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ARJETA ALBANI\*

## Equality in the Age of the Internet: Websites under Title III of the Americans with Disabilities Act

### I. INTRODUCTION

The Americans with Disabilities Act of 1990<sup>1</sup> (“ADA”) was enacted before the internet took root in people’s everyday lives.<sup>2</sup> Since the ADA was enacted, the internet changed the way people learn, shop, spend their leisure time, and run their businesses. The kinds of technological advances that made it possible for the internet to grow also made it possible for people with disabilities to enjoy things that they were otherwise unable to enjoy.<sup>3</sup> People with disabilities can access computers and use the internet in ways that were previously impossible with the use of assistive technology, such as screen readers, screen magnification, speech recognition, and subtitles for videos.<sup>4</sup> However, despite the existence of these assistive technologies, there remains a “digital divide,”<sup>5</sup> which excludes some individuals with disabilities from accessing some or all aspects of a website because the website programmers

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\* J.D. Candidate, University of Maryland Francis King Carey School of Law, 2018; B.A., The College of New Jersey, 2015. All opinions, errors, omissions, and conclusions in this Comment are my own.

1. 42 U.S.C. § 12101 (2012).

2. Ali Abrar & Kerry J. Dingle, *From Madness to Method: The Americans With Disabilities Act Meets the Internet*, 44 HARV. C.R.-C.L. L. REV. 133, 133 (2009) (“In 1991, just one year after the ADA was signed into law, researcher Tim Berners-Lee created the world’s first web server, web browser, and web site.”).

3. See Laura Wold, *Equal Access in Cyberspace: On Bridging the Digital Divide in Public Accommodations Coverage through Amendment to the Americans with Disabilities Act*, 91 NOTRE DAME L. REV. 447, 449 (2015); see also Andrew G. Celli, Jr. & Kenneth M. Dreifach, *Postcards from the Edge: Surveying the Digital Divide*, 20 CARDOZO ARTS & ENT. L.J. 53, 53–54 (2002).

4. Applicability of the Americans With Disabilities Act (ADA) to Private Internet Sites: Hearings Before the House Subcomm. on the Constitution of the House Comm. on the Judiciary, 106th Cong. 48 (2000) (testimony of Prof. Peter David Blanck). “The preliminary findings illustrate, but do not yet prove, that the ADA fosters future technological innovation and economic activity in the private Internet-based service industry, in many ways unanticipated at the time that the law was passed. As e-commerce markets and initiatives for goods and services expand, inventors, manufacturers, retailers, and employers are responding to meet the needs of consumers with disabilities, those who may become disabled in the future, and the elderly. The untapped accessible web-based “e-commerce” marketplace holds vast profit-making opportunities.” *Id.*

5. Celli, Jr. & Dreifach, *supra* note 3, at 53–54.

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did not create the website to work with assistive technologies.<sup>6</sup> For example, screen readers cannot work properly to describe the page to users unless web site programmers properly encode image descriptions.<sup>7</sup>

Often, websites are designed without regard for assistive technology and the need to present information to disabled users.<sup>8</sup> Because of this inadequacy, many lawsuits addressing whether companies are required to make their websites accessible to people with disabilities have been filed.<sup>9</sup> These suits hinge on the issue of whether a business' website is covered under Title III of the ADA's (Title III)<sup>10</sup> definition of "public accommodation."<sup>11</sup> Currently, there is a circuit split on the issue. Some courts hold that the definition of public accommodation is limited to physical locations and the only way that a website can be covered is if a sufficient nexus exists between the website and a physical location.<sup>12</sup> Other courts hold that the definition of public accommodation is not limited to physical locations, allowing websites to be covered under Title III, regardless of whether a sufficient nexus exists.<sup>13</sup> Applying the ADA's text, legislative history, and Congressional intent, this comment suggests that the latter interpretation is correct and that websites are places of public accommodation under Title III.

The Department of Justice ("DOJ") has taken the position that websites are covered under the ADA.<sup>14</sup> The DOJ is expected to issue proposed regulations supporting this position in 2018.<sup>15</sup> However, the DOJ's position is not binding on the courts until those regulations have passed.<sup>16</sup> The inconsistent judicial application of Title III to websites highlights the necessity for formal regulations that will create

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6. Wold, *supra* note 3, at 449.

7. Abrar & Dingle, *supra* note 2, at 146.

8. See Wold, *supra* note 3, at 449.

9. See *infra* Part III.

10. 42 U.S.C. § 12181 (2012).

11. *Id.*

12. Benjamin S. Briggs & Cynthia Sass, *Websites and Mobile Applications: Do They Comply with Title III of the Americans with Disabilities Act?*, 90 FLA. B.J. 40, 42 (2016) (citing *Access Now v. Southwest Airlines*, 227 F. Supp. 2d 1312, 1321 (S.D. Fla. 2002)).

13. *Id.* at 43.

14. See Anne Marie Estevez et. al. *DOJ Delays ADA Regulations for Accessibility of Private Websites To 2018*, NAT'L L. REV. (Dec. 7, 2015) <http://www.natlawreview.com/article/doj-delays-ada-regulations-accessibility-private-websites-to-2018#sthash.i8mbeR2w.dpuf>.

15. Deeva V. Shah, *Web Accessibility for Impaired Users: Applying Physical Solutions to Digital Problems*, 38 HASTINGS COMM. & ENT. L. J. 215, 236 (2016).

16. *Id.*

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uniformity across the country. However, the Trump Administration poses serious problems for not only the DOJ website regulations, but all future regulations.<sup>17</sup>

Part II of this comment discusses the text and legislative history of the ADA and explains what Congress intended when passing the ADA. Part III of this comment discusses the circuit split regarding whether websites are covered under Title III. This paper lays out different judicial approaches to interpreting Title III, and the potential issues of each approach. Part IV of this comment discusses the DOJ's need for Title III website regulations, what the regulations will likely include, and the probability of the regulations passing under the Trump Administration.

## II. TITLE III OF THE AMERICANS WITH DISABILITIES ACT

The stated purpose of the ADA<sup>18</sup> is to provide a “national mandate for the elimination of discrimination against individuals with disabilities” because people with

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17. Gregory Korte, *Trump Orders Two-For-One Repeal of All New Regulations*, USA TODAY (Jan. 30, 2017), <http://www.usatoday.com/story/news/politics/2017/01/30/trump-orders-two—one-repeal-all-new-regulations/97237870/>.

18. See 42 U.S.C. § 12101 (2012). Congress finds that:

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older; (2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem; (3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services; (4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination; (5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities; (6) *census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally*; (7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society; (8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and (9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and non-productivity.

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disabilities previously had little legal recourse against discrimination.<sup>19</sup> The ADA was created to protect the rights of individuals with disabilities in a variety of circumstances.<sup>20</sup> Specifically, Title III protects individuals from discrimination by private entities that fall under Title III's definition of places of public accommodation.<sup>21</sup> Title III states 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>22</sup> Private entities are considered places of public accommodation if their operations affect commerce and they are one of the following:

- (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 entertainment;
- (D) an auditorium, convention center, lecture hall, *or other* place of public gathering;
- (E) a bakery, grocery store, clothing store, hardware store, shopping center, *or other* sales or rental establishment;
- (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or 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;

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*Id.* (emphasis added)

19. *Id.* § 12101(a)-(b).

20. *Id.*

21. *Id.* § 12181.

22. *Id.* § 12182(a).

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- (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>23</sup>

Compliance with Title III's nondiscrimination mandate requires places of public accommodation to provide auxiliary aids and services to individuals with disabilities in order to prevent them from being excluded, denied services, segregated or otherwise treated differently.<sup>24</sup> Auxiliary aids and services include, but are not limited to, "qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments."<sup>25</sup>

Once a private entity is considered a place of public accommodation, the ADA mandates that the entity comport with Title III.<sup>26</sup> Congress created an extensive list of places of public accommodation with a catchall, "other similar entities," phrase at the end of each enumeration.<sup>27</sup> The courts are split on whether the catchall phrase creates ambiguity in the statute or if the text of the statute is sufficiently clear on its face.<sup>28</sup> This is important because when the text of a statute is ambiguous, "[e]xtrinsic materials. . . shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms."<sup>29</sup> The ADA's legislative history provides insight to understand the meaning of the catchall phrase within Title III's definition of public accommodation.<sup>30</sup>

Congress included the catchall phrase to guard against a narrow judicial interpretation that would allow for public accommodations to include only those enumerated in the ADA.<sup>31</sup> A Senate report explains, "[t]he Committee intends that the 'other similar' terminology should be construed liberally consistent with the intent of the legislation that people with disabilities should have equal access to the array of establishments that are available to others who do not currently have

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23. 42 U.S.C. § 12181(7) (emphasis added). "The list of categories of places of public accommodation is exhaustive, but what types of accommodation fall under each category are not. The list itself simply provides a breadth of examples of what may fall under the ADA requirements to remove barriers to access." Shah, *supra* note 15, at 218.

24. 42 U.S.C. § 12182 (b)(2)(A)(iii).

25. *Id.* § 12103(1)(B).

26. *Id.* § 12182.

27. *Id.* § 12181(7).

28. Nat'l Fed'n of the Blind v. Scrib'd Inc. (*Scrib'd Inc.*), 97 F. Supp. 3d 565, 567–68 (D. Vt. 2015).

29. Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005).

30. Michael O. Finnigan, Jr., Brian C. Griffith & Heather M. Lutz, *Accommodating Cyberspace: Application of the Americans with Disabilities Act to the Internet*, 75 U. CIN. L. REV. 1795, 1802 (2007).

31. *Id.* at 1814.

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disabilities.”<sup>32</sup> The “other similar” terminology was included because “discrimination against people with disabilities is not limited to specific categories of public accommodations.”<sup>33</sup> “The [ADA’s] goal is ‘full participation in and access to all aspects of society.’”<sup>34</sup>

Although the internet was not as integral a part of everyday life as it is today, Congress anticipated the need for the protections of the ADA to evolve with changing technologies.<sup>35</sup> Representative Nadler stated Congress’s intention aptly:

*[W]e were not communicating by e-mail, blog, or tweet; we were not filling virtual shopping carts with clothes, books, music, and food; we weren’t banking, renewing our driver’s licenses, paying taxes or registering for and taking classes online. Congress could not have foreseen these advances in technology. Despite Congress’ great cognitive powers, it could not have foreseen these advances in technology which are now an integral part of our daily lives. Yet Congress understood that the world around us would change and believed that the nondiscrimination mandate contained in the ADA should be broad and flexible enough to keep pace.*<sup>36</sup>

The ADA’s text and legislative history demonstrate that Congress intended the ADA to encompass future technological advancements. However, despite the seemingly clear intent of Congress, contention remains within the courts about how broadly the definition of public accommodations should be interpreted.

## III. CIRCUIT SPLIT

The circuit split surrounding the issue of whether websites are places of public accommodation evolved from an earlier, similar dispute over whether places of public accommodations necessarily require a physical location.<sup>37</sup> The most prevalent

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32. S. REP. NO. 101–116, at 157 (1990).

33. Nat’l Fed’n of the Blind v. Scrib’d Inc. (*Scrib’d Inc.*), 97 F. Supp. 3d 565, 573 (D. Vt. 2015) (citing H.R. REP. NO. 101–485(II), at 35 (1990)).

34. *Id.* at 573 (citation omitted).

35. H.R. REP. NO. 101–485(II), at 108 (1990) (“[T]he Committee intends that the types of accommodation and services provided to individuals with disabilities, under all of the titles of [the ADA], should keep pace with the rapidly changing technology of the times.”).

36. See *Achieving the Promises of the Americans with Disabilities Act in the Digital Age—Current Issues, Challenges and Opportunities: Hearing before the H. Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the House Comm. on the Judiciary*, 111th Cong. 111–95 (2010) (statement of Rep. Nadler).

37. See Shah, *supra* note 15, at 225.

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cases to address this question were those involving insurance policies.<sup>38</sup> When addressing websites as places of public accommodation, contemporary courts often cite earlier insurance cases that decided whether public accommodations were limited to physical locations.<sup>39</sup>

The new era of public accommodation cases emerged in response to the growth of the Internet and dealt with Title III's applicability to websites. The courts are currently split on whether websites are places of public accommodation.<sup>40</sup> The first group of courts has held that places of public accommodation are limited to websites that have a nexus to a physical location.<sup>41</sup> These court relied on the text of the definition of public accommodations, focusing primarily on the language that public accommodations are *places*.<sup>42</sup> The second group of courts has held that websites are places of public accommodation, without the need for a nexus test.<sup>43</sup> The latter group of courts' broad interpretation of Title III is more consistent with the stated purpose of the ADA.<sup>44</sup>

*A. Websites are Not Places of Public Accommodation Unless There is a Nexus with a Physical Location*

Several courts have interpreted the definition of public accommodation narrowly to require public accommodations to be physical places, but that websites may still be subject to Title III if there is a nexus between the website and a physical place of public accommodation.<sup>45</sup> The nexus approach was first adopted to address whether places of public accommodation are limited to physical locations, primarily in the insurance context.<sup>46</sup> Under the nexus approach, "the ADA might apply to an activity or service if a nexus exists between the challenged service and a physical place of

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38. The cases involving insurance policies provided the framework through which the courts analyzed websites; a circuit split existed as to whether, and how, the nexus test applied in those cases. *See, e.g.*, *Palozzi v. Allstate Life Ins. Co.*, 198 F.3d 28 (2d Cir. 1999); *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998); *Parker v. Metro Life Ins. Co.*, 121 F.3d 1006 (6th Cir. 1997); *Weyer v. Twentieth Century Fox Film Corp.* 198 F.3d 1104 (9th Cir. 2000); *Rendon v. Valley Crest Prod. Ltd.*, 294 F.3d 1279 (11th Cir. 2002); *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994); *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999).

39. *See Shah, supra* note 15, at 225.

40. *Finnigan, Jr., Griffith & Lutz, supra* note 30, at 1812.

41. *Briggs & Sass, supra* note 12, at 42.

42. *Id.*

43. *Id.*

44. *Id.*

45. *See, e.g.*, *Nat'l Fed. of the Blind v. Target Co.*, 452 F. Supp. 2d 946 (N.D. Cal. 2006); *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110 (N.D. Cal. 2011); *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532 (E.D. Virginia 2003); *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017 (N.D. Cal. 2012).

46. *See, e.g.*, *Palozzi*, 198 F.3d 28; *Parker*, 121 F.3d 1006; *Weyer*, 198 F.3d 1104; *Rendon*, 294 F.3d 1279; *Carparts*, 37 F.3d 12; *Doe*, 179 F.3d 557.



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public accommodation.”<sup>47</sup> A nexus exists when a website serves “as a conduit to the provision of goods and services offered by the physical places of public accommodation enumerated in the statute.”<sup>48</sup> Because websites can only be subject to Title III if a connection exists with a physical location, all of the companies that run exclusively through the Internet are excluded from Title III’s nondiscrimination obligations under the nexus approach.<sup>49</sup>

*i. Judicial Application of the Nexus Test*

One of the first cases to address websites as places of public accommodation was *Access Now, Inc. v. Southwest Airlines Co.*,<sup>50</sup> in which plaintiffs sued Southwest Airlines because its website was inaccessible to blind customers.<sup>51</sup> The Southern District Court of Florida held that the website was not a place of public accommodation because places of public accommodation are limited to physical locations, and no nexus existed between the website and a physical location.<sup>52</sup> The court stated that “because the Internet website, [S]outhwest.com, does not exist in any particular geographical location, [p]laintiffs are unable to demonstrate that Southwest’s website impedes their access to a specific, physical, concrete space such as a particular airline ticket counter or travel agency.”<sup>53</sup> The court relied on the statute’s “standards” purpose, which required that because Congress created “specifically enumerated rights and expressed the intent of setting forth ‘clear, strong, consistent, enforceable standards,’ courts must follow the law as written . . . Here, to fall within the scope of the ADA as presently drafted, a public accommodation must be a physical, concrete structure.”<sup>54</sup> The court warned “to expand the ADA to cover ‘virtual’ spaces would be to create new rights without well-defined standards.”<sup>55</sup> The court also relied on the principle of *ejusdem generis*, which states “where general words follow a specific enumeration of persons or things, the general words should be limited to persons or things similar to those specifically enumerated.”<sup>56</sup> The court found that because the catchall phrase followed a list of

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47. Richard E. Moberly, *The Americans with Disabilities Act in Cyberspace: Applying the “Nexus” Approach to Private Internet Websites*, 55 MERCER L. REV. 963, 973–74 (2004).

48. Debra D. Burke et. al., *Accessible Online Instruction for Students with Disabilities: Federal Imperatives and the Challenge of Compliance*, M, 145 (2016) (citing *Rendon v. Valley Crest Prod. Ltd.*, 294 F.3d 1279, 1280 (11th Cir. 2002)).

49. Shah, *supra* note 15, at 226.

50. 227 F. Supp. 2d 1312 (S.D. Fla. 2002).

51. *Id.* at 1314.

52. *Id.* at 1321.

53. *Id.*

54. *Id.* at 1318.

55. *Id.*

56. *Access Now*, 227 F. Supp. 2d at 1318 (citing *Allen v. A.G. Thomas*, 161 F.3d 667, 671 (11th Cir.1998)).

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physical establishments, the catchall phrase was limited to *physical structures*.<sup>57</sup> Therefore, the court concluded that Southwest.com was not a place of public accommodation as it did not have a nexus to a physical place.<sup>58</sup>

Similarly, the Northern District Court of California in *Cullen v. Netflix*<sup>59</sup> applied the nexus test to determine that Netflix is not a place of public accommodation because the website is not “an actual physical place,” and there was no nexus to any physical location.<sup>60</sup> The court’s holding relied on binding precedent that required places of public accommodation to be physical locations or to have a sufficient nexus with a physical location to be protected under Title III.<sup>61</sup>

Unlike *Access Now* and *Cullen*, the Northern District Court of California in *National Federation of the Blind v. Target Corp.*,<sup>62</sup> used the nexus test to determine that parts of Target’s website were subject to Title III.<sup>63</sup> The plaintiffs argued that Target’s website was inaccessible to blind individuals, thereby denying them full and equal access to Target’s physical stores and website.<sup>64</sup> The court applied the nexus test and “granted in part and denied in part Target’s motion to dismiss for failure to state a claim.”<sup>65</sup> The court stated that to the extent that the blind wished to shop without visiting a store, no cause of action existed.<sup>66</sup> However, those blind individuals who used the website to make preparations allowing a more fruitful visit to a physical Target store had stated a valid claim.<sup>67</sup>

*ii. Issues with the Nexus Test*

The outcome of *Access Now* and *Target* exemplify the major problem that the nexus test poses: unequal application of Title III’s non-discrimination obligations.<sup>68</sup> Because the nexus test excludes all websites without a nexus to a physical location, the entire category of web-only businesses are necessarily excluded from Title III.<sup>69</sup> The nexus test allows two websites, which provide similar services, to be treated

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57. *Id.* at 1319.

58. *Id.*

59. 880 F. Supp. 2d 1017 (N.D. Cal. 2012).

60. *Id.* at 1024.

61. *Id.* (citing *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9th Cir. 2000)).

62. 452 F. Supp. 2d 946 (N.D. Cal. 2006).

63. *Id.* at 956.

64. *Id.* at 949–50 (“The website was not compatible with screen-readers, making it so that the website’s code could not be translated into vocalized text.”).

65. *Id.* at 956.

66. *Id.*

67. *Id.*

68. See Shah, *supra* note 15, at 228.

69. *Id.* at 225.

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differently because one has a nexus to a physical location and the other does not.<sup>70</sup> “For example, while Target.com would have to make changes because of its nexus to brick and mortar stores, Amazon.com would not have to make the same changes.”<sup>71</sup> This type of unequal application of the law could create loopholes for companies to evade their nondiscrimination obligations under Title III. Additionally, requiring websites to be accessible only when there is a nexus to a physical location encourages evasive practices to avoid compliance with Title III. This could lead to companies creating an online-only business or completely separating the online portion of their business from their physical business in order to avoid Title III’s non-discrimination obligations.

Furthermore, because the nexus test is subjective, courts have the discretion to decide what constitutes a nexus and whether a nexus exists, which leads to different interpretations for each jurisdiction. This subjectivity creates a legal landscape in which many business owners are unsure whether they are in compliance with Title III. A business owner with an online presence does not have clear guidance about whether their website, or some portion thereof, must comply with Title III because compliance varies depending on the jurisdiction in which a case against the business is brought.

*B. Websites are Places of Public Accommodation*

Unlike courts that have adopted the nexus test, some courts have adopted an approach that does not require any physical location or nexus to a physical location to determine that websites are places of public accommodation.<sup>72</sup> These courts relied on earlier cases that addressed whether places of public accommodations were limited to only physical locations or extended to the goods and services of the public accommodation offered outside of the physical location.<sup>73</sup> The courts relied on the language of the statute, the purpose of the ADA, and the legislative history to determine that the definition of public accommodation is not limited to a “physical structure for persons to enter.”<sup>74</sup> Later courts have used this line of prior cases to extend the definition of public accommodation to include websites.<sup>75</sup>

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70. *Id.* at 228–29.

71. *Id.* at 228–29.

72. Nat’l Ass’n of the Deaf v. Netflix, Inc. (*Netflix, Inc.*), 869 F. Supp. 2d 196 (D. Mass. 2012); Nat’l Fed’n of the Blind v. Scrib’d Inc. (*Scrib’d Inc.*), 97 F. Supp. 3d 565, 565 (D. Vt. 2015).

73. *See e.g.*, Carparts Distribution Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New England, Inc., 37 F.3d 12 (1st Cir. 1994).

74. *Id.* at 19.

75. *See Netflix, Inc.*, 869 F. Supp. 2d 196; *see also Scrib’d Inc.*, 97 F. Supp. 3d 565.

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*i. Judicial Application*

In *National Association of the Deaf v. Netflix*,<sup>76</sup> the District Court of Massachusetts held that Netflix's website was a place of public accommodation, subjecting Netflix to Title III's non-discrimination obligations.<sup>77</sup> The court relied on the ADA's purpose, legislative history, and prior caselaw to determine that places of public accommodation are not limited to physical locations. The court stated:

*In a society in which business is increasingly conducted online, excluding businesses that sell services through the Internet from the ADA would 'run afoul the purposes of the ADA and would severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public.'*<sup>78</sup>

The court explained that merely because websites and web-based services were not included in the definition of public accommodation, they are not necessarily exempt from Title III's definition of public accommodation.<sup>79</sup> The court further stated that Congress did not intend to limit the ADA to specific examples, but intended the ADA's examples to be construed liberally and consistent with the intent of the legislation.<sup>80</sup> The court noted that "Congress intended the ADA to adapt to changes in technology," and simply because websites and other web-based services did not exist when the ADA was passed, does not mean that it is necessarily excluded from the definition of places of public accommodation.<sup>81</sup> Moreover, the court identified a crucial distinction that the "ADA covers the services 'of' a public accommodation, not services 'at' or 'in' a public accommodation."<sup>82</sup> Therefore, the

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76. 869 F. Supp. 2d 196 (D. Mass. 2012)

77. *Id.* at 202.

78. *Id.* at 200 (citing *Carparts*, 37 F.3d at 20).

79. *Id.*

80. *Id.* at 201 (citing S. Rep. No. 116, at 59 (1990) ("[W]ithin each of these categories, the legislation only lists a few examples and then, in most cases, adds the phrase 'other similar' entities. The Committee intends that the 'other similar' terminology should be construed liberally consistent with the intent of the legislation."); H.R. Rep. No. 485 (III), at 54 (1990), as reprinted in 1990 U.S.C.C.A.N. 445, 477 ("A person alleging discrimination does not have to prove that the entity being charged with discrimination is similar to the examples listed in the definition. Rather, the person must show that the entity falls within the overall category.")).

81. *Netflix, Inc.*, 869 F. Supp. 2d at 200–01 (citing H.R. Rep. No. 101–485(II), at 108 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 391 ("[T]he Committee intends that the types of accommodation and services provided to individuals with disabilities, under all of the titles of this bill, should keep pace with the rapidly changing technology of the times.")).

82. *Id.* at 201 (citing *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 953 (N.D. Cal. 2006) ("The statute applies to the services of a place of public accommodation, not services in a place of public

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court explained, a service is not exempt from Title III merely because it is utilized in a private residence, and not a public space.<sup>83</sup>

In a similar case, *National Federation of the Blind v. Scrib'd*,<sup>84</sup> the District Court of Vermont also held that websites are places of public accommodation under Title III.<sup>85</sup> The court began its analysis by noting the circuit split on whether public accommodations are limited to physical places before turning to websites specifically.<sup>86</sup> The court explained that because “there is more than one reasonable interpretation of the language at issue . . . the Court may go beyond the text and context of the text to understand the statute’s meaning.”<sup>87</sup> Additionally, the court found that “[i]t was ‘critical’ to define places of public accommodation more broadly . . . because ‘discrimination against people with disabilities is not limited to specific categories of public accommodations.’”<sup>88</sup> The court stated “[t]he goal is ‘full participation in and access to all aspects of society . . .’ [i]t would make ‘no sense’ for the law to say people with disabilities cannot be discriminated against if they want a sandwich at a deli but can be discriminated against next door at the pharmacy where they need to fill a prescription.”<sup>89</sup> The court noted that the Senate Committee Reports “[made] it clear that Congress intended that the statute be responsive to changes in technology, at least with respect to available accommodations.”<sup>90</sup> The court also noted that at the time the ADA was enacted, Congress had no conception of how commerce would be affected by the growth of the Internet.<sup>91</sup> The court held that “[n]ow that the Internet plays such a critical role in the personal and professional lives of Americans, excluding disabled persons from access to covered entities that use it as their principal means of reaching the public would defeat the purpose of this important civil rights legislation.”<sup>92</sup>

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accommodation. 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.”).

83. *Id.* at 201.

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

85. *Id.* at 576.

86. *Id.* at 569–71.

87. *Id.* at 571 (citing *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 108 (2d Cir. 2012)).

88. *Id.* at 573 (citing H.R. REP. NO. 101–485(II), at 35, (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 317).

89. *Id.* (citation omitted).

90. *Nat’l Fed’n of the Blind v. Scrib’d Inc. (Scrib’d Inc.)*, 97 F. Supp. 3d 565, 574 (D. Vt. 2015) (citing H.R. REP. NO. 101–485(II), at 108, (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 391 (“[T]he Committee intends that the types of accommodation and services provided to individuals with disabilities . . . should keep pace with the rapidly changing technology of the times.”)).

91. *Id.* at 575 (citing *Achieving the Promises of the Americans with Disabilities Act in the Digital Age—Current Issues, Challenges and Opportunities: Hearing before the H. Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the House Comm. on the Judiciary*, 111th Cong. 111–95 (2010) (statement of Rep. Nadler)).

92. *Id.*

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*ii. Issues with Websites as Public Accommodations*

Although this comment contends that websites are places of public accommodation under Title III, there are several objections to this approach. Therefore, each objection will be outlined and refuted below. Opponents of websites as places of public accommodation argue that applying Title III to websites is too difficult and that making websites accessible is not feasible.<sup>93</sup>

The first potential concern of applying Title III to websites is that Congress has not created legislatively defined standards for applying Title III to websites.<sup>94</sup> However, courts may use the Title III framework that is used for physical locations to determine Title III's applicability to websites.<sup>95</sup> When evaluating a challenge to Title III, a court must determine whether the public accommodation affects interstate commerce and whether it is open to the public.<sup>96</sup> When challenging a website under Title III, the court would have to undertake the same analysis, and determine whether the website in question is open to the public.<sup>97</sup> "Just as a court would look to the revenue and customers targeted by a business to determine whether the business affects interstate commerce, a court would look to similar factors of the website."<sup>98</sup> "[J]ust as a business in a physical place that directs itself only to other businesses would not be considered a public accommodation required to make its store accessible, a website targeted to businesses would also be exempt from Title III coverage."<sup>99</sup>

Another concern with websites as places of public accommodation is that some believe it is not feasible for companies to reprogram their websites to make them accessible to individuals with disabilities.<sup>100</sup> Because there are many categories of individuals with disabilities, "accessible" takes on new dimensions for each group. For deaf and hard of hearing individuals, accessibility could require adding captions; for blind and vision impaired individuals, accessibility could mean requiring websites to be compatible with screen readers by adding visual descriptions and

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93. Shani Elise, Note, *Courts Must Welcome the Reality of the Modern World: Cyberspace Is A Place Under Title III of the Americans with Disabilities Act*, 65 WASH. & LEE L. REV. 1121, 1148 (2008).

94. *Access Now, Inc. v. Southwest Airlines Co.*, 227 F. Supp. 2d 1312, 1321 (S.D. Fla. 2002).

95. Elise, *supra* note 93, at 1149 (citing 28 C.F.R. pt. 36, app. B. (2007) (clarifying the application of Title III to "wholesale establishments")). "The Department of Justice regulations state: The Department intends for wholesale establishments to be covered under this category as places of public accommodation except in cases where they sell exclusively to other businesses and not to individuals. For example, a company that grows food produce and supplies its crops exclusively to food processing corporations on a wholesale basis does not become a public accommodation because of these transactions." Elise, *supra* note 93, at 1149 n. 157.

96. *See* 42 U.S.C. § 12181(7) (2012).

97. Elise, *supra* note 93, at 1148.

98. *Id.* at 1149 (citation omitted).

99. *Id.* at 1149.

100. *Id.* at 1149.

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coding hyperlinks; for mobility impaired or limited individuals, accessibility could require making the page easier to navigate and tab through; and for people with intellectual disabilities, accessibility could mean simplifying the text.<sup>101</sup> Although the different groups of individuals with disabilities require different accommodations to make websites accessible, the changes that need to be made are possible.

Not only are the changes to make websites accessible feasible, but since 1998 the federal government has been required to make their websites accessible. In 1998, Congress passed Section 508 of the Rehabilitation Act, which requires all federal websites to be accessible to individuals with disabilities.<sup>102</sup> Section 508 of the Rehabilitation Act demonstrates that websites can be made accessible to individuals with disabilities. Since the adoption of Section 508 of the Rehabilitation Act, standards have been developed by the Architectural and Transportation Barriers Compliance Board to outline what is necessary for a website to be accessible.<sup>103</sup> These accessibility standards require web developers to make simple changes to a website's underlying code, such as clearly identifying images and links on web pages.<sup>104</sup>

In addition to Section 508 of the Rehabilitation Act and the Architectural and Transportation Barriers Compliance Board's standards for accessibility, there are Web Content Accessibility Guidelines (WCAG) published by the Web Accessibility Initiative of the World Wide Web Consortium which create international standards for the Internet.<sup>105</sup> The WCAG created four principles to organize their guidelines: (1) perceivable; (2) operable; (3) understandable; and (4) robust.<sup>106</sup> In addition, the WCAG provided concrete guidelines that businesses can follow to make their websites accessible to people with disabilities.<sup>107</sup>

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101. See Abrar & Dingle, *supra* note 2, at 146.

102. 29 U.S.C. § 794d(a)(1) (2012) (requiring that federal agencies make electronic and information technology accessible to individuals with disabilities).

103. Elise, *supra* note 93, at 1149–50.

104. *Id.*

105. Web Content Accessibility Guidelines (WCAG) Overview, WEB ACCESSIBILITY INITIATIVE, <https://www.w3.org/WAI/intro/wcag> (last updated Mar. 10, 2017).

106. *Id.*

107. WCAG 2 at a Glance, WEB ACCESSIBILITY INITIATIVE, <https://www.w3.org/WAI/WCAG20/glance/> (last updated Dec. 6, 2011). To be perceivable, websites must: (1) provide text alternatives for non-text content; (2) provide captions and other alternatives for multimedia; (3) create content that can be presented in different ways, including by assistive technologies, without losing meaning; and (4) make it easier for users to see and hear content. *Id.* To be operable, websites must: (1) make all functionality available from a keyboard; (2) give users enough time to read and use content; (3) do not use content that causes seizures; and (4) help users navigate and find content. *Id.* To be understandable, websites must: (1) make text readable and understandable; (2) make content appear and operate in predictable ways; and (3) help users avoid and correct mistakes. *Id.* To be robust websites must maximize compatibility with current and future user tools. *Id.*

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Despite the ability and guidance to make websites accessible, the ADA has exceptions that would nevertheless exempt some company from changing their websites.<sup>108</sup> The ADA states that a company is not required to make changes to its website if it would cause the business to suffer an undue burden.<sup>109</sup> Therefore, it is feasible to mandate businesses to make their websites accessible to people with disabilities.

#### IV. THE DEPARTMENT OF JUSTICE'S ANNOUNCEMENT OF PROPOSED RULEMAKING IS A WELCOME STEP IN THE RIGHT DIRECTION

##### A. *The Need for Uniformity*

The DOJ's delay in passing regulations for websites under Title III produced inconsistency in caselaw around the country. One of the clearest examples of inconsistent application of caselaw regarding websites under Title III is the opposing results in *National Association of the Deaf v. Netflix*<sup>110</sup> and *Cullen v. Netflix*.<sup>111</sup> Both cases alleged that Netflix's video streaming service was inaccessible to deaf and hard of hearing individuals.<sup>112</sup> The court in *Cullen v. Netflix* applied a nexus analysis to find that Netflix was not subject to Title III and did not have to make its videos accessible.<sup>113</sup> Conversely, the court in *National Association of the Deaf v. Netflix* did not apply the nexus test and conducted an analysis that websites are places of public accommodation, holding that Netflix was subject to Title III and therefore required to make its website accessible.<sup>114</sup> Because the DOJ has yet to establish regulations for websites under Title III, the courts have discretion to interpret Title III as they see fit.<sup>115</sup> The DOJ's continued failure to issue Title III regulations for websites exposes businesses to a legal landscape in which they may be sued in different jurisdictions and receive opposite results in each case.

##### B. *Growing Anticipation for DOJ's Website Regulations*

In 2010, the DOJ issued an Advanced Notice of Proposed Rulemaking, which announced that the DOJ was considering passing regulations "in order to establish requirements for making . . . the Internet . . . accessible to individuals with

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108. Elise, *supra* note 93, at 1149–50 (citing 42 U.S.C. § 12182(b)(2)(A)(iii) (2012)).

109. *Id.* (citing 42 U.S.C. § 12182(b)(2)(A)(iii) (2012)).

110. 869 F. Supp. 2d 196 (D. Mass. 2012).

111. 880 F. Supp. 2d 1017, 1024 (N.D. Cal. 2012).

112. See Nat'l Ass'n of the Deaf v. Netflix, Inc. (*Netflix, Inc.*), 869 F. Supp. 2d 196 (D. Mass. 2012); see also *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017 (N.D. Cal. 2012).

113. See *Cullen*, 880 F. Supp. 2d, at 1024.

114. See *Netflix, Inc.*, 869 F. Supp. 2d, at 202.

115. Shah, *supra* note 15, at 233.



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disabilities.”<sup>116</sup> With the dispute in the courts, and the uneven application of the ADA, the DOJ’s Advanced Notice of Proposed Rulemaking on websites as public accommodations is a step in the right direction.<sup>117</sup> The purpose of the Advanced Notice of Proposed Rulemaking was primarily to ask questions and receive comments by parties that might be affected by the regulations.<sup>118</sup> The notice also stated that the rulemaking would be helpful in providing guidance as to how covered entities could meet their *pre-existing* obligations to make their websites accessible.<sup>119</sup> To date, the “pre-existing obligation” has not been unanimously reflected in the caselaw.<sup>120</sup> However, it does suggest that any future regulations will include an obligation for websites to be made accessible.<sup>121</sup>

In May 2016, the DOJ surprised the disability community by passing the Supplemental Advanced Notice of Proposed Rulemaking instead of issuing the proposed regulations for Title II website regulations.<sup>122</sup> Title II of the ADA applies to nondiscrimination of public services such as state and local governments.<sup>123</sup> The DOJ cited the effect that the Title II regulations will have on Title III website regulations as the reason for the delay.<sup>124</sup> Because the “Title II Web accessibility rule is likely to facilitate the creation of an infrastructure for web accessibility that will be very important in the Department’s preparation of the Title III Notice of Proposed Rulemaking on Website accessibility of public accommodations,” it seems that the Title III regulations will not be released until, at a minimum, the Title II regulations are released.<sup>125</sup> The initial date of the proposed Title III regulations were sometime in 2016, but the regulations are now due to come out in 2018.<sup>126</sup> The 2018 proposed release date falls squarely within the Trump Administration, which has vowed to cut back on regulations.<sup>127</sup>

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116. *Id.* at 233.

117. Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460 (proposed July 26, 2010) [hereinafter “ANPRM”].

118. Shah, *supra* note 15, at 237.

119. ANPRM, *supra* note 117.

120. Burke, *supra* note 48, at 148.

121. Shah, *supra* note 15, at 237.

122. Minh Vu & Kristina M. Launey, *DOJ Extends Comment Period for ADA Title II SANPRM, Cites Impact on Title III Rule*, ADA TITLE III NEWS AND INSIGHTS (July 28, 2016), <http://www.adatitleiii.com/doj/>.

123. 42 U.S.C. § 12131 (2012).

124. Vu & Launey, *supra* note 122.

125. *Id.*

126. *Id.*

127. Gregory Korte, *Trump Orders Two-For-One Repeal of All New Regulations*, USA TODAY (Jan. 30, 2017), <http://www.usatoday.com/story/news/politics/2017/01/30/trump-orders-two-one-repeal-all-new-regulations/97237870/>.

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*C. The DOJ's Position*

Despite the lack of formal regulations, the DOJ's position is clear: websites are places of public accommodation under Title III.<sup>128</sup> The DOJ has said that websites are covered under the ADA in its Advanced Notice Proposed Rule Making<sup>129</sup> and in a letter from the former Assistant Attorney General of the DOJ's Civil Rights Division<sup>130</sup> stating:

*Covered entities under the ADA are required to provide effective communication, regardless of whether they generally communicate through print media, audio media, or computerized media such as the Internet. Covered entities that use the Internet for communications regarding their programs, goods, or services must be prepared to offer those communications through accessible means as well.*<sup>131</sup>

Since then, the DOJ has maintained the position that websites are public accommodations and must therefore be accessible to individuals with disabilities.<sup>132</sup> In 2010, the DOJ entered into a consent decree with Hilton Hotels,<sup>133</sup> which required the entity "to make its online reservations system accessible to visually impaired users and to update information on its website about accommodation available to guests with disabilities."<sup>134</sup> The Hilton consent decree is notable because it was the first time a DOJ consent decree included website accessibility when discussing an entity's ADA obligations.<sup>135</sup>

From 2014 to 2016, the DOJ entered into settlements with Peapod.com,<sup>136</sup> Carnival Cruise Lines,<sup>137</sup> and edX Incorporated,<sup>138</sup> requiring those entities to make

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128. See Burke, *supra* note 48, at 148.

129. See ANPRM *supra* note 117.

130. Letter from Deval L. Patrick, Assistant Attorney Gen. for Civil Rights, to Tom Harkin, U.S. Senator (Sept. 9, 2002) [hereinafter DOJ Letter] (on file with the DOJ).

131. *Id.*

132. Shah, *supra* note 15, at 237.

133. See Consent Decree, United States v. Hilton Worldwide Inc., No. 1:10-CV-01924 (D.D.C. Nov. 9, 2010) <http://www.ada.gov/hilton/hilton.htm> [hereinafter Hilton Consent Decree].

134. Shah, *supra* note 15, at 237.

135. *Id.* at 237; see also Hilton Consent Decree, *supra* note 133.

136. Press Release, Dep't of Justice, Office of Pub. Affairs, Justice Department Enters into a Settlement Agreement with Peapod to Ensure that Peapod Grocery Delivery Website Is Accessible to Individuals with Disabilities (Nov. 17, 2014) [hereinafter Peapod Press Release].

137. Press Release, Dep't of Justice, Office of Pub. Affairs, Settlement Agreement Between the United States of America and Carnival Corporation (July 23, 2015) [hereinafter Carnival Press Release].

138. Press Release, Dep't of Justice, Office of Pub. Affairs, Justice Department Reaches Settlement with edX Inc., Provider of Massive Open Online Courses, to Make its Website, Online Platform and Mobile

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their websites accessible to individuals with disabilities.<sup>139</sup> The settlements further indicate that the DOJ interprets Title III to require that websites be accessible, and that this obligation is not limited by a nexus test.<sup>140</sup> Therefore, the DOJ does not require a nexus test to require websites to comply with Title III, since the settlement with Peapod.com required the company to comply with Title III's nondiscrimination obligations even though Peapod.com has *no connection to a physical location*.<sup>141</sup>

Further support of the DOJ's position on websites under Title III may be found in two statements of interest the DOJ filed in 2015.<sup>142</sup> The DOJ filed statements of interest in two higher education Title III cases, *National Association of the Deaf v. MIT*<sup>143</sup> and *National Association of the Deaf v. Harvard*.<sup>144</sup> Both lawsuits alleged that the Universities failed to caption many of the videos posted on their websites.<sup>145</sup> The statements of interest stated that Title III extended to websites and that the universities have an obligation under Title III to ensure that their websites are accessible.<sup>146</sup>

*D. What Does Trump's Administration Mean for DOJ's Website Regulations*

The DOJ's Title III website regulations are expected to be released in 2018, during the Trump Administration.<sup>147</sup> However, the passage of any new regulations under the Trump Administration, whether to prevent discrimination or otherwise, is unlikely because President Trump has made it clear that he intends to cut back on all regulations.<sup>148</sup> The Trump Administration stated that it intends to issue a temporary moratorium on new agency regulations.<sup>149</sup> Additionally, President Trump

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Applications Accessible Under the Americans with Disabilities Act (Apr. 2, 2015) [hereinafter EdX Press Release].

139. Peapod Press Release, *supra* note 136; Carnival Press Release, *supra* note 137; EdX Press Release, *supra* note 138.

140. Shah, *supra* note 15, at 237.

141. Peapod Press Release, *supra* note 136.

142. *See* Burke, *supra* note 48, at 149.

143. Statement of Interest of the United States, Nat'l Ass'n. of the Deaf v. Mass. Inst. Tech., No. 3:15-cv-300024-MGM (D. Mass. June 25, 2015), available at [http://www.ada.gov/briefs/mit\\_soi.pdf](http://www.ada.gov/briefs/mit_soi.pdf).

144. Statement of Interest of the United States, Nat'l Ass'n. of the Deaf v. Harvard U., Civil Action No. 3:15-cv-30023-MGM (D. Mass. June 25, 2015), available at [http://www.ada.gov/briefs/harvard\\_soi.pdf](http://www.ada.gov/briefs/harvard_soi.pdf).

145. *See* Burke, *supra* note 48, at 149 (citation omitted).

146. *See id.* at 149 (citation omitted).

147. ANPRM, *supra* note 117.

148. Regulations, DONALD TRUMP, <https://www.donaldjtrump.com/policies/regulations> (last visited Feb. 6, 2017) ("Donald J. Trump's Vision. . . Issue a temporary moratorium on new agency regulations that are not compelled by Congress or public safety in order to give our American companies the certainty they need to reinvest in our community, get cash off of the sidelines, start hiring again, and expanding businesses. We will no longer regulate our companies and our jobs out of existence.").

149. *Id.*

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implemented a policy that “whenever an executive department or agency publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed.”<sup>150</sup> During the election, then candidate Trump openly mocked a reporter with a disability.<sup>151</sup> Considering President Trump’s Executive Order aimed at de-regulation and his public shaming of a person with disabilities, it is unlikely that the DOJ website regulations is going to be a high priority for the Trump Administration.<sup>152</sup> This could not only result in more delays to the already past due DOJ Title III website regulations, but it could also mean that the regulations will contain less demanding standards or that the regulations may be abandoned altogether.<sup>153</sup>

Nevertheless, businesses should not wait for when, or if, the regulations are passed before taking action. If published, the DOJ’s regulations will likely provide guidance on how to make websites accessible. However, there are other resources currently available that provide guidelines and procedures for website accessibility.<sup>154</sup> By using the resources already available, businesses can manage the cost and time of transitioning their websites to make them accessible to individuals with disabilities. Furthermore, by making a website accessible before any regulations are passed, businesses can eliminate potential future costs litigation for non-compliance.

## V. CONCLUSION

Web accessibility is a major problem arising in the courts, and there is no clear consensus on how to deal with it. Courts disagree whether websites are covered under Title III of the ADA, and whether a nexus test should be used to determine which websites are covered. Some courts have adopted the nexus test, which requires websites to comply with Title III of the ADA if a nexus exists between the website and a physical place of public accommodation. However, the nexus test falls short for many reasons, the most critical being the subjectivity of the test, which has led to a circuit split. Instead, courts should adopt the approach, as some already have, that

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150. Donald J. Trump, *Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs*, THE WHITE HOUSE (Jan. 30, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling/>.

151. Irin Carmon, *Donald Trump’s Worst Offense? Mocking Disabled Reporter, Poll Finds*, NBC NEWS (Aug. 11, 2016), <http://www.nbcnews.com/politics/2016-election/trump-s-worst-offense-mocking-disabled-reporter-poll-finds-n627736>.

152. Minh Vu, *How Will A Trump Administration Change The ADA Title III Landscape?*, ADA TITLE III NEWS AND INSIGHTS (Nov. 10, 2016), <http://www.adatitleiii.com/2016/11/how-will-a-trump-administration-change-the-ada-title-iii-landscape/>.

153. *Id.*

154. *Web Content Accessibility Guidelines (WCAG) Overview*, WEB ACCESSIBILITY INITIATIVE, <https://www.w3.org/WAI/intro/wcag> (last updated March 10, 2017).

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because places of public accommodations are not limited to physical locations, websites are covered under Title III of the ADA.

The circuit split highlights the need for the DOJ to pass Title III regulations for websites to provide direct guidance for businesses and courts. The DOJ has communicated its position that websites are covered under Title III of the ADA, but without formal regulations their position is irrelevant to courts. Courts have the discretion to interpret the statute without regard to the DOJ, so long as the decision follows any binding precedent in the jurisdiction. The DOJ's Title III website regulations will likely echo the DOJ's current position and require businesses to make their websites accessible. Although the regulations have a proposed timeframe, the Trump Administration has taken a stance against the passage of any new regulations, calling into question the likelihood the Title III regulations will be released as expected. Regardless, businesses would likely benefit from beginning to make their websites accessible now, using the standards and guidelines already available.