1.<sup>152</sup> As this only brought further complication to website owners, the DOJ announced on September 25, 2018 that “the important decision for businesses is not whether to comply with a certain set of guidelines, but whether a disabled person can access the company’s goods, services, and benefits through its website.”<sup>153</sup>

If the DOJ were to officially prescribe the WCAG 2.0 AA within the text of the ADA as the official guidelines for website accessibility, website owners would be required to:

- Provide text alternatives for any non-text content so that it can be changed into other forms people need, such as large print, braille, speech, symbols or simpler language.

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145. *Id.*

146. *What are WCAG 2.0 A, AA, and AAA?*, USERWAY, <https://userway.org/blog/what-are-wcag-20-a-aa-and-aaa> (last visited Oct. 29, 2020).

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*; Brown & Quackenboss, *supra* note 21.

152. *See Understanding the Web Content Accessibility Guidelines*, *supra* note 19 (illustrating WCAG 2.1 requirements, which include WCAG 2.0 in its entirety, and seventeen new criteria that address, among other things, mobile accessibility, low vision, and cognitive user needs).

153. Brown & Quackenboss, *supra* note 21.

- Provide alternatives for time-based media.
- Create content that can be presented in different ways (e.g., with a simpler layout) without losing information or structure.
- Make it easier for users to see and hear content by, among other things, separating foreground from background.
- Make all functionality available from a keyboard, provide users with sufficient time to read and use content, not design content in a way that is known to cause seizures and provide ways to help users navigate, find content and determine where they are on the website.
- Make text content readable and understandable to web navigation tools.
- Make web pages appear and operate in predictable ways.
- Maximize compatibility with assistive technologies on user computers and devices.<sup>154</sup>

These are only a few of the necessary alterations listed within the lengthy guidelines of the WCAG 2.0 AA.<sup>155</sup> Additionally, repairing websites to be compliant with the WCAG 2.0 AA could take as long as two years, with expenses of up to half a million dollars.<sup>156</sup>

As of now, several other countries have adopted the WCAG 2.0 and the United States should soon follow in their footsteps.<sup>157</sup> For purposes of government websites only, the following jurisdictions have enforced the WCAG 2.0: Canada, France, Germany, Hong Kong, India, Ireland, Italy, Japan, the Netherlands, New Zealand, Ontario, Spain, and the

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154. See Gavin Appleby et al., *The Wave of Website and Other ADA Accessibility Claims – What You Should Know*, LITTLER (Feb. 22, 2016), <https://www.littler.com/publication-press/publication/wave-website-and-other-ada-accessibility-claims-%E2%80%93-what-you-should-know>.

155. *Id.*

156. *Id.*

157. See Mark Rogers, *Government accessibility standards and WCAG 2*, POWERMAPPER (Nov. 28, 2017), <http://www.powermapper.com/blog/government-accessibility-standards/>; see also Sofia Enamorado, *WCAG 2.0: The International Standard for Web Accessibility and Inclusive Design*, 3PLAYMEDIA (Aug. 31, 2018), <https://www.3playmedia.com/2018/08/31/wcag-2-0-the-international-standard-for-web-accessibility-and-inclusive-design/>; see also Sofia Enamorado, *Countries that Have Adopted WCAG Standards [MAP]*, 3PLAYMEDIA (June 3, 2019), <https://www.3playmedia.com/2017/08/22/countries-that-have-adopted-wcag-standards-map/>.

United Kingdom.<sup>158</sup> Additionally, Quebec, Norway, and Australia have enforced the WCAG 2.0 for all websites.<sup>159</sup>

## V. COSTS OF WEBSITE COMPLIANCE WITH THE ADA AND THE UNDUE BURDEN DEFENSE

Compared to physical store locations, the ADA regulations for online stores are not specifically stated.<sup>160</sup> For example, a website owner does not need to have a certain number of fire exits, sprinkler heads, wheelchair ramps, or bathroom stalls.<sup>161</sup> Unlike these structural necessities, which are typically built once in physical locations and need little maintenance, “digital website compliance is an ongoing concern for businesses.”<sup>162</sup> Regardless, websites need to be compliant under the ADA.<sup>163</sup> Even though recent accessibility cases have targeted larger companies, smaller companies are still at risk.<sup>164</sup> To become compliant under Title III of the ADA, small business owners could spend anywhere between \$3,000 to \$5,000, as well as an additional expense of \$500 to \$1,000 monthly to maintain compliance.<sup>165</sup> A website compliance audit alone could cost near \$1,500, which does not include work to help get the website in actual compliance.<sup>166</sup> Another source indicates that on average, the expense a website owner bears for making a small to medium-sized online store ADA accessible costs between \$27,000 and \$50,000, depending on website size.<sup>167</sup> The price of compliance can also depend on how old the website is, how many pages it contains, how many templates or page types are on the website, and the framework the website was built on.<sup>168</sup> Additionally, “[e]very time a new photo, link, or page is added, additional coding is required,” thus increasing costs.<sup>169</sup>

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158. See sources cited *supra* note 157.

159. See sources cited *supra* note 157.

160. Mike Cristancho, *How To Make Your Site ADA Compliant*, SHERO (Aug. 18, 2017), <https://sherocommerce.com/how-to-make-your-site-ada-compliant>.

161. *Id.*

162. Stuy, *supra* note 16, at 1100.

163. Kristen Bachmeier, *How Much Does ADA Compliance Cost?*, ATILUS (May 1, 2019), <https://www.atilus.com/ada-website-compliance-cost/>.

164. *Id.*

165. *Id.*

166. *Id.*

167. Cristancho, *supra* note 160.

168. Bachmeier, *supra* note 163.

169. Stuy, *supra* note 16, at 1100.

Yet, costs of ADA accessible wheelchair ramps cost approximately anywhere between \$948 to \$3,026<sup>170</sup> and ADA accessible bathrooms could cost anywhere between \$2,000 and \$3,000.<sup>171</sup> Although these are only two costs of making a physical location ADA compliant, depending on website size, prices for making websites accessible in accordance with the ADA could surpass costs of making a physical building or store ADA accessible.<sup>172</sup> This is because any updates to a website could accrue additional costs.<sup>173</sup> As standards for website compliance are on the horizon, “reaching and maintaining compliance won’t be an option,” which means website owners will unfortunately be subjected to these costs regardless of whether or not they wish to pay them.<sup>174</sup> On the other hand, website compliance limits legal liability and the threat of legal action, which can be worth the investment for many website owners.<sup>175</sup>

However, Title III requires that places of public accommodation make “reasonable modifications to facilities, policies, and procedures, and take other actions to enable disabled individuals to have equal access to the goods and services they offer . . . provided that such modifications or actions do not ‘fundamentally alter the nature’ of the goods or services or result in ‘undue burden.’”<sup>176</sup> Those who oppose Title III’s expansion to websites argue that the cost of compliance, together with the lack of accessibility guidelines, constitutes an undue burden for compliance with the ADA.<sup>177</sup> Therefore, businesses could assert “undue burden” as a defense to the litigation brought against them.<sup>178</sup>

The ADA defines “undue burden” as “significant difficulty or expense.”<sup>179</sup> Whether an accommodation is considered an undue hardship

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170. *How Much Does It Cost To Build A Wheelchair Ramp?*, HOMEADVISOR, <https://www.homeadvisor.com/cost/environmental-safety/build-a-disability-ramp/> (last visited Oct. 29, 2020).

171. Mike Matthews, *The Costs for Constructing a Handicapped-Accessible Bathroom*, SFGATE, <https://homeguides.sfgate.com/costs-constructing-handicapped-accessible-bathroom-106254.html> (Nov. 17, 2015).

172. Stuy, *supra* note 16, at 1099-101.

173. *Id.*

174. Cristancho, *supra* note 160.

175. *Id.*; Bachmeier, *supra* note 163.

176. J. Gregory Grisham, *Website Inaccessibility: The New Wave of ADA Title III Litigation*, 20 FEDERALIST SOC’Y 66, 66-67 (2019) (quoting 42 U.S.C. § 12182(a)-(b)), <https://fedsoc.org/commentary/publications/website-inaccessibility-the-new-wave-of-ada-title-iii-litigation>.

177. Stuy, *supra* note 16, at 1097-101.

178. *Id.*

179. 28 C.F.R. § 36.104 (2016).

is determined on a case-by-case basis based on several factors.<sup>180</sup> An undue hardship is any effort “that is unduly costly, extensive, substantial, disruptive or fundamentally alters the nature or operation of the business.”<sup>181</sup> The ADA and Equal Employment Opportunity Commission (hereinafter “EEOC”) have devised their own list of factors for determining when accommodations impose an undue hardship, including:

- The number, type and location of facilities
- The overall financial resources of the covered entity
- The number of employees employed by the covered entity
- The type of operation of the covered entity, including:
  - composition, structure and functions of the workforce
  - geographic separateness and administrative or fiscal relationship of the facility where the accommodation will be provided
- The effect of the accommodation of the operation of the facility making the accommodation.<sup>182</sup>

Factors for determining undue burden include the “nature and cost of the accommodation in relation to the size, resources, nature, and structure of the employer’s operation.”<sup>183</sup> Additionally, when the facility that is making the accommodation is a component of a greater entity, “the structure and overall resources of the larger organization would be considered, as well as the financial and administrative relationship of the facility to the larger organization.”<sup>184</sup> Generally, a larger entity with greater resources is expected to make greater accommodations than smaller entities with fewer resources.<sup>185</sup>

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180. George C. Morrison, *Reasonable Accommodations: Employer Defenses to Accommodation Claims*, WHITE & WILLIAMS LLP (Aug. 5, 2015), <https://www.whiteandwilliams.com/resources/alerts-Reasonable-Accommodations-Employer-Defenses-to-Accommodation-Claims.html>.

181. *Id.*

182. *Id.*

183. *What is considered an “undue hardship” for a reasonable accommodation?*, ADA NAT’L NETWORK, <https://adata.org/faq/what-considered-undue-hardship-reasonable-accommodation> (Oct. 2020).

184. *Id.*

185. *Id.*



If a certain type of accommodation would place an entity in a position of undue hardship, the entity needs to identify other accommodations that would not cause such a hardship.<sup>186</sup> In other words, if a business demonstrates an undue burden, it is required to make their goods or services available through other means.<sup>187</sup> For example, a company may demonstrate an undue burden in altering its website by showing that it requires more money or that it “substantially frustrate[s] the purpose or function of the website.”<sup>188</sup> The “other means” would require disabled individuals to visit the physical location, such as a store location.<sup>189</sup>

On the other hand, website owners also have advantages for making their websites compliant with the ADA, such as government incentives.<sup>190</sup> For example, some businesses can claim a tax credit, which could cover up to 50% of the costs of website compliance.<sup>191</sup> The tax credits could be used to cover expenses between \$250 and \$10,250 and could apply to costs for “interpreters, acquiring or modifying equipment or devices, and other auxiliary aids.”<sup>192</sup>

## VI. THE RISE OF ADA LITIGATION OVER WEBSITE INACCESSIBILITY

Lawsuits arise from a failure to incorporate specialized software, such as screen reading technology, into the website.<sup>193</sup> Because “blind and visually impaired individuals use specialized software, including screen reading technology,” which “reads website content aloud allowing users to access and navigate websites,” failure to include such technology into the website results in publicly available websites being inoperable to those with disabilities or impairments.<sup>194</sup> Consequently, those with such disabilities are denied access to a place of public accommodation and may bring suit under Title III of the ADA.<sup>195</sup> Under Title III, plaintiffs are

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186. *Id.*

187. Sheerin, *supra* note 24, at 600.

188. *Id.*

189. *Id.*

190. Cristancho, *supra* note 160.

191. *Id.*

192. *Id.*

193. Wiener & Fuchs, *supra* note 9.

194. *Id.*; see also Appleby et al., *supra* note 154 (discussing the assistive technologies that enable disabled individuals to operate websites, including, among other technologies, software that magnifies web page content).

195. Appleby et al., *supra* note 154.

permitted to seek injunctive relief, but may not seek damages.<sup>196</sup> Although monetary damages are unavailable under Title III of the ADA, these claims are not easily dismissible and the cost of defending such a claim could be significant.<sup>197</sup>

In the past few years, there has been a significant increase of cases regarding website inaccessibility to people with impairments.<sup>198</sup> Within one year alone, there was a 30% increase in federal website accessibility lawsuits filed.<sup>199</sup> According to the law firm Seyfarth Shaw LLP, the state of New York was particularly affected by the increase in suits, with nearly two-thirds of 2018's cases being filed within the state.<sup>200</sup> The state of New York alone had approximately 300 ADA website lawsuits filed in their federal courts within the first quarter of 2018.<sup>201</sup> These lawsuits mainly targeted "retail, fashion, and financial institutions."<sup>202</sup> Further, in 2018, more than 2,250 lawsuits were filed by disabled plaintiffs in federal court alleging violations of the ADA for corporate website inaccessibility.<sup>203</sup> Yet, fewer than 240 cases regarding this issue were filed in federal court in 2015 and 2016.<sup>204</sup> In 2017, this number raised to 814, which is a 200% increase within one year.<sup>205</sup> It has also been warned that courts will likely see these same claims brought against companies for lack of compliance on their mobile applications, also known as "apps."<sup>206</sup>

Upon analyzing the results of these cases, the majority are settled after a motion to dismiss is denied, as both parties want to avoid litigation costs.<sup>207</sup> However, many of the website accessibility lawsuits have targeted "larger businesses with perceived deeper pockets," as plaintiffs' counsel are under the belief that these companies will be more willing to settle the cases, which won't require the plaintiffs' counsel to continue litigating the case.<sup>208</sup> For example, major companies including Target,

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196. Wiener & Fuchs, *supra* note 9.

197. Michaels, *supra* note 7.

198. *Id.*

199. Miron, *supra* note 134.

200. Frankel, *supra* note 23 ("According to Seyfarth Shaw, which tallied the cases, the growth of ADA website accessibility litigation has been nothing short of staggering.").

201. Michaels, *supra* note 7.

202. *Id.*

203. Frankel, *supra* note 23.

204. *Id.*

205. *Id.*

206. Toni Cannady & Teshale Smith, *Avoiding the Website Accessibility Shakedown*, ABA BANKING J. (May 22, 2018), <https://bankingjournal.aba.com/2018/05/avoiding-the-website-accessibility-shakedown-2/>.

207. Sheerin, *supra* note 24, at 575, 602.

208. Brown & Quackenboss, *supra* note 21.

Patagonia, JCPenney, Panera Bread, Domino's Pizza, and Brooks Brothers are just a few of the companies that have already faced lawsuits for having non-compliant websites.<sup>209</sup>

Additionally, statistics indicate that the number of websites that are inaccessible and consequently vulnerable to lawsuits are immense.<sup>210</sup> For example, "[s]ince 2008, the Business Disability Forum has given 70 percent of the sites it reviewed a 'red' assessment – defined as 'significant potential commercial, PR or legal risk.'"<sup>211</sup> As this has become an ongoing issue with excessive litigation, and it does not appear as though the DOJ or Congress will be taking action in the near future, other remedies or actions must be taken.<sup>212</sup>

## VII. THE MOOTNESS DOCTRINE

Another debated topic regarding website compliance is whether a defendant can raise a mootness defense.<sup>213</sup> Typically, this mootness defense would be raised after the defendant reached a settlement with a different plaintiff in a prior suit and agreed to bring their website into compliance.<sup>214</sup> The mootness doctrine is defined as "a principle of judicial procedure whereby American courts will not decide . . . cases in which there is no longer any actual controversy."<sup>215</sup> With the mootness doctrine, the defendant can dismiss the website noncompliance claim against them by effectively showing that the claim has "been resolved, either because it is subject to another settlement agreement that's already in place that calls on them to bring the website into compliance or that they have already taken steps to make this happen either through an internal policy or something else."<sup>216</sup> To mitigate the amount of litigation regarding website compliance with the ADA, courts should render a case as moot

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209. Cristancho, *supra* note 160.

210. Miron, *supra* note 134.

211. *Id.* (footnote omitted).

212. Frankel, *supra* note 100. The author notes that "[w]ith plaintiffs' lawyers filing thousands of lawsuits a year against businesses with allegedly inaccessible internet operations, it's time for the U.S. Supreme Court to clarify whether and to what extent the ADA applies to online commerce." *Id.* Considering the DOJ's lack of action in this regard, the need for clarification is especially pressing. *Id.*

213. Anthony R. McClure, *Websites May Be Places of Public Accommodation Subject to the ADA*, A.B.A. (Mar. 18, 2019), <https://www.americanbar.org/groups/litigation/publications/litigation-news/featured-articles/2019/websites-may-be-places-public-accommodation-subject-the-ada/>.

214. *Id.*

215. *Mootness Doctrine Law and Legal Definition*, USLEGAL, <https://definitions.uslegal.com/m/mootness-doctrine/> (last visited Oct. 29, 2020).

216. McClure, *supra* note 213 (statement of David Gevertz).

when the defendant has become compliant prior to litigation.<sup>217</sup> In recent years, there have been several attempts to apply the mootness doctrine to this type of litigation.<sup>218</sup> For example, a defendant attempted to apply the mootness doctrine in a case in front of the Eleventh Circuit, but the appellate court declined to moot the litigation based on a settlement entered into by the defendant in a prior and unrelated litigation.<sup>219</sup> In *Haynes v. Hooters of America, LLC*, Dennis Haynes, the plaintiff, challenged the accessibility of Hooters of America, LLC's (hereinafter "Hooters") website, claiming that the website was not fully accessible to those with disabilities.<sup>220</sup> The plaintiff sought declaratory relief, injunctive relief, costs, and attorney's fees for violations of Title III of the ADA.<sup>221</sup> However, prior to the filing of the plaintiff's suit, a separate plaintiff filed a nearly identical lawsuit against the defendant for website inaccessibility.<sup>222</sup> The parties to that suit reached a settlement where Hooters agreed to make their website accessible through conformance with the WCAG 2.0 within a year from the settlement.<sup>223</sup>

Hooters then sought to dismiss Haynes' case, as they had already agreed to improve their website in the prior settlement.<sup>224</sup> The Eleventh Circuit defined the term "moot" as a case that "no longer presents a live controversy with respect to which the court can give meaningful relief."<sup>225</sup> After Hooters argued that the litigation should be moot, as they were in the process of updating their website, the Eleventh Circuit denied the mootness challenge, as there was "nothing in the record demonstrating that Hooters has successfully done so."<sup>226</sup> Additionally, Haynes sought injunctive relief in his complaint, and requested that the court order the defendant to continually update and maintain its website to ensure long-term accessibility.<sup>227</sup> This was not a term of the previous settlement, so

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217. *See id.*

218. *See id.*; Heather Goldman et al., *New York District Court Addresses Mootness Argument in Website Accessibility Case*, BRYAN CAVE LEIGHTON PAISNER (June 10, 2019), <https://retaillawhelp.com/new-york-district-court-addresses-mootness-argument-in-website-accessibility-case/>.

219. McClure, *supra* note 213; Goldman et al., *supra* note 218.

220. *Haynes v. Hooters of Am., LLC*, 893 F.3d 781, 782-83 (11th Cir. 2018).

221. *Id.* at 783.

222. *Id.*

223. *Id.*

224. *Id.*; *see also* McClure, *supra* note 213.

225. *Haynes*, 893 F.3d at 784 (citing *Troiano v. Supervisor of Elections*, 382 F.3d 1276, 1281-82 (11th Cir. 2004)).

226. *Id.*

227. *Id.*

the plaintiff's request for injunctive relief could not be deemed moot.<sup>228</sup> As a result, the plaintiff was granted injunctive relief to compel Hooters to update and maintain its website to ensure continued compliance.<sup>229</sup>

#### A. *The Mootness Doctrine Within the State of New York*

As previously mentioned, the state of New York was especially affected by website noncompliance litigation in 2018, with nearly two-thirds of the year's cases being filed within the state.<sup>230</sup> The mootness doctrine was brought as a defense to several cases in New York beginning in 2017.<sup>231</sup> In 2017, the Southern District Court of New York examined the mootness doctrine within the case *Del-Orden v. Bonobos, Inc.*<sup>232</sup> The case concerned a putative class action led by a legally blind plaintiff, who alleged that the defendant, Bonobos, Inc. (hereinafter "Bonobos"), operated a website that was non-compliant with the ADA because it denied equal access to blind customers.<sup>233</sup> Bonobos moved to dismiss, arguing that the ADA did not apply to commercial websites.<sup>234</sup> Further, Bonobos alleged that it had remedied its website of access barriers prior to the filing of plaintiff's complaint.<sup>235</sup>

Del-Orden's complaint alleged that on numerous occasions, he was unable to complete transactions on the defendant's website due to accessibility barriers that the defendant willfully placed on its website.<sup>236</sup> The complaint sought relief under the ADA in the form of injunctive relief and attorney's fees, and further sought compensatory damages under New York State and City Human Rights Laws.<sup>237</sup> The plaintiff later amended his complaint, specifically alleging that to complete purchases, the website required the use of a computer mouse, which the plaintiff was

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228. *Id.*

229. McClure, *supra* note 213.

230. Frankel, *supra* note 23.

231. *See, e.g.*, Diaz v. Kroger Co., No. 18 Civ. 7953, 2019 WL 2357531, at \*3 (S.D.N.Y. June 4, 2019); Del-Orden v. Bonobos, Inc., No. 17 CIV. 2744, 2017 WL 6547902, at \*2 (S.D.N.Y. Dec. 20, 2017).

232. *Del-Orden*, 2017 WL 6547902, at \*1 (examining defendant's mootness argument in a website noncompliance suit).

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.* at \*2.

237. *Id.*; *see also* *Web Accessibility Lawsuits: What's the Current Landscape?*, *supra* note 4 ("[W]hen plaintiffs file federal lawsuits under the ADA, they . . . can only seek reimbursement of their legal fees as well as remediation of the inaccessibility in question.").

unable to use.<sup>238</sup> Consequently, the plaintiff could only purchase items from the defendant in one of its “brick-and-mortar locations.”<sup>239</sup> Specifically, Bonobos argued that after the filing of the plaintiff’s initial complaint, it had made alterations to its website’s accessibility, which made it presently accessible to blind users.<sup>240</sup> Therefore, Bonobos argued that claims for injunctive relief are unavailable, therefore rendering the sole federal claim under the ADA moot.<sup>241</sup>

In examining these issues, the New York District Court first determined that websites are places of public accommodation, stating that “[i]t would make little sense . . . to limit Title III’s scope only to discrimination in the provision of goods or services literally consumed in a place of public accommodation.”<sup>242</sup> The court found that the Title III term “public accommodation” extends “to private commercial websites that affect interstate commerce,” and that such interpretation “is compellingly supported by the ADA’s purposes, legislative history, and context.”<sup>243</sup> Lastly, the court determined that based on the structure of the defendant’s business, including how the website refers customers to real-world stores, that the website was a good, service, facility, or accommodation.<sup>244</sup>

The court then turned to whether Del-Orden’s claims were moot, in that the defendant properly made alterations to its website.<sup>245</sup> Plaintiff’s first amended complaint alleged an ongoing accessibility barrier to the website that remained present, which was that blind customers were unable to select “desired fit and type of clothes.”<sup>246</sup> Further, Del-Orden

238. *Del-Orden*, 2017 WL 6547902, at \*2.

239. *Id.* (“[B]ecause of access barriers on the website, Del-Orden ‘was unable to find the location of a physical store location on [Bonobos’] website, preventing him from going into a physical store to complete a purchase with the help of Bonobos’ employees.’”); see also Chris B. Murphy, *Brick-and-Mortar*, INVESTOPEDIA, <https://www.investopedia.com/terms/b/brickandmortar.asp> (Sept. 28, 2020) (“The term ‘brick-and-mortar’ refers to a traditional street-side business that offers products and services to its customers face-to-face in an office or store that the business owns or rents. The local grocery store and the corner bank are examples of brick-and-mortar companies.”).

240. *Del-Orden*, 2017 WL 6547902, at \*3.

241. *Id.*

242. *Id.* at \*5 (citing cases to buttress the notion that websites constitute places of public accommodation).

243. *Id.* at \*10.

244. *Id.* at \*11.

245. *Id.* at \*12.

246. *Id.* Further, the court found that when reviewing the website, “a user may be unable to activate the alt-text coded into the images on the site without highlighting those images with a cursor,” making it “substantially less useful to a blind user.” *Id.* at \*13.

submitted an audit conducted by ADASure,<sup>247</sup> which evaluated Bonobos' website and found several issues with the website's accessibility.<sup>248</sup> As a result, the court held that Del-Orden's claim of inaccessibility was plausible, therefore denying the defendant's mootness argument.<sup>249</sup>

A similar conclusion was reached in *Sullivan v. Study.com LLC*.<sup>250</sup> Sullivan, the plaintiff, brought a class action suit against Study.com LLC (hereinafter "Study.com"), after its website denied equal access to deaf customers.<sup>251</sup> The defendant is a company offering online video courses as well as educational programs to its consumers.<sup>252</sup> Due to his disability, Sullivan relied on closed captioning to view defendant's videos.<sup>253</sup> However, the videos did not use closed captioning and Sullivan was therefore unable to understand the contents of the videos.<sup>254</sup> The defendant moved to dismiss the complaint pursuant to Rule 12(b)(6) and Rule 12(f).<sup>255</sup> Further, the defendant filed an affidavit from the president of Study.com, Ben Wilson, asserting that all of the website's videos were closed captioned.<sup>256</sup> The court requested that the plaintiff assess whether the videos were, in fact, closed captioned, which would moot the plaintiff's ADA claim.<sup>257</sup> On February 9, 2019, the plaintiff submitted evidence that several of the defendant's videos still did not contain closed captioning.<sup>258</sup> Three days later, the defendant responded with proof showing that those videos were indeed captioned.<sup>259</sup>

With its motion to dismiss, the defendant further asserted that it satisfied the ADA's auxiliary aid requirement, as it provided viewers with detailed transcripts under each video.<sup>260</sup> The plaintiff contended that the

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247. *Id.* at \*13. ADASure is a digital consulting firm committed "not only to helping your business achieve basic legal requirements, but also to developing current and future content with an eye toward accessibility." ADASURE, <https://adasure.com/> (last visited Oct. 30, 2020).

248. *Del-Orden*, 2017 WL 6547902, at \*13.

249. *Id.* at \*14.

250. *Sullivan v. Study.com LLC*, 18-CV-1939, 2019 WL 1299966, at \*1 (S.D.N.Y. Mar. 21, 2019) (denying defendant's mootness doctrine argument because defendant failed to take sufficient steps to make their website fully compliant).

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.* at \*3 ("Study.com relies heavily on the Second Circuit decision in *Noll v. Int'l Bus. Machines Corp.*, 787 F.3d 89 (2d Cir. 2015), arguing that the Second Circuit in *Noll* held that

transcripts did not effectively communicate the information in the videos because the transcripts prevented deaf and hearing impaired viewers from engaging with the video, despite the fact that the website itself emphasized engagement and interactivity with the video lessons as part of its company platform.<sup>261</sup> The court held that a reasonable factfinder could determine that the transcripts do not satisfy the ancillary aid requirement of the ADA and that they do not provide effective communication to the deaf and hearing impaired.<sup>262</sup>

The defendant then sought to invoke the mootness doctrine, asserting that its remedial efforts to caption its videos moot the plaintiff's ADA claim.<sup>263</sup> "To dismiss a Title III ADA claim as moot, a movant must demonstrate that '(1) there is no reasonable expectation that the alleged violation will recur *and* (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.'"<sup>264</sup> The court held that the defendant failed to make this showing, as at least four of the website's videos lacked closed captioning as of February 9, 2019, which was months after the defendant first claimed the plaintiff's claims were moot.<sup>265</sup> Although the defendant submitted proof that the videos were captioned three days later, the court held such a showing was "insufficient to satisfy Study.com's 'formidable burden of showing that it is *absolutely clear* the alleged wrongful behavior could not reasonably be expected to recur.'"<sup>266</sup> Therefore, because the videos were not effectively changed to include closed captioning, Study.com's request to moot the ADA claim against it failed.<sup>267</sup> New York further denied application of the mootness doctrine in several other cases.<sup>268</sup>

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transcripts alone, even in the absence of closed captions, may be sufficient to reasonably accommodate the hearing impaired.").

261. *Id.* ("The Court agrees with Sullivan that he has plausibly pleaded that a transcript alone is insufficient to provide effective communication of the contents of the Website's videos."); *see also id.* at \*4 ("Thus, in relying on Study.com's transcripts, Sullivan suffers not only from the inconvenience caused by the need to shift his vision or focus, but also from the inability to absorb the same information or content as would a person without a hearing disability.").

262. *Id.* at \*5.

263. *Id.*

264. *Id.* (quoting *Rosa v. 600 Broadway Partners, LLC*, 175 F. Supp. 3d 191, 201 (S.D.N.Y. 2016)).

265. *Id.*

266. *Id.* (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013)).

267. *Id.*

268. *See Wu v. Jensen-Lewis Co.*, 345 F. Supp. 3d 438, 442 (S.D.N.Y. 2018) (rejecting mootness argument where defendant did "not provide any affirmative showing that its current website is ADA-compliant, and will remain that way, beyond asserting so and citing to the website itself"); *Feltenstein v. City of New Rochelle*, 254 F. Supp. 3d 647, 657-58 (S.D.N.Y. 2017) (rejecting claim where



*B. The Mootness Doctrine as Applied in Diaz v. Kroger Co.*

The mootness doctrine was further analyzed in New York in the case *Diaz v. Kroger Co.*<sup>269</sup> The plaintiff, Edward Diaz, a visually impaired and legally blind individual residing in the state of New York, sued a supermarket chain, The Kroger Company (hereinafter “Kroger”), in federal court after he was denied equal access to the supermarket’s website.<sup>270</sup> The plaintiff, dependent on the assistance of screen reading software to access websites, faced several accessibility barriers when visiting the supermarket’s website, as the website’s content could not be rendered into text.<sup>271</sup> The defendant moved to dismiss the plaintiff’s case under Rules 12(b)(1) and 12(b)(2) in the Federal Rules of Civil Procedure for lack of subject matter jurisdiction and lack of personal jurisdiction based upon the belief that the plaintiff’s claim is moot.<sup>272</sup> The defendant asserted that it did not conduct business in the state of New York and that it had remedied the alleged barriers to access in its website.<sup>273</sup>

Important to the 12(b)(1) defense, Kroger alleged that prior to the inception of the lawsuit, the company had already begun taking steps to comply with the WCAG and that it was already compliant with the WCAG 2.0.<sup>274</sup> Therefore, the defendant argued that no such barriers to access existed at the time the suit was filed.<sup>275</sup> However, the plaintiff argued that ADA cases concerning websites could never be mooted due to the ever-changing nature of websites.<sup>276</sup> Andrew Whiting, the defendant’s group product design manager, submitted an affidavit asserting the following:

(i) Defendant undertook compliance with the WCAG standards before the lawsuit was filed; (ii) the Website is today compliant with those standards; (iii) he personally confirmed that the specific barriers to access identified in Plaintiff’s initial and amended complaints “have been remedied and that no such barriers to access, as alleged, still exist with the website”; (iv) Defendant has no intention of undoing those

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defendant was still reforming access to its website at the time of filing the motion and where supporting affidavits failed to provide sufficient details to verify claims of ADA compliance).

269. *Diaz v. Kroger Co.*, No. 18 CIV. 7953, 2019 WL 2357531, at \*2 (S.D.N.Y. June 4, 2019).

270. *Id.* at \*1.

271. *Id.* at \*2.

272. *Id.* at \*1.

273. *Id.*

274. *Id.* at \*3.

275. *Id.*

276. *Id.* at \*4.

changes or regressing to non-compliance with the ADA; and (v) Defendant commits “to keep its website up to date and compliant with all applicable standards to make the website as accessible to all as possible.”<sup>277</sup>

The court, analyzing the defendant’s 12(b)(1) defense, stated that a request for injunctive relief would only be found moot if a defendant fully complied with the statute through meeting its “formidable burden,” which means that the defendant needs to show that the wrongful behavior was not reasonably expected to recur.<sup>278</sup> The court further stated that “[t]he voluntary cessation of allegedly illegal activity may render a case moot ‘if the defendant can demonstrate that [i] there is no reasonable expectation that the alleged violation will recur and [ii] interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.’”<sup>279</sup>

The judge presiding over the case, U.S. District Judge Katherine Polk Failla, dismissed the suit against Kroger under the mootness doctrine.<sup>280</sup> Although Judge Failla recognized that other judges have previously held that ADA website litigation could never be mooted due to the ever-changing nature of websites, she denied “that an ADA claim involving a website can never be mooted, solely because of the technological characteristics of websites. Such limit is both unnecessary and would inset a brittle, technology-specific exception into the mootness doctrine that would itself become obsolete in an era of rapidly-changing technology.”<sup>281</sup>

Although, as aforementioned, several courts within the same district denied the defendants’ motions for failure to establish mootness, the court in *Diaz v. Kroger Co.* distinguished itself, as it found that the employee’s affidavit met the “stringent showing required by the Supreme Court’s mootness precedent.”<sup>282</sup> This decision was significant because it provides

277. *Id.* at \*3.

278. *Id.* at \*2 (quoting *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000)); see also *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91-92 (2013).

279. *Diaz*, 2019 WL 2357531, at \*2 (quoting *Clear Channel Outdoor, Inc. v. City of New York*, 594 F.3d 94, 110 (2d Cir. 2010)).

280. Frankel, *supra* note 23.

281. *Id.*

282. Joshua A. Stein & Shira M. Blank, *As Summer Approaches, the SDNY Once Again Provides Hope for Businesses Exhausted by Repeated Website Accessibility Lawsuits*, THE NAT’L L. REV. (Jun. 6, 2019), <https://www.natlawreview.com/article/summer-approaches-sdny-once-again-provides-hope-businesses-exhausted-repeated> (“Simply put, plaintiff identified several barriers on the website, the defendant remediated them, brought the website into compliance with the WCAG, and stated its intention to remain in compliance going forward.”).

businesses with grounds to defend themselves from numerous claims.<sup>283</sup> Additionally, prior to this decision, the Southern District of New York also decided the case *Mendez v. Apple, Inc.*, which provided defendants with further, although minor, defenses.<sup>284</sup> In this case, the plaintiff sued for denial of full and equal access to the defendant's website, and consequently, its physical location.<sup>285</sup> The court dismissed the plaintiff's claims for failure to allege that she sustained any particular injury.<sup>286</sup> Although plaintiffs are permitted to file numerous lawsuits where they sustain the same injury, the court made note that the complaint was identical to more than four hundred complaints that were filed over the past two years.<sup>287</sup> However, the main detriment to the plaintiff's claim was her failure to assert an injury, which resulted in the dismissal of her claims.<sup>288</sup> Further, the plaintiff failed to provide the court with dates that she tried to access the physical store, and she failed to specify the services or goods she could not purchase.<sup>289</sup> Such deficiencies in a plaintiff's complaint will lead to dismissal.<sup>290</sup>

### VIII. SOLUTION

In order to solve the ongoing issues regarding website compliance with the ADA, it is imperative that circuit courts come to a final agreement about whether websites are considered "places of public accommodation" under Title III of the ADA.<sup>291</sup> The circuit split will likely continue until the Supreme Court hears a website compliance suit and reaches an

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283. *Id.*

284. Joshua A. Stein & Shira M. Blank, *While Far from a Knockout, the Southern District of New York Strikes a Blow for Businesses Facing Website Accessibility Lawsuits*, EPSTEIN BECKER GREEN (Apr. 12, 2019), <https://www.retailaborandemploymentlaw.com/disability-discrimination/while-far-from-a-knockout-the-southern-district-of-new-york-strikes-a-blow-for-businesses-facing-website-accessibility-lawsuits/>.

285. *Id.*

286. *Id.*

287. *Id.* The authors note that "[w]hile the court acknowledged that the law permits plaintiffs to file duplicative lawsuits where the same harm exists, it added that, 'those who live by the photocopier shall die by the photocopier.'" *Id.* Further, "[w]hile this decision does not preclude serial plaintiffs from continuing to file significant numbers of similar website accessibility matters against multiple businesses, by requiring greater time and effort from plaintiff's counsel to successfully maintain website accessibility actions, businesses can hope that the S.D.N.Y. will now be considered a less hospitable jurisdiction to file 'cut and paste' style complaints." *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. See *supra* Part I.A. (discussing the circuit court split over whether websites constitute places of public accommodation).

ultimate decision on the matter. Until then, the DOJ has already supported the idea that websites are considered places of public accommodation under Title III, so courts should recognize and comply with this stance.<sup>292</sup>

The main solution to the overall issue of excessive litigation on this matter would be for the DOJ or Congress to implement descriptive guidelines for website compliance. It is simply not enough for the DOJ to look towards the WCAG 2.0 AA as the standard for compliance, but there is a necessity to actually prescribe this standard within the text of the ADA.<sup>293</sup> However, there are still issues with the approach of adopting the WCAG 2.0 AA as the standard for website compliance. First, such a requirement can become overly burdensome for businesses with smaller, less active websites, such as mom-and-pop stores.<sup>294</sup> The DOJ or Congress, when setting standards for compliance, must carve out an exception for those invoking an undue burden defense. The undue burden defense should be made available for all businesses that can prove compliance would be “unduly costly, extensive, substantial, disruptive,” or that compliance “fundamentally alters the nature or operation of the business.”<sup>295</sup> Therefore, those that can prove actual undue burden should be permitted to dismiss all claims filed against them.

Further, such standards should include the mootness doctrine as laid out in *Diaz v. Kroger Co.*, so that businesses are made aware that compliance can moot future litigation brought against them.<sup>296</sup> Without taking these defenses into account, Congress or the DOJ run the risk of causing defendants an extreme burden due to excessive litigation and costly alterations to their websites.<sup>297</sup> Furthermore, until Congress or the DOJ ultimately decide to set these standards, confusion among judges on how to resolve these cases will continue.<sup>298</sup> Therefore, the best solution to the ongoing litigation would be for Congress or the DOJ to adopt website compliance standards with considerations of both the undue burden defense and the mootness doctrine. Bringing forth such a fair standard will promote compliance, thus providing the disabled individuals with greater access to the internet.

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292. See Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, *supra* note 9, at 43463.

293. Sheerin, *supra* note 24, at 600-01 (highlighting the need for explicit website compliance guidelines).

294. See *supra* Part V (discussing the costs associated with achieving website compliance).

295. Morrison, *supra* note 180.

296. See *supra* Part VII.B.

297. See *supra* Part V.

298. Compare *Robles v. Domino's Pizza, LLC*, 913 F.3d 898 (9th Cir.), *cert. denied*, 140 S. Ct. 122 (2019), with *Gil v. Winn Dixie Stores, Inc.*, 242 F. Supp. 3d 1315 (S.D. Fla. 2017).

## CONCLUSION

As internet usage has become prevalent within our daily lives, it is imperative that businesses make their websites fully accessible to all users. With the immense rise of litigation regarding website compliance with the ADA, it is evident that the DOJ or Congress must define set standards for compliance in order for companies to make their websites fully accessible, especially with the split amongst the circuit courts concerning whether websites serve as places of public accommodation.<sup>299</sup> Although the DOJ and several courts have looked towards the WCAG 2.0 for guidance, until the DOJ or Congress adopt set standards, the rise in ADA website compliance litigation will likely continue. Due to the inaction on behalf of the DOJ when setting website compliance standards, the public may have nowhere to turn but towards Congress for a solution. For now, the WCAG 2.0 appears to be the most appropriate standard for the DOJ or Congress to adopt, as it sets forth clear standards and criteria for websites to abide by.<sup>300</sup> It is advised that businesses make their websites compliant with the WCAG 2.0 AA in order to avoid litigation until further standards are mandated.

Until such set standards are defined, companies can feel free to invoke defenses against the abundant litigation. For many businesses that maintain smaller, less developed websites, the requirements for making their websites compliant to the WCAG 2.0 or any standard for that matter could be extremely costly and burdensome.<sup>301</sup> Courts must acknowledge this immense burden and allow defendants to invoke the undue burden defense. Additionally, defendants that have already made their websites compliant should be able to invoke the mootness doctrine defense set forth in *Diaz v. Kroger Co.* to avoid endless litigation.<sup>302</sup> Overall, it is indispensable that Congress or the DOJ set website compliance standards that take these defenses into account in order to promote compliance. Such standards will allow disabled individuals to have greater access to the benefits that nondisabled individuals often take for granted.

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299. Compare *Jancik v. Redbox Automated Retail, LLC*, No. SACV 13-1387-DOC, 2014 U.S. Dist. LEXIS 67223 (C.D. Cal. May 14, 2014), with *Carparts Distrib. Ctr. Inc. v. Auto. Wholesaler's Ass'n of New England*, 37 F.3d 12 (1st Cir. 1994).

300. See *supra* Part IV (illustrating the WCAG 2.0 AA standards).

301. See *supra* Part IV.

302. See *supra* Part VII.B.

*Victoria Scaglione\**

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\* Victoria Scaglione is a J.D. candidate at the Maurice A. Deane School of Law at Hofstra University, where she anticipates graduation in May of 2021. Ms. Scaglione is the Editor-in-Chief of the Hofstra Labor & Employment Law Journal. Ms. Scaglione would like to thank the entire Staff of Volume 38 and Professor Gundlach for their dedication. She would also like to thank her family and friends for their constant support, especially Paul McHugh and her siblings. Lastly, she would like to thank her parents Vito and Fran for all of their guidance.

