DON'T ASK ME WHAT TO DO, JUST LET ME SUE YOU: WHY WE NEED CLEAR GUIDELINES FOR WEBSITE ACCESSIBILITY UNDER TITLE III OF THE AMERICANS WITH DISABILITIES ACT

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I. INTRODUCTION

Facebook, Target, Domino's, e-Bay, Dunkin', Red Lobster, JetBlue: these are just a few of the many companies whose websites have been subject to a recent flood of litigation under Title III of the Americans With Disabilities Act (ADA) for being inaccessible to the visually impaired.[1] In 2018 alone, there

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1. *See generally* Minh N. Vu, Kristina M. Launey & Susan Ryan, *Number of Federal Website Accessibility Lawsuits Nearly Triple, Exceeding 2250 in 2018*, SEYFARTH SHAW (Jan. 31, 2019), https://www.adatitleiii.com/2019/01/number-of-federal-website-accessibility-lawsuits-nearly-triple-exceeding-2250-in-2018/ (outlining the many corporations that are subject to the growing number of ADA suits for having inaccessible websites).

were over 2,250 ADA Title III website violation lawsuits.[2] While it is essential to ensure that people with disabilities are able to use the Internet as much as people without disabilities, this flood of litigation has presented a problem for corporations nationwide that now have to devote extra time and resources to defending lawsuits. It has also been a new blessing for plaintiffs and, especially, plaintiffs' attorneys, who have been receiving high settlement costs and attorney's fees.[3]

Most troublingly, the current litigation comes amid considerable uncertainty about the legal standards relating to website accessibility.[4] First, the Federal Courts of Appeals are split over which websites (and other electronic resources) are subject to Title III of the ADA.[5] Second, the ADA is silent about how companies' websites can comply with the law. Companies are losing lawsuits because of their inaccessible websites,[6] but no law tells them clearly whether their websites are covered, or what an accessible website is.

The ADA was enacted in 1990 to ensure that people with disabilities have access to the same opportunities and live with the same rights as people without disabilities.[7] To achieve that goal, the law forbids discrimination in public life against people with disabilities.[8] The law is divided into five categories where discrimination is forbidden: employment, state and local government, public accommodations, telecommunications, and miscellaneous provisions.[9] Title III of the ADA addresses the third category, "places of public accommodation."[10]

The purpose of Title III is for people with disabilities to enjoy public accommodations as much as people without disabilities.[11] For example, Title III requires stores to have at least one checkout aisle available to assist customers with disabilities during store hours.[12] Also, ticket vendors must identify accessible seating to people with disabilities, as well as allow people with disabilities to purchase tickets in the same manner, with the same terms and

2. *Id*.

3. Mark Pulliam, *Is Your Company's Website Accessible to the Disabled? You'd Better Hope So*, L.A. TIMES (June 11, 2017), http://www.latimes.com/opinion/op-ed/la-oe-pulliam-ada-websites-20170611-story.html.

4. *See id*. ("Under President Obama, the Department of Justice took the broader position, but it didn't issue any actual regulations providing specific guidance to businesses . . . [i]n the meantime, millions of businesses with websites have the worst of both worlds: mandates without directions.").

5. Jason P. Brown & Robert T. Quackenboss, *The Muddy Waters of ADA Website Compliance May Become Less Murky in 2019*, HUNTON EMPLOYMENT & LABOR PERSPECTIVES (Jan. 3, 2019), https://www.huntonlaborblog.com/2019/01/articles/public-accommodations/muddy-waters-ada-website-compliance-may-become-less-murky-2019/.

6. *Companies Are Losing Web Cases: Spend Money on Web Access, Not Lawyers*, LAW OFFICE OF LAINEY FEINGOLD (Aug. 7, 2017), https://www.lflegal.com/2017/08/ny-web-cases/?fbclid=IwAR2S45ll4cPg5kg1rQpc1tKhaUaGTLiw4KlYioCekJiCNpJPDQQLOlf4PMw.

7. *What is the Americans With Disabilities Act?*, ADA NATIONAL NETWORK, https://adata.org/learn-about-ada (last visited Dec. 21, 2018).

8. *Id*.

9. *Id*.

10. *Id*.

11. *Id*.

12. Nondiscrimination on the Basis of Disability in Public Accommodations and Commercial Facilities, 28 C.F.R. § 36.302(d) (2019).

conditions, and at the same time as event-goers without disabilities.[13] These provisions are just a few examples of efforts to eliminate discrimination based on disability in public accommodations.

But Title III, enacted before use of the Internet became widespread, does not make clear how (or if) the term "place of public accommodation" applies to websites.[14] Plaintiffs have recently started a whirlwind trend of suing companies, claiming that the companies' websites are inaccessible to the blind.[15] The main problem for companies with these lawsuits is that Title III does not mention websites as places of public accommodation.[16] Thus, companies are uncertain about whether they need to make their websites fully accessible to the blind, and if so, how to make their websites as accessible as possible.[17]

The Department of Justice (DOJ), which enforces the ADA, stated in October 2018 that Title III does apply to websites; however, courts have reached differing conclusions.[18] Some courts believe that all websites are places of public accommodation,[19] and others believe a website is a place of public accommodation only if there is a corresponding physical store.[20]

Even assuming Title III covers some or all websites, Congress, the DOJ, and the Supreme Court have not provided a clear set of standards by which to judge a website's accessibility. While non-governmental standards exist, they are not legal blueprints for compliance with Title III.

To slow down and eventually halt the flood of litigation while also providing visually impaired people non-discriminatory access to the Internet, it is important for courts to agree on whether a website is a place of public accommodation. Courts should hold that websites are all places of public accommodation in order to ensure that the visually impaired have equal enjoyment of the Internet. Congress also needs to adopt a set of concrete standards, for example, the WCAG or something similar, or it needs to amend ADA Title III to instruct the DOJ to implement the standards.[21]

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13. Nondiscrimination on the Basis of Disability in Public Accommodations and Commercial Facilities, 28 C.F.R. § 36.302(f) (2019).

14. Pulliam, *supra* note 3.

15. Minh N. Vu & Susan Ryan, *2017 Website Accessibility Lawsuit Recap: A Tough Year for Businesses*, SEYFARTH SHAW (Jan. 2, 2018), https://www.adatitleiii.com/2018/01/2017-website-accessibility-lawsuit-recap-a-tough-year-for-businesses/.

16. *See* 42 U.S.C. § 12182 (illustrating that the statute does not mention websites).

17. *See, e.g.*, Thomas Pellechia, *Winery Websites Must Comply with the Americans With Disabilities Act, But How?*, FORBES (Nov. 12, 2018), https://www.forbes.com/sites/thomaspellechia/2018/11/12/winery-websites-must-comply-with-the-americans-with-disability-act-but-how/#1bf2ab0d2cd0 (noting the ambiguity in the ADA for companies regarding website compliance); Pulliam, *supra* note 3 (explaining that legal standards do not exist for websites).

18. Letter from Stephen E. Boyd, Assistant U.S. Attorney General, to Ted Budd, U.S. House of Representatives (Sept. 25, 2018).

19. Anthony R. McClure, *Websites May Be Places of Public Accommodation Subject to the ADA*, AMERICAN BAR ASSOCIATION (2019), https://www.americanbar.org/groups/litigation/publications/litigation-news/featured-articles/2019/websites-may-be-places-public-accommodation-subject-the-ada/.

20. *See* Gomez v. Gen. Nutrition Corp., 323 F. Supp. 3d 1368 (S.D. Fla. 2018) (holding that defendant's "website is a place of public accommodation within the meaning of ADA" since it "facilitates the use of the physical stores by providing a store locator.").

21. *See, e.g.*, Pellechia, *supra* note 17 (showing ambiguities in the law); Pulliam, *supra* note 3.

After this happens, companies can help the visually impaired access their websites with screen readers, and the flood of lawsuits will slow down considerably if companies are compliant. In the meantime, companies should allocate extra money and insurance for Title III lawsuits, as legislation and regulation are slow processes; despite the importance of concrete standards, it is unlikely they will be adopted in the near future.[22] Companies should also take extra precautions, such as setting up an extra telephone line to ensure that all visually impaired consumers can access all of the important functions of the website and making sure that the website's essential features are compatible with screen readers.[23] If companies adopt these measures, they can avoid litigation as much as possible and improve their reputation by accommodating those with disabilities.

In Part II, this note will present an overview of Title III, the flood of website accessibility litigation, and the circuit split among courts. Next, Part III will address why the full accessibility approach should be adopted, but only after clear standards for website accessibility are implemented. This Note will also recommend certain steps for companies to adopt in the meantime, such as creating an alternative telephone line to help visually impaired consumers do whatever the website does not allow them to do directly.

II. BACKGROUND

A. ADA Title III

ADA Title III, part of the 1990 Americans With Disabilities Act, is a broad statute prohibiting discrimination against people with disabilities in public places.[24] It states, as a general rule, 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."[25] It is unclear how, or even if, this provision of the ADA applies to websites because "place of public accommodation" is not defined to include the terms "website" or "Internet."[26] Additionally, the ADA was enacted in 1990, before the Internet became an important part of the average American's everyday life.[27]

22. Pulliam, *supra* note 3.

23. *See* Robles v. Domino's Pizza, No. 16-06599, 2017 U.S. Dist. LEXIS 53133, at *18, (C.D. Cal. Mar. 20, 2017) (suggesting that a phone line to assist visually impaired consumers is enough for ADA Title III compliance).

24. 42 U.S.C. § 12182 (2018).

25. *Id*.

26. *See What is the Americans with Disabilities Act*, ADA NATIONAL NETWORK, https://adata.org/learn-about-ada (last accessed Oct. 5, 2019) (illustrating that the word "website" does not appear in the statute).

27. *Id*.

B. The Flood of ADA Title III Litigation

Recently, a flood of ADA Title III lawsuits from persons who are visually impaired have been filed against many major companies because of their allegedly inaccessible websites.[28] Specifically, there is a phenomenon of "surf-by" lawsuits, in which a person browses a company's website and files a federal lawsuit to collect damages, claiming that the website is inaccessible to the blind.[29] Many of these lawsuits are filed in federal courts in New York and Florida, which have adopted what is termed in this note the "full accessibility" approach and tend to rule sympathetically in favor of plaintiffs.[30]

Of the 10,000 lawsuits filed for ADA claims, 814 federal lawsuits were filed specifically about ADA Title III website accessibility in 2017, and there were over 2,250 filed in 2018.[31] These suits arise because of plaintiffs' frustration that websites are not always compatible with the screen reader tools commonly used to assist people with visual impairments.[32] Plaintiffs claim the websites do not have the necessary accommodations to allow screen readers to read text, adjust colors, perform functions, and identify choices, which impairs plaintiffs' use of the website.[33]

Some plaintiffs have even filed lawsuits against multiple companies.[34] As a result, the term "ADA Troll" was coined, which describes a visually impaired person who regularly seeks out companies with "deep pockets," finds ADA violations, and sues using "cookie cutter documents."[35] In December 2018, Jason Camacho sued fifty different higher education institutions, including Cornell University, Northeastern University, and Vanderbilt University, seeking to collect money from all for ADA Title III website violations.[36] Another example is Sean Gorecki, who has filed many of these lawsuits in the Central District of California, including against GrubHub, Dave and Buster's, Bath and Body Works, Build-a-Bear, Supercuts, Pinkberry, Dairy Queen, Lucky Strike, Shakey's USA, and Hobby Lobby.[37] Yet another plaintiff, Emanuel Delacruz, filed eight similar federal lawsuits within a two-week period, all against

28. Vu & Ryan, *supra* note 15.

29. *Federal Court Decision Approves New Class of "Surf-By" Lawsuits*, FISHER PHILLIPS (Jun. 16, 2017), https://www.fisherphillips.com/resources-alerts-federal-court-approves-new-class-surf-by-lawsuits.

30. Vu & Ryan, *supra* note 15.

31. Minh Vu et. al, *Number of ADA Title III Lawsuits Filed in 2018 Tops 10,000*, SEYFARTH SHAW (Jan. 22, 2019), https://www.adatitleiii.com/2019/01/number-of-ada-title-iii-lawsuits-filed-in-2018-tops-10000/.

32. *See, e.g.*, Brianne Garrett, *New York Wineries Sued Over Website Accessibility for Visually Impaired*, WINE SPECTATOR (Oct. 29, 2018), https://www.winespectator.com/articles/new-york-wineries-sued-over-website-accessibility (demonstrating a plaintiff's frustration that her screen reader was not compatible with a website).

33. *Screen Readers*, AMERICAN FOUNDATION FOR THE BLIND, https://www.afb.org/blindness-and-low-vision/using-technology/assistive-technology-products/screen-readers (last accessed Oct. 5, 2019).

34. *See, e.g.*, Gorecki v. Dave and Buster's, 2017 U.S. Dist. LEXIS 187208 (C.D. Cal. Oct. 10, 2017) (the lawsuit in which Sean Gorecki sued Dave and Buster's); Gorecki v. Hobby Lobby 2017 U.S. Dist. LEXIS 176312 (C.D. Cal. Oct. 24, 2017) (the lawsuit in which Sean Gorecki sued Hobby Lobby).

35. Mark Pulliam, *Robbing Beyoncé Blind*, CITY-JOURNAL (Jan. 10, 2019), https://www.city-journal.org/beyonce-lawsuit-ada.

36. Lindsay McKenzie, *50 Colleges Hit with ADA Lawsuits*, INSIDE HIGHER EDUCATION (Dec. 10, 2018), https://www.insidehighered.com/news/2018/12/10/fifty-colleges-sued-barrage-ada-lawsuits-over-web-accessibility.

37. *Id*.

institutions of higher learning in New York.[38] Fifteen wineries in New York have also been hit with these lawsuits, all filed by the same plaintiff, Kathy Wu, who claimed she could not make reservations using her screen reader.[39]

Surf-by ADA Title III litigation has also impacted the entertainment business.[40] The website for Beyoncé, a popular singer, was hit with an ADA Title III website inaccessibility claim in December 2018.[41] Mary Conner brought a class action suit against Beyoncé's production company, Parkwood Entertainment, alleging that she was unable to browse beyonce.com and purchase a sweatshirt using her screen reader software because the site does not have accessible drop-down menus or navigation links, and the pictures are not coded with text for the screen reader to interpret.[42] The suit seeks to force Parkwood Entertainment to pay attorneys' fees, as well as add features to Beyoncé's website that would make it accessible to the blind and visually impaired consumer, or, alternatively, shut down the website altogether.[43] One legal blog suggests that Conner is just another "ADA Troll" who has also targeted singer Rihanna, a shoe company, a restaurant, a workout company, a Christmas tree company, and a beef jerky seller.[44] The blog also says that she has agreed to confidential settlements with the companies, making it hard to know whether she is looking to cause important change in Internet accessibility or if she's looking to make money from "shopping for a lawsuit."[45]

One approach that can constrain some of this surf-by litigation is limiting standing. In its January 2019 decision in *Griffin v. Dep't of Labor Fed. Credit Union*, the Fourth Circuit limited the flood of litigation by stating that in order for a plaintiff to have an injury in fact under ADA Title III, the plaintiff must be eligible to use the website's services or intend to use the website's services in the future.[46] In *Griffin*, the plaintiff asserted that the defendant credit union's website had ADA violations.[47] However, the court denied the plaintiff standing because he was ineligible to be a member of the Department of Labor's credit union; he could not use its services regardless of his ability to access the website.[48] The Southern District of New York held similarly when it dismissed

38. Vivian Wang, *College Websites Must Accommodate Disabled Students, Lawsuits Say*, N.Y. TIMES (Oct. 11, 2017), https://www.nytimes.com/2017/10/11/nyregion/college-websites-disabled.html.

39. Garrett, *supra* note 32.

40. Pulliam, *supra* note 35.

41. *Id.*

42. *Id.*

43. *Id.*; Tosten Burks, *Beyoncé's Production Company Sued for Discriminating Against Visually Impaired Fans*, SPIN (Jan. 3, 2019), https://www.spin.com/2019/01/beyonce-parkwood-entertainment-accessibility-lawsuit/.

44. Richard Hunt, *Beyoncé's Website Was Sued–But That's Not the News*, ACCESS DEFENSE (Jan. 7, 2019), http://accessdefense.com/?p=4621#more-4621.

45. *Id.*

46. *See* Griffin v. Dep't of Labor Fed. Credit Union, 912 F.3d 649, 656 (4th Cir. 2019) (holding that Griffin was ineligible to use the Credit Union's service and thus Griffin likely lacked the intent to return to the Credit Union website).

47. *Id.* at 653.

48. *Id.* at 649.

a plaintiff's website accessibility claim against Kroger because Kroger does not have any locations or deliver to any zip code in New York.[49]

In general, however, even with the limitations based on standing, the increase in surf-by litigation is out of control and negatively affecting companies, who now have to allocate extra money, time, and resources to ADA Title III lawsuits.[50] Plaintiffs in these surf-by lawsuits can recover large settlements, or, if a case is litigated to judgment, can receive injunctive relief and attorneys' fees.[51] Although a plaintiff who initiates a case that is litigated to judgment cannot recover monetary damages, the threat of costly, long litigation may pressure a company to pay out a settlement.[52] This is a problem not because plaintiffs should not be compensated for wrongful discrimination, but because there are no legal standards for companies to follow to avoid noncompliance. Thus, it seems that no matter how much a company tries to make its website accessible, it will never be truly immune to Title III lawsuits.

C. The Circuit Split Over How to Apply ADA Title III to Websites

Courts disagree as to how, and even whether, Title III applies to websites, which is a big issue, considering that there are approximately 1.3 billion people in the world living with visual impairment.[53] There is a circuit split among appellate courts regarding whether a website is a "place of public accommodation" for which companies have to make special modifications for the visually impaired under ADA Title III.[54] Most of the current legal opinions are from U.S. District Courts, which do not provide law that is binding on other district courts or on any higher-level court.[55] As of October 2019, the U.S. Supreme Court has not heard an ADA Title III website accessibility case.[56] On

49. Kristina M. Launey & Samuel Sverdlov, *SDNY Dismisses Website Accessibility Lawsuit Based on Mootness and Lack of Personal Jurisdiction*, SEYFARTH SHAW LLP (June 11, 2019), https://www.adatitleiii.com/ 2019/06/sdny-dismisses-website-accessibility-lawsuit-based-on-mootness-and-lack-of-personal-jurisdiction/.

50. *See, e.g.*, Pulliam, *supra* note 3 (explaining the negative effects of the flood of ADA Title III website accessibility litigation on corporations).

51. *What Businesses Should Know about Website Accessibility Lawsuits Under the ADA*, FOX ROTHSCHILD LLP (Sept. 13, 2017), https://www.foxrothschild.com/publications/what-businesses-should-know-about-website-accessibility-lawsuits-under-the-ada/.

52. Arlene Haas, *Essential Guide to ADA Title III Enforcement: Private Party Lawsuits*, BURNHAM (Jan. 10, 2017), https://www.burnhamnationwide.com/final-review-blog/essential-guide-to-ada-title-iii-enforcement-private-party-lawsuits.

53. *Blindness and Vision Impairment*, WORLD HEALTH ORG. (Oct. 11, 2018), https://www.who.int/news-room/fact-sheets/detail/blindness-and-visual-impairment.

54. *See, e.g.*, Gathers v. 1-800-Flowers.com, Inc., No. 17-cv-10273-IT, 2018 U.S. Dist. Lexis 22230, at *3 n.1 (D. Mass. Feb. 12, 2018) (noting that defendant did not dispute that its website was a place of public accommodation); Carparts Distribution Center v. Automotive Wholesaler's Ass'n of New England, 37 F.3d 12, 19–20 (1st Cir. 1994) (holding that places of public accommodation need not be physical structures); Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999) (listing a Web site as an example of a place of public accommodation); Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28, 32 (2d Cir. 1999) (holding that access to a place of public accommodation includes access to an entity's goods and services, not simply access to an entity's physical offices).

55. *See, e.g.*, Robles v. Domino's Pizza LLC, No. 16-06599, 2017 U.S. Dist. LEXIS 53133 (C.D. Cal. Mar. 20, 2017); Gil v. Winn-Dixie Stores, Inc., 257 F. Supp. 3d 1340 (S.D. Fla. 2017).

56. Jeffrey S. Ranen & Kelley Fox, *Accessibility 2.0: The Applicability of the ADA to the Internet as a Place of Public Accommodation*, LEWIS BRISBOIS BISGAARD & SMITH LLP,

June 13, 2019, Domino's Pizza filed a petition for writ of certiorari to appeal the ruling in *Robles v. Domino's Pizza*, but the petition was denied on October 7, 2019.[57]

According to the First, Second, and Seventh Circuits, which adopt the "full accessibility approach," websites are places of public accommodation, and all must be fully accessible to the blind under Title III; it does not matter what the connection is between the website and the physical store, and it does not matter if the company operates only online.[58] For example, Blue Apron, which is an online-only service that delivers pre-measured ingredients and recipes, was held to be a place of public accommodation in the New Hampshire District Court, even though there is no physical store for a customer to enter.[59] The court said that ADA Title III is sufficiently specific for a company to have notice to make its website accessible.[60]

On the other hand, the Third, Sixth, and Ninth Circuits, as well as many District Courts in the Eleventh Circuit, have held that in order for a website to qualify as a "place of public accommodation," there must be a "nexus" between the website and the physical brick and mortar store's operations.[61] Under the "nexus approach," online-only operations, such as Facebook or e-Bay, are not required to be accessible to the visually impaired.[62] Additionally, some elements of a website that are accessible via a physical store, such as ordering prescriptions from a pharmacy, are not required to be accessible via the Internet.[63]

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https://lewisbrisbois.com/accessibility-2.0-the-applicability-of-the-ada-to-the-internet-as-a-place-of-public-accommodation.

57. Minh N. Vu & Kristina M. Launey, *Domino's Files Petition for US Supreme Court Review of Unfavorable Website Access Decision*, SEYFARTH SHAW LLP (June 13, 2019), https://www.adatitleiii.com/2019/06/dominos-files-petition-for-us-supreme-court-review-of-unfavorable-website-access-decision/; Tucker Higgins, *Supreme Court Hands Victory to Blind Man Who Sued Domino's Over Site Accessibility*, CNBC (Oct. 7, 2019), https://www.cnbc.com/2019/10/07/dominos-supreme-court.html.

58. *See, e.g.*, *Gathers*, 2018 U.S. Dist. Lexis 22230, at *3 n.1 (noting that defendant did not dispute that its website was a place of public accommodation); *Carparts Distribution Center*, 7 F.3d at 19–20 (holding that places of public accommodation need not be physical structures); *Doe*, 179 F.3d at 559; *Pallozzi*, 198 F.3d at 32 (holding that access to a place of public accommodation includes access to an entity's goods and services, not simply access to an entity's physical offices).

59. Access Now v. Blue Apron, No. 17-cv-116-JL, 2017 U.S. Dist. LEXIS 185112, at *8–9, (D.N.H. Nov. 8, 2017).

60. *Id.* at *15.

61. *See, e.g.*, Price v. Everglades Coll., No. 6:18-cv-492-Orl-31GJK, 2018 U.S. Dist. LEXIS 117629, at *4 (M.D. Fla. July 16, 2018) (holding that there must be a nexus between an entity's website and its physical place of public accommodation); Gomez v. Bang & Olufsen Am., No. 1:16-cv-23801—LENARD, 2017 U.S. Dist. LEXIS 15457, at *10 (S.D. Fla. Feb. 2., 2017) (holding that there must be a nexus between an entity's website and its physical place of public accommodation); Peoples v. Discover Fin. Servs., 387 F. App'x 179, 183 (3d Cir. 2010) (a place of public accommodations is limited to a physical space); Rendon v. Valleycrest Prods., 294 F.3d 1279, 1282 (11th Cir. 2002) (holding that intangible, non-physical barriers preventing plaintiffs from participating in a competition held in a physical space were unlawful under the ADA); Ford v. Schering-Plough Corp., 145 F.3d 601, 612–13 (3d Cir. 1998) (holding that since plaintiff received her disability benefits via her employment at a company, there was no nexus to the physical insurance office); Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1010–11 (6th Cir. 1997) (holding that a place of public accommodation is a physical place).

62. *See, e.g.*, Young v. Facebook, Inc., 790 F. Supp. 2d 1110, 1115 (N.D. Cal. 2011) (holding that because Facebook is an online-only operation, it is not required to be accessible to the visually impaired).

63. Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 949–56 (N.D. Cal. 2006).

In *Robles v. Domino's Pizza*, the Ninth Circuit Court of Appeals clarified what the "nexus" approach means in its jurisdiction.[64] The court held that because both a website and an application were primary, advertised means of obtaining products from a physical store, there was enough of a connection between the physical store and both the website and the app to allow the plaintiff to sue under ADA Title III.[65] Specifically, the Ninth Circuit said, "[t]he statute applies to the services *of* a place of public accommodation, not *in* a place of public accommodation.[66] To limit the ADA to discrimination in the provision of services occurring on the premises of a public accommodation would contradict the plain language of the statute."[67] In other words, a website cannot impede access to goods and services offered at a physical location, which is a place of public accommodation.[68]

D. The Lack of Website Accessibility Standards

The inconsistency between circuits negatively affects companies because there is no clear solution to implement to make their websites legally compliant for users in all fifty states.[69] A major issue is that the Department of Justice (DOJ) declined to create regulations to clarify what constitutes an accessible website in September 2018.[70] Instead, the DOJ hinted that the ADA does apply to websites, but called upon Congress to create specific guidelines for businesses.[71] This occurred after the DOJ had put the issue on its priority list, left the topic inactive, and then suggested that regulations might be coming in 2018.[72] Recently, in a letter dated July 30, 2019, a group of senators requested that the DOJ answer a multitude of questions, including what steps it has taken to "help resolve uncertainty" and whether it would "push back against any identified litigation abuses."[73] Hopefully, the DOJ will answer these questions promptly.

Despite the DOJ's inactivity, companies can find some limited guidance because there are some non-governmental guidelines in existence, such as the Web Content Accessibility Guidelines (WCAG).[74] A multitude of private

64. Robles v. Domino's Pizza, 913 F.3d 898 (9th Cir. 2019).

65. *Id.* at 905; Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114 (9th Cir. 2000).

66. *Robles*, 913 F.3d at 905 (quoting Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 953 (N.D. Cal. 2006)).

67. *Id.*

68. *Id.*

69. *See* Pulliam, *supra* note 3 (explaining there is inconsistency among courts on whether public accommodation applies to websites).

70. Letter from Stephen E. Boyd, Assistant U.S. Attorney General, to Ted Budd, U.S. House of Representatives (Sept. 25, 2018) (on file Seyfarth Shaw LLP).

71. *Id.*

72. Minh N. Vu, *DOJ Says Failure to Comply with Web Accessibility Guidelines is Not Necessarily a Violation of the ADA*, SEYFARTH SHAW LLP (Oct. 2, 2018), https://www.adatitleiii.com/2018/10/doj-says-failure-to-comply-with-web-accessibility-guidelines-is-not-necessarily-a-violation-of-the-ada/.

73. Letter from Charles E. Grassley, United States Senator, to William Barr, U.S. Attorney General (July 30, 2019) (on file on United States Senate).

74. *Essential Components of Website Accessibility*, WEB ACCESSIBILITY INITIATIVE, https://www.w3.org/WAI/fundamentals/components/ (last visited Oct. 5, 2019).

companies, articles, and blogs have also created lists of guidelines for companies to use to help increase the accessibility of their websites.[75]

The WCAG is a set of standards for website accessibility, which is used for US government websites and is also used in other countries.[76] It is developed by an international organization called the World Wide Web Consortium, also known as W3C, which has offices in Japan, France, China, and Cambridge, Massachusetts.[77] The WCAG blueprints what an accessible website looks like and was adopted as law for US Government websites, US airline websites, as well as private and public websites in other places, including Australia, the European Union, and the United Kingdom.[78] The WCAG was not adopted as law for US private sector websites, other than airlines.[79]

The WCAG outlines what to do to make a website fully accessible to the visually impaired.[80] For example, it suggests providing "text alternatives to non-text content," "captions and other alternatives for multimedia," making all "functionality available from a keyboard," and giving users extra time to read content.[81] It also suggests making content occur in "predictable ways" and avoiding content that may cause "seizures or physical reactions."[82]

The problem with private companies adopting the WCAG before the DOJ or Congress definitively tells them to is that adopting accessibility standards is expensive and may cause other issues with the website, such as impeding security precautions.[83] Also, because there are no actual legal standards to follow before legislation is passed, courts have limited authority and guidelines to use in determining whether a company's website is accessible or not.[84] Therefore, companies will have to keep allotting extra time and resources for these lawsuits, even if they take steps to make their website more accessible.[85] The judicial system has not been entirely helpful in solving the problem because courts are split on which companies need to make their websites accessible, as well as the extent to which companies need to make their websites accessible.[86]

Some courts, including the Central District of California in *Robles v. Domino's Pizza*,[87] have dismissed decisions specifically because the DOJ has yet to administer guidelines on the topic (although, importantly, the decision was

75. *See* Rebecca Vogels, *How to Make Your Website Accessible in 2018*, USERSNAP, https://usersnap.com/blog/website-accessibility-2018/ (describing the process of making websites accessible for those with disabilities) (last visited Oct. 5, 2019).

76. *Id*.

77. *Contacting WAI*, WEB ACCESSIBILITY INITIATIVE, https://www.w3.org/WAI/about/contacting/ (last visited Oct. 5, 2019).

78. *Web Accessibility Laws and Policies*, WEB ACCESSIBILITY INITIATIVE, https://www.w3.org/WAI/policies/?q=wcag-20 (last visited Oct.5, 2019).

79. *Id*.

80. *WCAG 2.1 at a Glance*, WEB ACCESSIBILITY INITIATIVE, https://www.w3.org/WAI/standards-guidelines/wcag/glance/(last visited Oct.5, 2019).

81. *Id*.

82. *Id*.

83. Pulliam, *supra* note 3.

84. *Id*.

85. *See id*. (describing the "predatory" litigation that has been brought forth).

86. Pellechia, *supra* note 17.

87. Robles v. Domino's Pizza, No. 16-06599, 2017 U.S. Dist. LEXIS 53133 at *1 (C.D. Cal. Mar. 20, 2017).

reversed by the Ninth Circuit Court of Appeals). The only known courts that required a company to implement specific standards, the WCAG, were the Southern District of Florida in *Gil v. Winn-Dixie* and the Ninth Circuit Court of Appeals in *Robles*.[88] *Gil* is pending decision from the Eleventh Circuit Court of Appeals.[89] In *Robles*, the Ninth Circuit said that it was not unconstitutional to require a company to adhere to the WCAG because the Constitution just requires "legal notice" of the need to be ADA compliant, rather than a specific "blueprint" of how to become compliant.[90]

III. ANALYSIS

The issue of website accessibility has produced an abundance of litigation with inconsistent results because of both the circuit split about Title III coverage and the lack of clear standards for website accessibility.[91] Those inconsistent results, in turn, further compound both problems. There is no end in sight for the litigation flood because there are no concrete or binding guidelines for a company to follow in order to make its website completely ADA Title III compliant and ensure it avoids future litigation.[92] Companies should be using the money they spend litigating ADA Title III lawsuits to fix their websites for the blind and conform to WCAG as much as possible.

On the other hand, although excessive litigation is problematic to companies, the flood of federal lawsuits is positively publicizing the needs of the visually impaired.[93] It is especially important to make sure that everyone understands the importance of all people being able to perform the everyday tasks required by the increasingly digital world, regardless of disability or non-disability status. Also, since visual impairment affects approximately 8.1 million people, it is not a miniscule amount of people for which companies would be adapting.[94]

Since many functions of companies are now online, companies are realizing the essential nature of making sure that all aspects of their business are as accessible to the public as possible.[95] Thus, companies should be acting as if the "full accessibility" approach is the law. However, it needs to be made clearer

88. *Id*.; Gil v. Winn-Dixie Stores, 257 F. Supp. 3d 1340, 1351 (S.D. Fla. 2017).

89. Kristina M. Launey, *Robles v. Domino's: Engaged Ninth Circuit Hears Web Access Appeal*, SEYFARTH SHAW LLP (Oct. 12, 2018), https://www.adatitleiii.com/2018/10/robles-v-dominos-engaged-ninth-circuit-hears-web-access-appeal/.

90. Robles v. Domino's Pizza, 913 F.3d 898 (9th Cir. 2019).

91. *See, e.g.*, Gathers v. 1-800-Flowers.com, Inc., 2018 U.S. Dist. Lexis 22230 (D. Mass Feb. 12, 2018) (dismissing the complaint in accordance with the first-filed rule); Carparts Distribution Center v. Automotive Wholesaler's Ass'n of New England, 7 F.3d 12, 19–20 (1st Cir. 1994) (holding that Title III of the ADA is not limited to physical structures); Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999) (ruling that caps on AIDS care insurance coverage did not violate the ADA); Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28 (2d Cir. 1999) (holding that the ADA does regulate medical insurance underwriting).

92. Pellechia, *supra* note 17.

93. *See* Pulliam, *supra* note 3 (noting the increase in litigation).

94. U.S. Dept. of Commerce, Economic and Statistics Administration, U.S. Census Bureau, *Americans With Disabilities: 2010*, July, 2017.

95. Rieva Lesonsky, *It's 2018. How Can You Not Have a Website Yet?*, SCORE (Sept. 11, 2018), https://www.score.org/blog/its-2018-how-can-you-not-have-website-yet.

to companies what they should do to accommodate their visually impaired consumers both to help people as much as possible and to avoid litigation.[96]

A. Requiring Standing and Proof of Harm

Courts should be more sympathetic towards businesses in ADA Title III website accessibility lawsuits until there are clear guidelines for companies to follow from Congress. Courts should also take quick action to ensure that any predatory or frivolous litigation in this area is halted and controlled. Every circuit should follow the Fourth Circuit Court of Appeals' opinion in *Griffin* and make sure that there is actual injury for standing; if a person is ineligible to use the website's services anyway, he or she should not be able to sue the company for ADA Title III website inaccessibility.[97]

On that level, courts should require more proof of how a plaintiff was harmed, instead of just accepting any and all ADA violations as proof of injury. Mark Pulliam notes that some "ADA Trolls" have been discovered to have only visited the physical location of the store on Google Earth (where the nexus approach is applicable) or haven't even needed the website at all; they were just targeting corporations with "deep pockets" in hopes of collecting a paycheck and attorney fees.[98] This is an unacceptable waste of court resources. The purpose of civil actions in courts is to repair actual legal harms, not to carry out "get rich quick" schemes.[99]

Requiring standing and proof of harm would not be targeting visually impaired plaintiffs who are actually injured and frustrated by their inability to use websites equally. However, it would be targeting plaintiffs' attorneys and plaintiffs who may be manipulating the ADA as a part of a larger money-making scheme. For example, one court suspended the law license of an Austin, TX attorney who filed over 300 of these cases, as well as some frivolous appeals.[100] Other courts should follow this example in order to halt predatory litigation and discourage plaintiff's attorneys from filing hundreds of surf-by suits on behalf of one or two plaintiffs.

B. Resolving the Circuit Split: Toward Full Accessibility

There are many benefits conferred to both companies and visually impaired plaintiffs if courts adopt the full accessibility approach. Most or all people with visual impairments will be able to access the web and use all of the functions available to people without visual impairments.[101] If courts adopt the full

96. Pulliam, *supra* note 3.

97. Griffin v. Dep't of Labor Fed. Credit Union. 2019 U.S. App LEXIS 116 (4th Cir. 2019).

98. Pulliam, *supra* note 35.

99. *Id.*

100. *Lawyers and Businesses Aim to Collect $235,000 from ADA Attorney Omar Rosales*, KXAN NBC (Nov. 8, 2018), https://www.kxan.com/news/local/austin/lawyers-and-businesses-aim-to-collect-235-000-from-ada-attorney-omar-rosales/1581507071.

101. *See, e.g.*, *ADA Guidelines for Web Accessibility: Everything You Need to Know*, ESSENTIAL ACCESSIBILITY (Jul. 21, 2017), https://www.essentialaccessibility.com/blog/ada-guidelines/ ("Over 71% of

accessibility approach, then the ability to use all of the functions of a website will no longer depend on whether one has sight or not. This will ensure that the purpose of the ADA is fulfilled as much as possible; the Internet will be as accessible as possible to both sighted and visually impaired people alike.[102] Also, importantly, there will be no need for further discussion of what websites are exempt from the need to adjust for accessibility, which would prevent future litigation centering around further defining the nexus approach.

Full accessibility only works, however, if there are clear standards. Many suggestions for what standards to implement are readily available on the Internet, even though there is no legal definition of what a fully accessible website looks like. Thus, companies are not entirely clueless about what an accessible website might possibly look like.[103] For example, the WCAG has a website that discusses its standards.[104] Also, there are quite a few blog posts and privately created websites explaining the WCAG and how to implement accessibility.[105] However, even though they can be helpful for understanding what industry standards might look like, blogs have no authority to dictate how companies make changes to their websites.[106] To be sure, even if a company follows WCAG and blog suggestions, there is no law saying *which* changes will protect them from litigation.

It is unclear what it *legally* means to make a website "fully accessible," and it may not be enough to tell a company to follow the WCAG.[107] Expert testimony cited during oral argument in both *Robles* and *Winn-Dixie* suggests that no website in existence is fully accessible or compliant with WCAG 2.0, and that it is currently impossible to fully implement those standards.[108] Therefore, it is ambiguous at this time what the term "fully accessible" means and how to implement full accessibility, even if a court mandates adopting the WCAG.

Also, even if courts decide on the full accessibility approach, the scope of full accessibility and whether a company must modify *all* of its technology to be ADA Title III compliant is also unclear.[109] In addition to the main website, many companies also operate mobile apps that connect with the operations of the store. For example, on the Walgreens app, you can order prescriptions to pick up in-

customers will leave a website that doesn't meet their accessibility needs. On the flip side, four out of five customers with disabilities would spend more if a website's accessibility was improved.").

102. *What is the Americans With Disabilities Act*?, ADA NATIONAL NETWORK, https://adata.org/learn-about-ada; *supra* note 1.

103. *Essential Components of Web Accessibility*, WEB ACCESSIBILITY INITIATIVE (Feb. 27, 2018), https://www.w3.org/WAI/fundamentals/components.

104. *Id*.

105. *Everything You Need to Know*, *supra* note 101.

106. *See, e.g.*, *id*. (explaining the WCAG).

107. Pellechia, *supra* note 17.

108. Kristina N. Launey, *Domino's: Ninth Circuit Hears Web Accessibility Appeal Argument*, SEYFARTH SHAW LLP (Oct. 19, 2018), https://www.adatitleiii.com/2018/10/dominos-ninth-circuit-hears-web-accessibility-appeal-argument.

109. *See, e.g.*, Robles v. Domino's Pizza, No. 16-06599, 2017 U.S. Dist. LEXIS 53133 (C.D. Cal. Mar. 20, 2017) (suggesting that the scope of ADA protection goes beyond websites and applies to mobile apps).

store, or you can upload photos for custom projects that will be made in-store.[110] On the Domino's Pizza app, you can customize your own pizza with your choice of crust, sauce, and toppings, and then you can order your custom pizza for delivery or pick-up.[111] The appellate decision in *Robles v. Domino's Pizza* suggests that the scope of ADA goes beyond just the website and also applies to mobile apps.[112] Thus, companies will need to not only make their main website, but also their mobile apps accessible as well. However, other courts have not commented on the scope of website accessibility to this extent.[113] It is also not clear if "website" means just the company's website, or if it is liable for the accessibility of its third-party advertisers' pop-ups as well.[114]

There additionally may be conflicts between accessibility and security. For example, bank websites often have "timeout" features, which increases the security of a person's online checking account by logging out automatically after a certain period of time.[115] However, this feature may be burdensome to a disabled person who needs more time than a sighted person.[116] In fact, WCAG suggests giving people enough time to access all of the features with their screen reading tools.[117] This might be more time than the average sighted person needs in order to utilize all the functions of the website. At the same time, companies may be unwilling to compromise security to either add more time to this feature or remove the feature altogether.[118] When companies make their websites accessible, they will need to find some kind of common ground that also allows them to maintain security.

Furthermore, a website can be accessed on many different devices, such as computers, mobile phones, and tablets, and it is unclear if a website is required to accommodate the visually impaired on just one device or on all of them.[119] These questions highlight the importance of clearly defining what it means to be fully accessible, and how far a company must go in order to be so.

Another problem of adopting full accessibility before defining clear standards is that getting a professional to implement website changes may be costly.[120] For Winn-Dixie, it was estimated to cost $250,000 to implement the changes.[121] The court determined that it would not be an undue burden for

110. *Walgreens App*, WALGREENS, https://www.walgreens.com/topic/apps/learn_about_mobile_apps.jsp (last accessed Sept. 24, 2019).

111. *Domino's Android App*, DOMINO'S, https://www.dominos.com.au/inside-dominos/technology/android-app (last accessed Sept. 24, 2019).

112. Robles v. Domino's Pizza, 913 F.3d 898, 911 (9th Cir. 2019).

113. See Pulliam, *supra* note 3 (commenting on rules which the ADA applies to websites have not been clearly outlined by the courts).

114. *Id*.

115. *See* Pulliam, *supra* note 3 ("[B]ank websites . . . often employ timers that will shut down an online session for security reasons after a particular time period is exceeded.").

116. *See id*. ("Such "timeouts" could present problems for some disabled users, but eliminating them in the interest of accessibility could impair security for all.").

117. *WCAG 2.1 At a Glance*, WEB ACCESSIBILITY INITIATIVE, https://www.w3.org/WAI/standards-guidelines/wcag/glance (last accessed Oct. 5, 2019).

118. *Id*.

119. Pulliam, *supra* note 3.

120. *Id*.

121. Gil v. Winn-Dixie Stores, 257 F. Supp. 3d 1340, 1345 (S.D. Fla. 2017).

Winn-Dixie to spend the $250,000 to successfully make their website accessible.[122] For a smaller company, the $250,000 to fix a website may not be feasible, and it may be forced to shut down its online presence or impede its operations significantly.[123] Therefore, forcing everyone to implement these changes may not be possible from a financial standpoint, unless the government helps to fund website accessibility or lowered standards for smaller companies.

The nexus approach to the definition of a "place of public accommodation," on the other hand, comes with upsides that the full accessibility approach does not have. Under the nexus approach, a "place of public accommodation" in ADA Title III is a physical location; in order for Title III to apply to a website, there must be a connection between the function of the website and the physical location of the store.[124] Small companies who operate online-only will be exempt from ADA Title III claims and will not be burdened by these lawsuits.[125] Thus, adopting the nexus approach would decrease the courts' massive flood of "surf-by" lawsuits by exempting companies like Facebook, Twitter, Instagram, YouTube, etc. that do not have physical presences.[126] To be clear, physical presences are the places where the service or good is sold and does not include mere offices where customers do not go; thus, the fact that Facebook has a physical office space does not disqualify it from exemption under the nexus approach.[127] However, making this distinction would not eliminate the "surf-by" lawsuits completely because there are still a high number of companies with both a physical and online presence for customers.[128]

The nexus approach also suggests some easier solutions to implement for accessibility, such as a telephone number to call to help the visually impaired perform all of the functions on the website.[129] In the district court opinion of *Robles v. Domino's Pizza*, the court suggests that because the telephone line allows a visually impaired person to do everything that a person with full vision can do on the website, that should be enough to be ADA Title III compliant.[130] This would be a much more cost-effective solution that still ensures that all people can access the same information.[131] However, a telephone line would not be an acceptable final solution because it would mean that visually impaired customers have to spend time on the phone instead of navigating the website. It would not be entirely fair to the visually impaired population to settle for easier, cop-out solutions when better solutions exist. Yet for companies with limited

122. *Id.*
123. Pulliam, *supra* note 3.
124. Andrews v. Blick Art Materials, 268 F. Supp 381, 389 (E.D.N.Y. 2017).
125. *See, e.g.*, Young v. Facebook, Inc., 790 F. Supp. 2d 1110, 1116 (N.D. Cal. 2011) ("Facebook's internet services thus do not have a nexus to a physical place of public accommodation for which Facebook may be liable under the statute.").
126. *Id.* at 1115.
127. *Id.*
128. Pulliam, *supra* note 3.
129. Robles v. Domino's Pizza, No. 16-06599, 2017 U.S. Dist. LEXIS 53133, at *20 (C.D. Cal. Mar. 20, 2017).
130. *Id*.
131. *See id*. (explaining that a telephone line is enough for a company to be ADA compliant).

funds or companies that are just building their business, it could be a great temporary solution.

One issue with the nexus approach is that social media would not be required to be accessible because it is online-only, so the visually impaired would not necessarily be able to be a part of that movement. Social media is a huge part of everyday life, with over one billion accounts on Instagram, 1.5 billion on WhatsApp, and 2.5 billion on Facebook.[132] Adopting the nexus approach means that social media, which operates only online, is not required to be accessible to the blind.

Some social media platforms have some level of accessibility already; for example, one visually impaired blogger reviewed that YouTube has closed captioning that can be read aloud.[133] Closed captioning is not perfect, as the captions are often very slow and behind the visuals on videos. Even though they have already made some efforts to become more accessible, social media platforms should not be fully exempt from being required to make their websites as accessible to the blind as possible. This way, all people, whether visually impaired or not, can partake.

The other main problem with the nexus approach is that what it truly means for a website to have a "nexus" with a physical location is unclear, especially because under the nexus approach, the requirement of accessibility can apply to some parts of the website and not others. *Target* makes this a little clearer, but it is not binding law on other district courts or higher courts.[134] In that case, the court says that the website must not impede any of the functions that are necessary for the physical store.[135] However, if a function exists just online and there is no connection between the function and the physical store, then there is no requirement to make it accessible to the blind.[136] *Price v. Everglades College* also attempts to clarify this by stating that there needs to be a connection between enjoyment of the good or service and the website, rather than just learning about the good or service.[137] For example, a website impairing one's ability to learn about a school is fine under the nexus approach, as long as it does not interfere with the person's ability to apply to and attend the school.

The logic in *Price* is slightly confusing, though, because learning about goods and services is fundamental to making a choice to purchase or consume the goods and services. People often visit the product's website, as well as read reviews of the product, before making the decision to purchase it. Thus, impairing one's ability to learn about goods and services inherently *does* impair the enjoyment of the goods and services. The distinction therefore does not

132. Sara Salinas, *Peak Social? The Major Social Platforms are Showing a Significant Slowdown in Users*, CNBC (Aug. 8, 2018, 11:21 AM), https://www.cnbc.com/2018/08/08/social-media-active-users-around-the-world.html.

133. *How Accessible Are Photo and Video Sharing Services if You Have a Visual Impairment?*, HENSHAWS (Jul. 28, 2017), https://www.henshaws.org.uk/blog/accessible-photo-video-sharing-services/.

134. Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 956 (N.D. Cal. 2006).

135. *Id.* at 955.

136. *Id.* at 962.

137. Price v. Everglades College, Inc., No. 6:18-cv-492-Orl-31GJK, 2018 U.S. Dist. LEXIS 117629, at *5 (M.D. Fla. Jul. 16, 2018).

make much real sense in practice. However, again, *Price* is just a district court decision and is not binding law or completely reflective of the nexus approach across-the-board.[138]

The fact that the nexus approach has quite a bit of uncertainty as to its application would mean that, if it was adopted, the flood of litigation would probably not stop. Courts would continue to attempt to clarify what specifically the connection has to be between the physical store and the online function. It cannot be understated that because of this lack of clarity, there is a huge importance for swift legislative guidance.

Between the full accessibility and nexus approaches, the full accessibility approach is preferable because it means that people with visual impairments are able to use the web as much as possible, regardless of whether or not there is a physical store connected to the website or certain functions of the website; this also ensures that people are able to use online-only sites like e-Bay, Blue Apron, and Instagram as much as people without visual impairments. Adopting full accessibility would be in line with the overarching goal of the ADA, that all people with disabilities are able to have equal enjoyment of goods and services just as people without disabilities have.

The full accessibility approach is also superior to the nexus approach because it is clearer to say that ADA Title III applies to all websites, rather than relying on courts to try to determine what constitutes a "nexus" between a physical store and a website or a website's functions.[139] Adopting the nexus approach could just invite courts to continue litigating in search of narrowing the legal question of what the "nexus" means under Title III; this would not solve the excessive litigation problem. Additionally, it is best to be as accessible to as many people as possible, for both online-only operations and physical stores with a website. If companies have issues with certain aspects of the website, such as the security "time-out," or if they want to accommodate the colorblind, then one suggestion is to create an alternative version of the website that is specifically blind-accessible.

However, companies need to be cautious if they elect to use an alternative version of their original website in order to comply with Title III in order to be fully accessible.[140] The Department of Transportation stated that Scandinavian Air Systems' (SAS) use of an alternative website, although it may have been compliant under Title III, was in violation of the Air Carrier Access Act (ACAA).[141] The ACAA requires that all pages on the airlines' *primary* website be accessible; using an alternative website does not ensure the compliance of the primary website.[142] SAS was fined $100,000 under a Consent Order and will

138. *Id.*

139. *See* Vu & Ryan, *supra* note 15 ("[T]he best risk mitigation effort for covered entities is still to make their websites accessible as soon as possible . . . .").

140. Minh Vu & Kristina Launey, *Airlines' Provision of Alternative Accessible Website Triggers Hefty Fine Under the Air Carrier Access Act* (Dec. 28, 2018), https://www.adatitleiii.com/2018/12/airlines-provision-of-alternative-accessible-website-triggers-hefty-fine-under-the-air-carrier-access-act/.

141. *Id.*

142. *Id.*

have to pay another $100,000 if it does not fix the problem.[143] Thus, although the ACAA applies to airlines and not all places of public accommodation, companies must check very carefully to make sure that using an alternative website is acceptable under the laws of their industry.

Overall, because it would allow people, regardless of visual ability, to access the Internet, the Supreme Court should elect to take an ADA Title III website case and adopt the full accessibility approach. However, it would be ideal to do this once Congress adopts clear guidelines or amends the ADA to instruct the DOJ to do so because it would eliminate the need for clarification of what accessibility looks like.

C. The Need for Clear Guidelines for Website Accessibility

Even though full accessibility is preferable, neither adopting the nexus approach nor adopting the full accessibility approach is a completely sufficient solution to protect companies from the influx of ADA Title III surf-by lawsuits, at least until there are proper regulations from Congress. Given the 2,250-plus lawsuits filed in 2018 and that the numbers are just increasing, it is evident that the court system, people with visual impairments, corporations, and corporate attorneys all need a permanent solution to halt this surf-by lawsuit trend.[144] One author dubbed this "predatory litigation" and pointed out that it does not accomplish much more than enriching a small number of plaintiff's attorneys and their clients.[145]

To be sure, even if courts or Congress clarify which websites need to be accessible, it still then has to be clarified what "accessible" actually means. ADA Title III does not outline what it means for a website to be accessible to the visually impaired; in fact, the statute does not mention websites at all.[146] The DOJ says that ADA Title III applies to websites, but it does not specify how or to what extent.[147] In the DOJ's letter to members of Congress who asked for further clarification on this issue, Assistant Attorney General Stephen E. Boyd wrote, "[t]he Department first articulated its interpretation that the ADA applies to public accommodations' websites over 20 years ago . . . public accommodations have flexibility in how to comply with the ADA's general requirements of nondiscrimination and effective communication. Accordingly, noncompliance with a voluntary technical standard for website accessibility does not necessarily indicate noncompliance with the ADA."[148] The DOJ also made it clear that the initiative will have to come from Congress.[149] However, legislation is a very slow process, so it will likely be a long time before Congress

143. *Id.*

144. *See* Vu & Ryan, *supra* note 15 (stating that an amendment to the Americans with Disabilities Act would be the only permanent solution to website accessibility lawsuits).

145. Pulliam, *supra* note 3.

146. 42 U.S.C. § 12182 (1990).

147. Letter from Stephen E. Boyd, Assistant U.S. Attorney General, to Ted Budd, U.S. House of Representatives (Sept. 25, 2018), https://www.adatitleiii.com/wp-content/uploads/sites/121/2018/10/DOJ-letter-to-congress.pdf.

148. *Id*.

149. *Id*.

passes a law clarifying what companies must do to comply with ADA Title III.[150] Business groups and others should push Congress to act.

There are benefits and problems in implementing either the full accessibility or the nexus approaches, as discussed previously. Neither approach is adequate until there is a legal definition of an accessible website under Title III. However, it seems unfair and potentially implicates due process concerns to require a company to comply with nonexistent guidelines, whether or not the website is connected to a physical location.[151] Even if a company is on notice to fix its website, a company should be on notice of what it looks like to fix it in order for these lawsuits to be fair. Also, even if a court mandates applying a set of standards that is currently in existence, such as WCAG, WCAG and other standards are non-governmental and modifiable.[152] Additionally, even if the Supreme Court compelled all companies to follow one approach today, there are still a lot of lingering, unanswered questions such as whether accessibility applies just to websites or if it applies also to mobile apps.[153] Thus, the problem of the flood of litigation would not be solved and the trend of surf-by lawsuits would continue.

Another issue is that trying to figure out how to make a website accessible without guidelines can be an "undue burden" for companies that don't have the money or resources of a large corporation like Winn-Dixie.[154] While the court determined that $250,000 was not a financial burden for Winn-Dixie, smaller and newer businesses may be unable to pay such an amount.[155]

This could potentially discourage the creation and maintenance of small businesses, especially because the Internet is increasingly important to running a business. For example, *Massage Magazine* tells the story of Stewart Cirolo, a massage therapist with a small business in Miami Beach, Florida.[156] A visually impaired plaintiff, who was unable to read his website, sued him for $10,000.[157] Cirolo said, "[i]t was a nightmare . . . this could have put me out of business."[158] To avoid huge legal fees, he settled the lawsuit outside of court.[159] Other businesses may hear anecdotes like Cirolo's and be discouraged from either creating a website for the business or creating a small business in the first place, out of fear of losing money to ADA settlements or lawsuits.

The article in *Massage Magazine* recommends that small business owners hire companies to make sure their websites are compliant; however, again, this

150. *Id*.

151. *See* Robles v. Domino's Pizza, No. 16-06599, 2017 U.S. Dist. LEXIS 53133, *16–17 (C.D. Cal. Mar. 20, 2017) (arguing that requiring a website to comply with ADA Title III without guidelines from Congress or the DOJ violates due process).

152. *Id*. at *24.

153. Pulliam, *supra* note 3.

154. *See* Gil v. Winn-Dixie Stores, 257 F. Supp. 3d 1340, 1350–51 (S.D. Fla. 2017) (adopting the approach that the "industry standard" for ADA Title III accessibility is the WCAG 2.0).

155. *Id*.

156. Aiyana Fraley, *What You Don't Know About ADA Compliance Could Cost You–Big Time*, MASSAGE MAGAZINE (Nov. 15, 2018), https://www.massagemag.com/ada-compliance-108374/.

157. *Id*.

158. *Id*.

159. *Id*.

approach can become expensive and impractical for small business owners who do not have the financial means of larger corporations.[160] This problem further highlights the importance of creating guidelines before adopting the full accessibility or nexus approach. The author of the article, Aiyana Fraley, also gives suggestions for implementing the changes without hiring anyone, but it might be an extreme, undue burden to require business owners to become ADA website compliance experts in addition to running their business.[161] Even so, since there are no guidelines, none of these steps guarantee protection from future litigation. Even though Fraley tells small business owners that "you should be good" if you take certain steps, "you should be good" is not 100% assurance that the business will not be hit with an expensive lawsuit.[162] Therefore, small business owners may be discouraged from having any Internet presence at all, which would only serve to hurt their businesses.

As Judge Otero suggests in the district court opinion of *Robles v. Domino's Pizza*, it is a violation of the fundamental constitutional principle of due process to require companies to comply with standards that do not legally exist.[163] The plaintiff in *Robles* sought to have Domino's comply with the WCAG.[164] However, at the district court level, the court dismissed the suit because while the WCAG is a particular set of standards, it is not fully identified, and is not issued by the government.[165] The court also said that solving the issue of web accessibility "require[s] both expertise and uniformity in administration . . . The Court concludes by calling on Congress, the Attorney General, and the Department of Justice to take action to set minimum web accessibility standards for the benefit of the disabled community, those subject to Title III, and the judiciary."[166] Since no action has been taken by any of them, the court cannot proceed further and legislate for them.

Judge Otero's reasoning is sound; the judicial system should not force companies to adhere to standards that are not legally issued by Congress or the DOJ because doing so would be outside the scope of the court.[167] To be sure, the judicial system should not perform legislative functions because it would be a serious breach of separation of powers.[168] Thus, Congress and the DOJ taking swift action in this area is of utmost importance.

The appellate court, however, did not accept Judge Otero's reasoning, and it reversed and remanded the case for more factual findings.[169] The court

160. *Id*.
161. *Id*.
162. Pulliam, *supra* note 3.
163. Robles v. Domino's Pizza, No. 16-06599, 2017 U.S. Dist. LEXIS 53133 at *18 (C.D. Cal. Mar. 20, 2017).
164. *Id.* at *2.
165. *Id.* at *25–26.
166. *Id.* at *26.
167. *See id.* at *25–26 ("Such regulations and technical assistance are necessary for the Court to determine what obligations a regulated individual or institution must abide by in order to comply with Title III.").
168. *See id.* at *26 ("Calling on Congress, the Attorney General, and the Department of Justice to take action to set minimum web accessibility standards for the benefit of the disabled community, those subject to Title III, and the judiciary.").
169. Robles v. Domino's Pizza, 913 F.3d 898, 911 (9th Cir. 2019).

rejected Domino's due process argument, saying that the Constitution only requires that a company be put on notice that they need to adjust their standards; there is no need for the law to go as far as providing a blueprint.[170]

This reasoning is flawed. How is one supposed to be "on notice" that he or she need to fix something if he or she does not have any legal guidance on what it looks like when it's fixed or how to fix it? Consider the following analogy. Many people buy IKEA furniture, which requires one to follow a set of blueprints to put pieces together to build an item of furniture that he or she looked at in a model showroom. However, if a person buys an IKEA chair and is both unable to see what the finished product clearly looks like and has no set of instructions, then it is difficult to know where any of the pieces go or what they're supposed to look like in the end. The Ninth Circuit's opinion is the equivalent of saying that having a box of wood planks and screws with a blurry photo of a chair, but no step-by-step instructions, constitutes enough to build a completed chair. Companies don't know exactly what the end product is supposed to look like, and companies also don't entirely know how to build the end product, either.

One could possibly counter Judge Otero's due process argument with the fact that companies are likely aware of non-legal industry standards, as well as the existence of the WCAG; thus, we should expect them to consider non-legal industry standards as a custom of the business. Yet, the problem with solely relying on industry standards is that since web technology is constantly evolving, industry standards are also constantly evolving and are not defined concretely.[171] It may help to define certain things as industry standards, but these need to be concretely defined if we want to preclude predatory, excessive litigation.

It is problematic that there are no clear guidelines outlining what an accessible website is. Before completely adopting the full accessibility approach, these guidelines need to exist. It is unfair to say whether a website must be accessible before we even know what "accessible" means.

D. Short-Term Guidance for Website Sponsors

Even though nothing truly prevents a company from being subject to ADA Title III website litigation at the present moment, there are a few steps that companies can take to minimize the damage and try to protect themselves as much as possible.[172] While there are currently no legislative standards for companies to adopt in order to make their websites accessible, companies with an online presence, especially those with brick and mortar stores, should set aside extra money in the budget for ADA Title III lawsuits, if it is practical for them to do so.[173] This way, when they are hit with a lawsuit, they will have budgeted for it and are not scrambling to come up with funds to defend themselves and pay hefty settlements. This will avoid situations like Mr.

170. *Id.* at 908.
171. *Id.*
172. *Id.*
173. *Id.*

Cirolo's where small business owners fear being put out of business because of having to either settle with plaintiffs or litigate these lawsuits.[174] Businesses should also make ADA Title III lawsuits a part of insurance plans, if possible, in order to minimize the overall cost spent on defending these suits.[175]

Additionally, companies should hire experts to make their websites more accessible and as in line with WCAG as possible.[176] Making a website more accessible would ensure that more visually impaired people can access all the functions of the website.[177] It would also minimize a plaintiff's ability to say that the website is incompatible with screen reader tools and make the court more likely to sympathize with companies.[178] Yet, at the same time, it is important to consider that a company could spend money on accessibility, but lose a lawsuit for following the "wrong" standards, since nothing is concrete by law.

Hiring an expert and fixing a website, however, can be costly and an undue burden to some companies that are not as large as Winn-Dixie.[179] Yet, to avoid further litigation, it is probably necessary for companies to take that step if it is at all within their means. The Web Accessibility Initiative, as well as some blogs, outline what standards for accessible websites look like, even though none of the standards are mandated by US law for private companies except for airlines.[180] Companies should exercise due diligence and check their industry's laws before utilizing an alternative, text-only version of the primary website as a solution, since industry laws may forbid this.[181]

At a bare minimum, while setting aside funds to fix the website, companies should have a 24/7 phone line to assist visually impaired customers in performing functions that are not currently accessible via screen reader technology.[182] This will reduce actual injury to customers because they will still be able to perform all functions that sighted people can before companies have the funds and the means to fix their websites.[183] However, over time, companies should try to make their websites as accessible as possible so that visually impaired people can utilize the web functions without having to be assisted over

174. *See* Fraley, *supra* note 156 (noting Mr. Cirolo's fear of losing his business to ADA Title III website litigation).

175. *See id*. (discussing a $10,000 lawsuit filed against Cirolo).

176. *See, e.g*., Gil v. Winn-Dixie Stores, 257 F. Supp. 3d 1340 (S.D. Fla. 2017); Fraley, supra note 156; Pulliam, *supra* note 3 (discussing costs of having consultants investigate accessibility matters).

177. *See generally* Pulliam, *supra* note 3 (discussing what accessible websites bring to impaired individuals).

178. *See, e.g.*, Haynes v. Hooters of Am. LLC, 893 F.3d 781, 784 (11th Cir. 2018) (holding that a second plaintiff's lawsuit on ADA Title III website inaccessibility was not moot even though the company had already settled and had a remediation plan in place to fix its website).

179. *See generally* Gil v. Winn-Dixie Stores, 257 F. Supp. 3d 1340, 1343–47 (S.D. Fla. 2017) (discussing potential costs associated with hiring experts to make websites more accessible).

180. *Essential Components of Web Accessibility*, WEB ACCESSIBILITY INITIATIVE (Feb. 27, 2018), https://www.w3.org/WAI/fundamentals/components/.

181. Minh Vu & Kristina Launey, *Airlines' Provision of Alternative Accessible Website Triggers Hefty Fine Under the Air Carrier Access Act* (Dec. 28, 2018), https://www.adatitleiii.com/2018/12/airlines-provision-of-alternative-accessible-website-triggers-hefty-fine-under-the-air-carrier-access-act/.

182. *See* Robles v. Domino's Pizza, No. 16-06599, 2017 U.S. Dist. LEXIS 53133, *3 (C.D. Cal. Mar. 20, 2017) (explaining the phone line to assist visually impaired customers).

183. *See id.* at *18 (stating this phone line satisfies obligations under the ADA for disabled persons).

the phone or wait for a call back. To be clear, the purpose of the ADA is for people with disabilities to equally enjoy public accommodations, and a telephone line would not constitute equal enjoyment.

If the worst does happen and a company is hit with an ADA Title III lawsuit, then it should take steps to be understanding of what circuit it has been sued in, so it can have an idea of how litigation may pan out. Companies also need to be aware that it is not enough to pay one plaintiff a settlement and call the issue over with, as companies can be sued for this issue multiple times.[184] It is best to make the website as accessible as possible and take any concrete steps recommended by courts to avoid this.

IV. CONCLUSION

In order to preserve valuable court resources and save businesses from further lawsuits and high settlement costs, Congress or the Department of Justice needs to establish concrete guidelines regarding what specifically constitutes proper website accessibility under Title III. There also needs to be a clearer court decision about whether this applies to all websites, specific websites that have a nexus to physical stores, or just certain functions of websites that connect to physical stores. It also needs to be clarified whether a company is liable for just its own website, or if it is liable for the accessibility of mobile apps and third-party advertisements. Because this is such a prevailing issue, given that thousands of lawsuits are being filed and companies operate websites that are accessed in all fifty states, a circuit split is highly counterproductive. Therefore, the Supreme Court should elect to listen to an ADA Title III website accessibility case in the near future and decide between the nexus and full accessibility approach. It is disappointing that the *Robles v. Domino's Pizza* petition for certiorari was denied, but hopefully the Supreme Court will accept an ADA Title III website accessibility case in the future and provide clarification.[185]

It would be a better idea for courts to adopt the full accessibility approach rather than the nexus approach to define a "place of public accommodation," in order to ensure that everyone can equally access the web, whether they have full vision or are using screen reader tools. Until that happens or until Congress concretely outlines what an accessible website is, however, courts should stay or dismiss ADA Title III cases that pertain to website accessibility. ADA Title III as it currently is written is too broad and gives companies no real guidance as to what makes a website accessible and how they can protect themselves from Title III lawsuits. Even if the ADA gives companies notice that they need to have accessible websites, it does not give notice of how to be accessible. It is simply unfair for a corporation to be forced to pay for not complying with nonexistent standards.

184. *See id.* (finding that the plaintiff was entitled to a one-time financial settlement).

185. Minh N. Vu, *Domino's to Ask Supreme Court to Consider Whether ADA Website/Mobile App Accessibility Lawsuits Violate Due Process*, SEYFARTH SHAW LLP (Mar. 21, 2019), https://www.adatitleiii.com/2019/03/dominos-to-ask-supreme-court-to-consider-whether-ada-website-mobile-app-accessibility-lawsuits-violate-due-process/; Tucker Higgins, *Supreme Court Hands Victory to Blind Man Who Sued Domino's Over Site Accessibility*, CNBC (Oct. 7, 2019), https://www.cnbc.com/2019/10/07/dominos-supreme-court.html.