

1-1-2022

Drawing Lines: Reconciling Disparate Standards of ADA Title III Protections in an Online World

Benjamin Holman
Suffolk University

Follow this and additional works at: <https://dc.suffolk.edu/jtaa-suffolk>



Part of the [Litigation Commons](#)

Recommended Citation

28 Suffolk J. Trial & App. Advoc. 33 (2022-2023)

This Notes is brought to you for free and open access by Digital Collections @ Suffolk. It has been accepted for inclusion in Suffolk Journal of Trial and Appellate Advocacy by an authorized editor of Digital Collections @ Suffolk. For more information, please contact dct@suffolk.edu.

DRAWING LINES: RECONCILING DISPARATE STANDARDS OF ADA TITLE III PROTECTIONS IN AN ONLINE WORLD.

*“Together, we must remove the physical barriers we have created and the social barriers that we have accepted. For ours will never be a truly prosperous nation until all within it prosper.”*¹

I. INTRODUCTION

The Americans with Disabilities Act (“ADA”) of 1990 is a civil rights law that prohibits discrimination based on disability in all areas of public life.² A sweeping piece of legislation, the ADA extends many of the protections against discrimination established in the Civil Rights Act of 1964.³ Divided into five sections, the central purpose of the ADA is to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”⁴

Title III of the ADA prohibits discrimination in places of public accommodation and protects qualified individuals with disabilities in their interactions with commercial entities.⁵ Title III defines places of public

¹ Remarks of President George H. W. Bush at the Signing of the Americans with Disabilities Act, ADA, <https://perma.cc/TJ6V-W5BH> (last visited Sept. 19, 2022).

² See *What is the Americans with Disabilities Act (ADA)?*, ADA NATIONAL NETWORK, <https://perma.cc/TCN3-UC6J> (last visited Sept. 10, 2022) (providing overview of ADA). The ADA prohibits discrimination on the basis of disability in areas including “jobs, schools, transportation, and all public and private places that are open to the general public.” *Id.*

³ See Robert D. Dinerstein, *The Americans with Disabilities Act of 1990*, A.B.A. (July 1, 2004), <https://perma.cc/6SL5-BPFJ> (explaining similarities between ADA and Civil Rights Act). The ADA relies on the same statutory “title” structure by banning discrimination in employment, public accommodations, and public services. *See id.*

⁴ See 42 U.S.C. § 12101(b)(1) (defining central purpose of ADA enactment); *see also The Americans with Disabilities Act: A Brief Overview*, JOB ACCOMMODATION NETWORK, <https://perma.cc/X63V-WWUZ> (last updated July 26, 2012) (listing five titles of ADA). The ADA prohibits discrimination in (I) employment, (II) public services, (III) public accommodations, (IV) telecommunications, (V) miscellaneous. *Id.*

⁵ See 42 U.S.C. § 12182(a) (stating general rule of Title III). Title III prohibits discrimination “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.” *Id.* To qualify for ADA-protected status, an individual must have a “physical or mental impairment that substantially limits one or more major life activities, [be] a person who has a history or record of such an impairment, or [be] a person who is perceived by others as having such an impairment.” *Introduction to the ADA*, U.S. DEP’T OF

accommodation into twelve broad categories, seeking to protect individuals who obtain goods or services in privately owned or operated entities which affect commerce and fall into one of the aforementioned categories.⁶ While many of the twelve categories, like museums, hotels, and gyms are undoubtedly physical facilities, the statutory language is unclear whether a “place of public accommodation” is exclusively limited to a physical structure, and Title III makes no mention of any potential application to web-derived goods or services.⁷ Due to this ambiguity, federal courts across the U.S. have grappled with the application of Title III to privately operated websites for businesses that would otherwise fall within the definition of a place of public accommodation.⁸

When the ADA was enacted in 1990, the proliferation of the internet was an unforeseen technological advancement that launched human society

JUSTICE, <https://perma.cc/6D6H-MDTF> (last visited Sept. 1, 2022) (explaining qualifications for ADA protection).

⁶ See 42 U.S.C. § 12181(1) (defining “commerce” under Title III); see *id.* at § 12181(7) (listing twelve categories of places of public accommodation). The twelve categories are listed as follows:

(A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor; (B) a restaurant, bar, or other establishment serving food or drink; (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment; (D) an auditorium, convention center, lecture hall, or other place of public gathering; (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment; (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment; (G) a terminal, depot, or other station used for specified public transportation; (H) a museum, library, gallery, or other place of public display or collection; (I) a park, zoo, amusement park, or other place of recreation; (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education; (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and (L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

Id.

⁷ See Christopher Mullen, *Places of Public Accommodation: Americans with Disabilities and the Battle for Internet Accessibility*, 11 DREXEL L. REV. 745, 754 (2019) (explaining ambiguity regarding intangible spaces); see also Alysia J. Ward & Diana N. Evans, *Navigating Website Accessibility Under Title III of the Americans with Disabilities Act*, BRADLEY ARANT BOULT CUMMINGS LLP (Sept. 23, 2021), <https://perma.cc/KK9U-HYAC> (addressing inconsistent interpretations).

⁸ See cases cited *infra* notes 48-67 and accompanying text (analyzing case law on differing interpretations). It should be noted that Title II of the ADA mandates accessibility for state and local government websites. See 42 U.S.C. § 12132. Websites operated by federal departments and agencies are also required to meet accessibility standards. See 29 U.S.C. § 794d(a)(1).

into a new era of daily life.⁹ From the turn of the twenty-first century to 2019, the number of households in the U.S. with broadband internet access went from 7.07 million to 114.26 million.¹⁰ As of January 2022, there were an estimated 307.2 million active internet users in the United States.¹¹

As if the ubiquity of the internet could not be amplified any further, the COVID-19 pandemic forced many Americans indoors, where the majority of daily tasks were supplanted with digital equivalents.¹² An accompanying surge in digital technology allowed workers to transition to work-from-home, students to online learning, family members to digital get-togethers, and consumers to e-commerce.¹³ In the retail space, many consumers who regularly shopped for clothes, bought groceries, or dined out, now

⁹ See 42 U.S.C. § 12181 (showing date ADA was enacted). Legislators began drafting the ADA in the late 1980s and heard testimony on the need for legislation even earlier in the mid-1980s. See H.R. Rep. No. 101-405(II) (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 303. The inventor of the World Wide Web, Tim Berners-Lee, published the first website using an HTML format in December 1990. See *From Arpanet to World Wide Web: An Internet History Timeline*, THOMAS JEFFERSON UNIVERSITY (Nov. 22, 2016), <https://perma.cc/4FAH-NHY7> (outlining unprecedented technological growth). See also Martin Bruncko, *Beyond the Fourth Industrial Revolution*, WORLD ECONOMIC FORUM (Nov. 13, 2015), <https://perma.cc/3BUE-46VZ> (detailing impact of “Information Age”). What many call the “Fourth Industrial Revolution” is characterized as the “moment when humanity reaches a point when . . . everyone can have access to perfect . . . information about everything, everywhere and all the time.” See *id.* See also Peter F. Drucker, *Beyond the Information Revolution*, THE ATLANTIC (Oct. 1999), <https://perma.cc/D4E2-F5SR> (predicting future internet impact). The Information Revolution and the advent of the internet will have an analogous historical impact to Gutenberg’s printing press. See *id.*

¹⁰ See S. O’Dea, *Number of Fixed Broadband Subscriptions in the United States from 2000 to 2020*, STATISTA (Nov. 9, 2021), <https://perma.cc/3JGV-979P> (measuring American household internet access).

¹¹ See Joseph Johnson, *Digital Population in the United States as of January 2022*, STATISTA (July. 7, 2022), <https://perma.cc/8TPS-ECYT> (counting American internet access); see also *Internet/Broadband Fact Sheet*, PEW RESEARCH CENTER (Apr. 7, 2021), <https://perma.cc/PDW7-PS5H> (detailing internet use among American adults). Ninety-three percent of American adults used the internet in 2021, compared to fifty-two percent in 1990. See *id.* See also *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <https://perma.cc/V6LZ-PRUE> (last visited Sept. 11, 2022) (counting U.S. population). As of September 2022, there were an estimated 333 million people living in the United States. See *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <https://perma.cc/V6LZ-PRUE> (last visited Sept. 11, 2022).

¹² See *COVID Data Tracker*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://perma.cc/4Q59-MT2S> (last visited Oct. 2, 2021) (updating live COVID-19 data). See Randy Pavlicko, Note, *The Future of the Americans with Disabilities Act: Website Accessibility Litigation After COVID-19*, 69 CLEV. ST. L. REV. 953, 954 (2021) (outlining online impact of pandemic). “Many individuals rely on the internet to perform daily tasks related to education, employment, entertainment and many other matters.” *Id.*

¹³ See Rahul De et al., *Impact of Digital Surge During Covid-19 Pandemic: A Viewpoint on Research and Practice*, NAT’L INST. OF HEALTH (Jun. 9, 2020), <https://perma.cc/L9YF-HPBS> (pointing out effects of digitization boom on daily life). Internet service usage has hit all-time highs due to pandemic-related lockdowns. See *id.* The research suggests that while the move to virtual daily life was initially intended to be temporary, many of the online solutions will extend into the foreseeable future. See *id.*

had to do so from their own home, forcing businesses to provide their goods and services through online mediums.¹⁴ This has resulted in historic e-commerce advancements.¹⁵

For the disabled community, the health risks posed by COVID-19, coupled with mandatory lockdowns, has led to an increased reliance on internet access, yet the accessibility of websites for individuals with disabilities remains highly varied and unreliable.¹⁶ As formerly in-person activities have moved online, the failure of many businesses to provide accessible mediums for their goods and services has left individuals with disabilities without an option to fully participate in the ever-growing e-commerce space, resulting in an accessibility gap between those with disabilities and those without.¹⁷ This accessibility gap, compounded by unprecedented levels of internet reliance due to general digital proliferation and COVID-19 pressures, has led to an uptick in ADA website accessibility litigation.¹⁸ The dramatic increase

¹⁴ See Mullen, *supra* note 7, at 750 n.27 (explaining term “click and mortar”); see also Alexandra Twin, *Click and Mortar*, INVESTOPEDIA, <https://perma.cc/3E8C-LCK7> (last updated Mar. 31, 2021) (defining term). Click and mortar is an omnichannel business model that has both online and physical storefronts. See Alexandra Twin, *Click and Mortar*, INVESTOPEDIA, <https://perma.cc/3E8C-LCK7> (last updated Mar. 31, 2021).

¹⁵ See Stephanie Chevalier, *Development of e-Commerce Shares in Total Retail Sales in Selected Countries Before and After the Coronavirus (COVID-19) Pandemic*, STATISTA, <https://perma.cc/U96T-FSKW> (last accessed July 7, 2021) (illustrating shares of e-commerce by country). Measured in proportion of total retail sales, e-commerce in the U.S. accounted for eleven percent of total retail pre-pandemic, rising to twenty-two percent during COVID. See *id.* See also Kate Rooney, *Online shopping overtakes a major part of retail for the first time ever*, CNBC (Apr. 2, 2019), <https://perma.cc/267E-Y3MJ> (detailing scope of e-commerce in America). The market share of e-commerce is now greater than traditional brick-and-mortar shopping, a testament to the prevalence of online shopping in recent years. See *id.*

¹⁶ See Hannah Schwarz, Note, *When the Facts Change: Interpreting Title III of the ADA in the Online Era*, 32 STAN. L. & POL’Y REV. 363, 373-74 (2021) (pointing to accessibility gap that exists for disabled community). See also *World Report on Disability*, WORLD HEALTH ORG., <https://perma.cc/2RXX-DSK9> (Dec. 14, 2011) (explaining increased risk for disabled individuals). Studies by the World Health Organization show that people with disabilities have a greater risk of developing the comorbidities that make one more susceptible to serious illness or death from COVID-19. See *id.* See also *Updated Estimates of Coronavirus (COVID-19) Related Deaths by Disability Status*, OFFICE FOR NAT’L STATISTICS (Feb. 11, 2021), <https://perma.cc/BVA9-J8XF> (citing studies showing increased health risk for disabled individuals). In England, the risk of death from COVID-19 was 3.1 times greater for disabled men and 3.5 times greater for disabled women, compared to non-disabled counterparts. *Id.*

¹⁷ See Schwarz, *supra* note 16, at 373 (using statistics demonstrating accessibility gap). “According to the 2019 study, two-thirds of the top ten e-commerce sites by revenue had ‘serious accessibility issues,’ and eight of the ten top-trafficked news and information sites . . . were inaccessible to blind users.” See *id.* at 373 n.58-59. A study conducted by the U.S. Department of Commerce mentioned that only forty-eight percent of American householders with a disability use the internet, compared with seventy-six percent of non-disabled householders. See *id.* at 374 n.64.

¹⁸ See Lewis Wiener and Alexander Fuchs, *Trending: ADA Website Accessibility Lawsuits*, LAW360 (Dec. 15, 2016, 12:46 PM), <https://perma.cc/UEB3-D2VX> (explaining trend of accessibility lawsuits). The lack of guidance on website compliance has led to increases “of class action

in Title III accessibility lawsuits is demonstrative of a larger problem: that the inconsistent guidelines and interpretations for the online offerings of places of public accommodation are freezing out disabled people from enjoying those goods and services.¹⁹ This note identifies the circuit split that currently exists regarding the applicability of Title III to online content as places of public accommodation, and advocates for a uniform interpretation for future Title III jurisprudence.²⁰

II. FACTS

In 2016, Juan Carlos Gil brought a claim against Winn-Dixie, alleging that the grocery chain's inaccessible website violated Title III of the Americans with Disabilities Act.²¹ As a legally blind man with a learning disability, Gil meets the qualifying disability standard to bring suit under the ADA.²² A customer of Winn-Dixie's grocery stores for over fifteen years,

enforcement suits on the part of private individuals.” *Id.* Online offerings by places of public accommodation, coupled with a shift in our economy away from brick-and-mortar stores has brought more attention to inaccessible websites which plaintiffs believe should be covered by the ADA guidelines. *See id.* *See also* Andrew T. Peebles & Joseph “Chip” Sheppard III, *Confronting the Rise in ADA Website Accessibility Lawsuits Against Businesses*, 77 J. of Mo. B. 230 (2021) (illustrating recent trend of ADA Title III lawsuits). In 2019, 2,235 ADA website accessibility lawsuits were filed, compared with only 262 in 2016. *See id.* *See also* Sarah E. Zehentner, *The Rise of ADA Title III: How Congress and the Department of Justice Can Solve Predatory Litigation*, 86 BROOK. L. REV. 701, 710 (2021) (explaining inconsistent adjudication has led to predatory Title III litigation). *See also* Kristina M. Launey et al., *ADA Title III Lawsuits Increase by 16% in 2017 Due Largely to Website Access Lawsuits; Physical Accessibility Legislative Reform Efforts Continue*, SEYFARTH SHAW LLP (Feb. 1, 2018), <https://perma.cc/7RMJ-SB7A> (tracking ADA Title III lawsuits over time). The study notes that the surge of Title III lawsuits in federal court is largely driven by website accessibility filings. *See id.* *See also* *Nearly 1 in 5 People Have a Disability in the U.S.*, U.S. CENSUS BUREAU (July 25, 2012), <https://perma.cc/3EEX-6NGP> (reporting number of disabled people in America). Approximately 19% of the population of the U.S. had a disability in 2010. *See id.*

¹⁹ *See* Melanie A. Conroy et al., *When Good Sites Go Bad: The Growing Risk of Website Accessibility Litigation*, NAT’L L. REV., (Aug. 2, 2019) <https://perma.cc/4N3J-K33E> (explaining inconsistency in regulations). *See* Carly Schiff, Note, *Cracking the Code: Implementing Internet Accessibility Through the Americans with Disabilities Act*, 37 CARDOZO L. REV. 2315, 2316 (2016) (highlighting difficulty of ADA to keep up with technological change). Due to the rapid nature of the internet’s rise, a lack of factually similar Title III precedent guided early accessibility decisions, leading to inconsistent judgments. *See id.*

²⁰ *See* sources cited *infra* notes 48-67 and accompanying text (explaining circuit split regarding Title III applicability).

²¹ *See* *Gil v. Winn-Dixie Stores, Inc.*, 242 F. Supp. 3d 1315, 1316 (S.D. Fla. 2017) (noting cause of action), *aff’d* 993 F.3d 1266 (11th Cir. 2021).

²² *See id.* (stating Gil’s disability complies with ADA standards); *see* 42 U.S.C. § 12182(a) (outlining rule for disability under ADA). To qualify for ADA-protected status, an individual must have a “physical or mental impairment that substantially limits one or more major life activities, [be] a person who has a history or record of such an impairment, or [be] a person who is perceived

Gil attempted to use the chain's website and discovered that it was incompatible with the screen reading software necessary for him to access online information.²³ Attempting to use the website's capabilities to refill prescriptions digitally, Gil's claim alleged that Winn-Dixie's website was a place of public accommodation under the ADA that had a nexus to both Winn-Dixie's grocery stores and its pharmacies.²⁴

At trial, the district court ruled in favor of Gil, finding that he had successfully established a sufficient nexus for Title III protection because Winn-Dixie's website is heavily integrated with their physical stores such that the website "operates as a gateway" to those locations.²⁵ On appeal, the Eleventh Circuit adopted the narrow, textualist approach of the Third and Sixth Circuits, holding that the unambiguous statutory language limits the application of Title III exclusively to physical places.²⁶ The court, acknowledging that Title III also prohibits intangible barriers, which may take the form of a failure to provide auxiliary aids and services, distinguishes from the precedent case law on a factual basis.²⁷ In finding that Winn-Dixie's

by others as having such an impairment." *See Introduction to the ADA*, U.S. DEP'T OF JUSTICE, <https://perma.cc/93N7-TVAN> (last visited Oct. 20, 2021).

²³ *See Gil*, 993 F.3d at 1270-71 (detailing events leading to Gil's claim of action).

²⁴ *See id.* at 1270 (explaining what website was used for and lacking features). It is important to note that customers are not able to purchase groceries directly through the Winn-Dixie website, and any transactional function must be undertaken in-person in the store's physical locations. *See id.*

²⁵ *See Gil*, 242 F. Supp. 3d at 1321 (finding nexus between Winn-Dixie website and physical locations). In finding a sufficient connection between the goods and services being offered online and Winn-Dixie's brick-and-mortar stores, the court did not need to determine whether the website itself was a place of public accommodation. *See id.*

²⁶ *See Gil*, 993 F.3d at 1276 (concluding that places of public accommodation are limited to actual, physical places); *see infra* notes 50-56 and accompanying text (identifying Third and Sixth Circuit approach to Title III). These courts look narrowly to the statutory language of the ADA. *See infra* notes 50-56 and accompanying text. The Eleventh Circuit adopts a similar construction technique: that the fundamental cardinal canon of interpretation is that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Gil*, 993 F.3d at 1276 (citing *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). Because the Eleventh Circuit views all the enumerated places of public accommodation as only physical locations, their "judicial inquiry is complete." *Id.* (citing *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 969 (11th Cir. 2016)).

²⁷ *See Gil*, 993 F.3d at 1278 (citing 42 U.S.C. § 12182(b)(2)(A)(iii)). The *Gil* court distinguishes the facts from *Rendon v. Valleycrest Prods.*, in which hearing-impaired plaintiffs brought an ADA claim against the production companies of "Who Wants To Be A Millionaire", because the hotline contestant selection method discriminated against deaf people. *See* 294 F.3d 1279, 1280 (11th Cir. 2002). While the phone system in *Rendon* was the sole access point for individuals to become contestants on the show, the Eleventh Circuit ruled that it constituted an "intangible barrier" that prevented the defendant's full and equal enjoyment of his privilege to use the facilities. *See id.* at 1279. Conversely, while the limited functionality and lack of transactional capabilities of Winn-Dixie's website may slightly inconvenience the Plaintiff, it does not erect an intangible barrier that prohibits Gil from fully and equally enjoying the goods, services, and offerings of Winn-Dixie's physical locations. *See Gil*, 993 F.3d at 1279.

website is non-transactional and that Gil was not prevented from obtaining the same goods and services that he had been accessing for the past fifteen years, the court held that Gil was not precluded from fully and equally enjoying the services at issue, and that Winn-Dixie was not in violation of Title III.²⁸ The court understood that reversing the judgment for injunctive relief could inconvenience disabled individuals like Gil, but cited controlling precedent that the ADA does not require public accommodations to provide identical experiences for disabled and non-disabled patrons.²⁹

The dissent, instead, reached the opposite conclusion, advocating in favor of Gil's position.³⁰ Making reference to the broad Congressional goals of the ADA, Judge Pryor opines that Winn-Dixie's admitted failure to provide an auxiliary aid gave visually-impaired individuals no alternative means to request express prescription refills or apply discounts to rewards cards online.³¹ By prohibiting Gil from the same services that expedite a non-disabled customer's experience at Winn-Dixie, Judge Pryor believes Gil was denied full and equal enjoyment of the store's services, privileges, and advantages.³²

²⁸ See *Gil*, 993 F.3d at 1280-81 (finding there is no basis for concluding a violation of Title III occurred). The court goes on to note that Gil erroneously assumed the ruling in *Rendon* established a nexus approach for the Eleventh Circuit. See *id.* at 1281. While Gil argues the defendant's website violates Title III because of the significant relationship between their online offerings and the physical locations, the court states that the Circuit did not adopt nor endorse a nexus standard in *Rendon*. See *id.* at 1281. In fact, the only reference to a nexus in that case is "a footnote acknowledging that certain precedent from *other* circuits" can require a nexus. See *id.*

²⁹ See *id.* at 1281 (citing *Silva v. Baptist Health S. Fla., Inc.*, 856 F.3d 824, 834 (11th Cir. 2017)) (explaining lack of identical experience requirement for handicapped and non-handicapped persons). To be equally effective, aids, benefits, and services need to provide disabled individuals with an equal opportunity to "obtain the same result" but need not produce an identical result. See 45 C.F.R. § 84.4(b)(2).

³⁰ See *id.* at 1284 (Pryor, J., dissenting) (arguing that Gil could not fully and equally enjoy defendant's goods and services).

³¹ See *id.* at 1284 (Pryor, J., dissenting) (criticizing majority's understanding of facts). Discrimination prohibited by the ADA includes "a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated[,] or otherwise treated differently than other individuals because of the absence of auxiliary aids and services." See 42 U.S.C. § 12182(b)(2)(A)(iii).

³² See *Gil*, 993 F.3d at 1285 (Pryor, J., dissenting) (advocating position that Winn-Dixie violated Title III). Additionally, the facts at trial indicate that, because of his disability, refilling his prescriptions in-person is an inconvenient and lengthy process for Gil, as he requires assistance from Winn-Dixie employees, who are sometimes "annoyed by his request for help." See *id.* at 1286.

III. HISTORY

A. Provisions and Purpose of ADA Title III

To succeed in an ADA Title III lawsuit, a plaintiff needs to demonstrate that they are: (1) qualified as disabled under the ADA; (2) that the defendant owns, leases (or leases to), or operates a place of public accommodation; and (3) the defendant discriminated against the plaintiff as defined by the ADA.³³ Under this definition, the different types of specific discrimination prevent individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations.³⁴ While there are specific rules for each form of discrimination, defendants may be able to assert two affirmative defenses in rebutting the asserted discrimination: (1) that the accommodating action fundamentally alters the nature of the good, service, facility, or privilege, or (2) the action results, or would result, in an undue burden upon the defendant.³⁵ These exceptions give potential defendants protection against unnecessary or unreasonably costly steps which may be taken to comply with ADA regulations, and are scrutinized by courts on a fact-specific and contextual basis.³⁶ For plaintiffs

³³ See 42 U.S.C. § 12182(a) (stating general rule against discrimination); see *Camarillo v. Carrolls Corp.*, 518 F.3d 153, 156 (2d Cir. 2008) (reiterating plaintiff's burden of proof for Title III discrimination); see *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 730 (9th Cir. 2007) (explaining Title III test).

³⁴ See 42 U.S.C. § 12182(b)(2)(A)(i)-(v) (defining different types of discrimination). Title III prohibits: (i) the imposition or application of eligibility criteria that screen out or tend to screen out disabled individuals unless necessary for the good, service, etc. being offered; (ii) a failure to make reasonable modifications when necessary to afford such good, service, etc. to disabled individuals; (iii) a failure to take steps to prevent disparate treatment for disabled individuals because of the absence of auxiliary aids and services; (iv) a failure to remove tangible barriers to access in facilities; (v) failure to use alternative methods if they are readily achievable. See *id.* Facilities are considered to be exclusively limited to physical structures. See 28 C.F.R. § 36.104(3)(iii) (defining facilities as structural and tangible); see also 28 C.F.R. § 36.304(b) (listing tangible barriers to access in facilities).

³⁵ See 42 U.S.C. § 12182(b)(2)(A)(i)-(v) (listing exceptions for defendant). A failure to prevent discrimination because of the absence of auxiliary aids or the failure to make reasonable modifications or remove barriers to access is discrimination unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered, or would result in an undue burden. See *id.* It is important to note that an undue burden defense is only available in the "auxiliary aid" provision. *Id.* All four provisions allow for a "fundamentally alter" defense. *Id.* For example, a museum would not have to make a reasonable modification to allow blind patrons to touch the artwork, because any ensuing damage would "fundamentally alter" the offering. See Ryan C. Brunner, Article, *Websites as Facilities Under ADA Title III*, 15 DUKE L. & TECH. REV. 171, 178 (2017) (clarifying meaning of "fundamentally alter" in application).

³⁶ See NONDISCRIMINATION ON THE BASIS OF DISABILITY BY PUBLIC ACCOMMODATIONS AND IN COMMERCIAL FACILITIES, 56 Fed. Reg. 35544 (July 26, 1991) (to be codified at 28 C.F.R. pt. 36) (defining factors for consideration of undue burden defense). Undue burden means

that are successful in proving that a place of public accommodation violates Title III, the primary available remedy is injunctive relief, which, effectively, eliminates any existing barrier to access.³⁷

As the first civil rights law addressing discrimination against disabled individuals since Section 504 of Rehabilitation Act of 1973, the ADA sought to broaden the scope of disability protections in contexts other than the public sphere.³⁸ Applying these safeguards to places of public accommodation, Title III reflects Congress’s findings that many individuals with disabilities were not provided equal opportunity or access in obtaining goods and services from private businesses.³⁹ Historically, the barriers to equal access that Congress intended to eliminate in Title III were primarily physical barriers, given the limited influence of web-based technology at the

“significant difficulty or expense” and limits obligation to provide auxiliary aids and services. *See id.* This exception, like the “fundamentally alter” defense, is an individualized inquiry that should be “applied on a case-by-case basis.” *See id.*; *see also* PGA Tour, Inc. v. Martin, 532 U.S. 661, 688 (2001) (demonstrating individualized inquiry based on context and facts). *See generally* Brunner, *supra* note 35, at 179 (discussing the two exceptions to discrimination in places of public accommodation).

³⁷ *See* 42 U.S.C. § 12188(a) (listing remedies for ADA Title III violations). Injunctive relief may include an order to alter facilities to make them readily accessible to disabled individuals, requiring the provision of an auxiliary aid or service, or a modification of a policy. *See id.* *See also* Peebles & Sheppard III, *supra* note 18, at 231 (explaining further remedies). A judgment for monetary damages is only available when brought by the attorney general in cases of public importance, or for places of public accommodation demonstrating a pattern and practice of disability discrimination. *See id.*

³⁸ *See* Rehabilitation Act of 1973, 93 Pub. L. No. 112 § 504 (defining first U.S. federal civil rights law protecting individuals with disabilities). Section 504 reads, “[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” *Id.* at 394. As such, Section 504 exclusively limited protection from disability discrimination by federal agencies and to recipients of federal financial assistance. *See id.* The Act did not protect disability discrimination in employment, places of public accommodation, or the private sector. *See id.* Regardless of its scope, this Act signaled the first piece of federal disability protection and laid the groundwork for the enactment of the ADA. *See* Schiff, *supra* note 19, at 2320, n.26 (detailing impact of Section 504 on ADA ratification).

³⁹ *See* H.R. Rep. No. 101-485(I)(a) (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 310 (finding greater social withdrawal for disabled individuals). Congress found that individuals with disabilities are marginalized members of society who, unlike other protected classes, historically had no legal recourse to remedy such discriminatory treatment. *See id.* The disparate treatment faced by disabled people in all walks of life has led to social isolation and unfair opportunity to compete on the equal basis for which the United States is known. *See id.* Congress noted that individuals with disabilities are a “discrete and insular minority” who have been faced with limitations and unequal treatment that has severely disadvantaged them “socially, vocationally, economically, and educationally.” *See id.* As such, it is the general purpose of the ADA to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” *See id.* at (b)(1).

time.⁴⁰ As the omnipresence of digital life becomes more amplified within a COVID-era society, the barriers to access that the ADA seeks to redress have taken on the unfamiliar form of online inaccessibility.⁴¹

Ratified as a purposefully broad, sweeping piece of legislation, Congress intended for the ADA to be construed liberally.⁴² That intention permeates throughout the twelve categories of places of public accommodation in Title III, which deliberately includes the extension “or other” at the end of most categories in order to apply the maximum breadth of protection in such places.⁴³ Recognizing this intent, the Supreme Court lent credence to the broad interpretation that should be afforded to Title III’s definition of public accommodation.⁴⁴

B. Circuit Split

In order for Title III protections to extend to websites, the online content at issue must be considered a place of public accommodation.⁴⁵ A multi-circuit split has emerged in light of the varying interpretations of the

⁴⁰ See *supra* notes 10-11 and accompanying text (highlighting infancy of digital era when ADA was enacted); see Schiff, *supra* note 19, at 2321 (noting ADA was primarily concerned with physical barriers). See also Patrick Sisson, *The ADA at 25, How one law helped usher in an age of accessible design*, CURBED (July 23, 2015), <https://perma.cc/44WQ-9HJK> (pointing to success of ADA in mitigating physical barriers to access). While members of the younger generations may take many of the ADA-instituted changes for granted, a revolution in accessible design occurred exclusively because of the ADA. See *id.* Braille signage, service animal accommodations, open bathroom designs, no-step entrances, and warning tiles on street corners are some examples of a post-ADA mitigation of physical barriers to access. *Id.*

⁴¹ See Schwarz, *supra* note 16 (discussing online accessibility gap for individuals with disabilities).

⁴² See 42 U.S.C. § 12102(4)(A) (stating liberal construction of ADA coverage). “The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.” *Id.*

⁴³ See 42 U.S.C. § 12181(7) (listing twelve broad categories of places of public accommodation). Note that seven of the twelve categories contain an “or other” modifier. See *id.* The Committee on Education and Labor, presenting their findings to the House, intended that “that the ‘other similar’ terminology should be construed liberally, consistent with the intent of the legislation that people with disabilities should have equal access” See H.R. Rep. No. 101-485(II) (1990), *reprinted in* 1990 U.S.C.C.A.N. 303 (explaining intent for liberal construction of “or other” language).

⁴⁴ See *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 676-78 (2001) (stating broad construction of public accommodation). The Supreme Court noted that the “extensive” broad categories included in Title III, coupled with its legislative history, indicate that places of public accommodation should be “construed liberally” to provide equal access to the “wide variety of establishments available to the nondisabled.” See *id.* at 677-78. As such, both statutory intent and judicial interpretation indicate that the ADA and Title III places of public accommodation should be broadly interpreted to remedy the disparate treatment faced by disabled individuals.

⁴⁵ 42 U.S.C. § 12181(7) (outlining where Title III protects individuals with disabilities).

issue of what constitutes a place of public accommodation.⁴⁶ Federal appellate courts have taken three approaches on the matter: (1) a broad interpretation that allows places of public accommodation to extend to non-physical spaces, (2) a narrow interpretation that limits places of public accommodation to physical structures, and (3) a “nexus” approach, which requires a sufficient connection between a physical location and the online offering to be considered a place of public accommodation.⁴⁷

The first approach to Title III, adopted by the First, Second, and Seventh Circuits, broadly interprets the statutory language of the ADA to extend places of public accommodation beyond mere physical spaces.⁴⁸ In *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New Eng.*,⁴⁹ the First Circuit acknowledged that the existence of ambiguous statutory language in places of public accommodation is evidence of Congress’s intent for broad construction of Title III.⁵⁰ In *Morgan v. Joint Admin.*,⁵¹ the Seventh Circuit placed itself squarely at odds with the Third and Sixth Circuits, stating that the site of the sale of an insurance policy is “irrelevant to Congress’s goal of granting the disabled equal access . . . [w]hat matters is that the good or service be offered to the public.”⁵² District courts in the First Circuit have

⁴⁶ See Mullen, *supra* note 7, at 756-64 (explaining circuit split); see also Lee Eulgen, *ADA Website Accessibility Ruling Deepens Circuit Split*, JDSUPRA (Apr. 29, 2021), <https://perma.cc/9YGS-5ZNR> (providing brief overview of circuit split).

⁴⁷ See Pavlicko, *supra* note 12, at 955-56 (listing three approaches taken by circuit courts). While some federal district courts have taken different approaches than the one adopted by their respective appellate courts for factually dissimilar cases, most circuits remain consistent on a distinct side of the issue. See Mullen, *supra* note 7, at 757 (explaining district court split from controlling precedent).

⁴⁸ See *Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler’s Ass’n of New Eng.*, 37 F.3d 12, 19-20 (1st Cir. 1994) (providing basis of First Circuit adoption of broad interpretation); see also *Morgan v. Joint Admin. Bd.*, 268 F.3d 456, 459 (7th Cir. 2001) (adopting broad interpretation in Seventh Circuit).

⁴⁹ 37 F.3d 12 (1st Cir. 1994).

⁵⁰ See *Carparts*, 37 F.3d at 19 (identifying ambiguity in Title III). Here, an AIDS victim and his employer brought suit against defendant trade association, alleging that a lifetime cap on health benefits for individuals with AIDS is a violation of the ADA. See *id.* at 14. Focusing on a travel service as an example of an enumerated place of public accommodation, the court noted that “[m]any travel services conduct business by telephone or correspondence . . . without requiring their customers to enter an office in order to obtain their services.” See *id.* at 19. The court states that Congress clearly considered that service establishments include service providers who do not require entry into an actual physical location. See *id.* It is the First Circuit’s opinion that Congress would not limit Title III so narrowly as to protect individuals who enter an office to purchase services, but would refuse to protect those who purchase the same services by telephone or mail. See *id.*

⁵¹ 268 F.3d 456, 459 (7th Cir. 2001).

⁵² See *Morgan*, 268 F.3d at 459 (rejecting literal interpretation of public accommodation). While the court acknowledged the irrelevance of the site of sale in determining a place of public accommodation, the retirement plan at issue was not offered to the public, so the Plaintiff’s argument ultimately failed. See *id.* Judge Posner powerfully analogized that “[a]n insurance company

extended the broad interpretation of their appellate court to the context of website accessibility, holding that websites may be covered by Title III if they fall under one of the twelve categories of places of public accommodation.⁵³ The Second Circuit, while not reaching the question of online application, has similarly espoused the view that places of public accommodation should extend beyond the mere physical.⁵⁴ In advocating for this approach, the First, Second, and Seventh Circuits look to the sweeping purpose of the ADA for support such that their liberal interpretation of Title III aligns with Congressional intent upon ratification of the Act.⁵⁵

can no more refuse to sell a policy to a disabled person over the internet than a furniture store can refuse to sell furniture to a disabled person who enters the store.” *See id.* But *see supra* notes 55-63 and accompanying text (explaining opposite Third and Sixth Circuit approach). As discussed, the Third and Sixth Circuit decisions state that the site of the sale of the insurance policy is determinative for Title III application. *See Morgan*, 268 F.3d at 459.

⁵³ *See Nat’l Ass’n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 201 (D. Mass. 2012) (holding that websites may be places of public accommodation). Plaintiff, a public interest group for the hearing-impaired, brought a Title III suit against Netflix for failing to provide closed captioning on its streaming website. *See id.* at 198-99. The court stated that it was not the intention of Congress to “limit the ADA to the specific examples listed in each category of public accommodation.” *See id.* at 201. According to the District Court, the ADA covers the services “of” a public accommodation, not services “at” or “in” a public accommodation, making the relevant inquiry not *where* the offering is provided, but rather, the content of the offering itself. *See id.* at 201-02; *see also Access Now, Inc. v. Blue Apron, LLC*, Civ. No. 17-cv-116-JL, 2017 U.S. Dist. LEXIS No. 185112, at *8-9 (D.N.H. Nov. 8, 2017) (reiterating *Netflix* rationale).

⁵⁴ *See Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 31 (2d. Cir. 1999) (speaking favorably of broad approach). Here, the Second Circuit vacated the judgment of a district court decision, which had dismissed the complaint of a disabled couple against an insurance company. *See id.* at 29. The plaintiffs alleged that the defendant’s refusal to sell them life insurance because of their mental disabilities constituted a violation of Title III. *See id.* at 30. The court, citing First and Seventh Circuit decisions, reasoned that “the statute was meant to guarantee them more than mere physical access.” *See id.* at 32. The court went on to explain that the operative term “of,” not “in,” a place of public accommodation is crucial, as the goods and services provided by places *of* public accommodation are different from the offerings provided by places *in* a public accommodation. *See id.* at 33 (emphasis added); *see also Markett v. Five Guys Enters. LLC*, 17-cv-788 (KBF), 2017 U.S. Dist. LEXIS 115212 at *5 (S.D.N.Y. July 21, 2017) (reiterating Second Circuit deference to broad approach). In *Markett*, a blind plaintiff brought a Title III claim against the burger chain after being unable to access the defendant’s website to order food. *See Markett*, 2017 U.S. Dist. LEXIS 115212 at *2. The court held that the breadth of federal appellate decisions suggests that Five Guys’ website is covered by the ADA. *See id.* at *5. In holding that the website applies “either as its own place of public accommodation or as a result of its close relationship as a service of defendant’s restaurants . . .” it appears the Southern District of New York of the Second Circuit endorses the nexus approach, but the court does not go any further than the mere suggestion. *See id.* at *5.

⁵⁵ *See Carparts*, 37 F.3d at 19 (clarifying legislative purpose of ADA). The court stated that to exclude all businesses which sell goods and services by phone or mail would “run afoul” of the original purpose of the ADA, which was to provide disabled individuals the opportunity to fully enjoy these goods and services that are indiscriminately enjoyed by the non-disabled. *See id.* at 20; *see also Mullen, supra* note 7, at 754 (explaining First Circuit alignment with ADA original purpose).

The narrow approach, adopted by the Third, Sixth, and Eleventh Circuits, explicitly limits places of public accommodation under Title III to physical locations.⁵⁶ The Third and Sixth Circuits, in *Ford v. Schering-Plough Corp.*,⁵⁷ and *Parker v. Metro. Life Ins.*⁵⁸ respectively, found that in the factually identical cases, the policies offered by insurance companies did not constitute places of public accommodation.⁵⁹ Holding that an employer-offered benefit plan – unlike an insurance office – cannot, in and of itself, be a place of public accommodation, the Sixth Circuit looked to the Code of Federal Regulations to determine that the statutorily defined words of “place” and “facility” are restricted to physical locations.⁶⁰ In a different context, the Third Circuit went on to uphold the same reasoning in *Peoples v. Discover Fin. Servs., Inc.*⁶¹ The limitation of places of public

⁵⁶ See Mullen, *supra* note 7, at 756-58 (noting stance of “narrow interpretation” circuits). While some secondary sources omit the Eleventh Circuit from the courts who have adopted a narrow interpretation, these sources predate the decision in *Gil v. Winn-Dixie Stores, Inc.*, 993 F.3d 1266 (11th Cir. 2021), which squarely places the Eleventh Circuit on the side of narrow interpretation. See Mullen, *supra* note 7, at 757-58 (omitting Eleventh Circuit from group with Third and Sixth).

⁵⁷ 145 F.3d 601 (3d Cir. 1998).

⁵⁸ 121 F.3d. 1006 (6th Cir. 1997).

⁵⁹ See *Ford*, 145 F.3d at 612 (holding benefits plaintiff challenged do not fall under Title III); see *Parker*, 121 F.3d. at 1011 (holding benefit plan is not a place of public accommodation). In both cases, plaintiffs with mental disabilities challenged employer-provided disability policies, arguing that the inferior benefits offered for mental disabilities compared to the better benefits offered for physical disabilities were in violation of Title III of the ADA. See Schwarz, *supra* note 16, at 381-82 (providing overview of facts). In both cases, plaintiffs’ arguments rested on the assumption that the benefits themselves were places of public accommodation. See *id.* at 382. The plans, while sold by insurance companies, were provided by plaintiffs’ employers, and both courts held that benefit plans offered by employers are not goods offered by a place of public accommodation. See *Parker*, 121 F.3d at 1010-11. While the Sixth Circuit admitted that insurance companies could offer goods as places of public accommodation, they found that an insurance office that sells plans to employers cannot, because a member of the public cannot enter the office and purchase an employer-provided disability policy like the ones at issue. See *id.* at 1011.

⁶⁰ See *Parker*, 121 F.3d at 1011 (citing statute defining “place” and “facility”). The Code of Federal Regulations defines “place” as a “facility operated by a private entity whose operations affect commerce and fall within at least one of the following [twelve] categories.” See 28 C.F.R. § 36.104. A “facility” is subsequently defined as “all or any portion of buildings, structures, sites . . . where the building, property, structure, or equipment is located.” See *id.* The Sixth Circuit reasons that if “place” is defined as a “facility”, and “facility” is defined as an exclusively physical location, then to hold a place of public accommodation as anything other than a physical location would be to misread the statute. See *Parker*, 121 F.3d at 1014 (distinguishing its findings from broad interpretation circuits); see also Michael Goldfarb, *Access Now, Inc. v. Southwest Airlines, Co. – Using the “Nexus” Approach to Determine Whether a Website Should Be Governed By the Americans With Disabilities Act*, 79 ST. JOHN’S L. REV. 1313, 1320 (2005) (reiterating definitions of “facility” and “place”).

⁶¹ No. 09-3991, 2010 U.S. App. LEXIS 14702 (3d Cir. 2010). In *Peoples*, a blind credit card holder sued the card issuer, alleging that overcharges on his card for a prostitute’s in-home services constituted a failure to provide reasonable accommodation under Title III. See *id.* at *1-6 (providing overview of facts). Reiterating the reasoning found in *Ford*, the Third Circuit held that because

accommodation to strictly physical locations reflects the statutory construction doctrine employed by the Third and Sixth Circuits of *noscitur a sociis*, that determination of the plain meaning of a word in a statute is to be interpreted within the context of its accompanying words.⁶² Similarly, the Eleventh Circuit relied on *ejusdem generis*, another canon of construction that limits general terms in a statute to their corresponding and specifically enumerated terms, in an effort to avoid unfounded statutory speculation.⁶³ Viewing general and ambiguous places of public accommodation like “other sales or rental establishment[s]” within the surrounding and specifically enumerated terms, all of which are plainly physical locations, the court concluded that it could not extend places of public accommodation to the non-physical.⁶⁴ Using these doctrines to “avoid the giving of unintended breadth

the card was used at the prostitute’s apartment, the Defendant issuer did not own, lease, or operate the location where the transaction occurred. *See id.* at *8-10. Applying the precedent that a place of public accommodation must be a physical place, the alleged discrimination did not relate to the equal enjoyment of any goods or services on any physical property of the defendant. *See id.* at *9-10. *But see* *Gniewkowski v. Lettuce Entertain You Enters., Inc.*, 251 F. Supp. 3d 908, 920 (W.D. Pa. 2017) (indicating possible shift in Third Circuit ADA jurisprudence). In *Gniewkowski*, blind plaintiffs alleged that the defendant’s website was inaccessible and violated Title III. *See id.* at 911-12. The district court, distinguishing the facts from Third Circuit precedent because the alleged discrimination at issue occurred on property that the Defendant owns (their website), denied the Defendant’s motion to dismiss, recognizing the legitimacy of the claim. *See id.* at 918-920.

⁶² *See Parker*, 121 F.3d at 1014 (defining the statutory canon of construction, *noscitur a sociis*); *Kurinsky v. United States*, 33 F.3d 594, 596-97 (6th Cir. 1994) (applying doctrine); *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) (demonstrating strict statutory construction); *Owen of Georgia, Inc. v. Shelby County*, 648 F.2d 1084, 1092 (6th Cir. 1981) (limiting statute to plain meaning). Because the Third and Sixth Circuits define all the enumerated places of public accommodation as physical locations, a place of public accommodation must be limited to physical places, according to the doctrine. *See Schwarz*, *supra* note 16, at 384 (explaining doctrinal construction technique).

⁶³ *See Access Now v. Southwest Airlines*, 227 F. Supp. 2d 1312, 1318 (S.D. Fla. 2002) (employing statutory construction technique of *ejusdem generis*), *appeal dismissed* 385 F.3d 1324, 1335 (11th Cir. 2004). When there is uncertainty regarding the meaning of a particular clause in a statute, the rule provides that “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.” *See United States v. Turkette*, 452 U.S. 576, 581 (1981) (explaining definition of *ejusdem generis*).

⁶⁴ *See Access Now*, 227 F. Supp. 2d at 1318 (applying rule to facts of case). In *Access Now*, a blind plaintiff sued Southwest Airlines, alleging that the defendant’s inaccessible virtual ticket counter violated Title III of the ADA. *See id.* at 1314. The Eleventh Circuit applied *ejusdem generis* to determine if the airline’s website was a place of public accommodation for Title III application, determining the meaning of the general terms of “other place of exhibition” and “other sales or rental establishment” in light of specifically enumerated terms such as “theater,” “bakery,” “museum,” and “library”. *See id.* at 1318-19. Determining that the specifically enumerated terms that corresponded to the ambiguous terms were clearly physical and concrete locations, the court declined to extend a place of public accommodation beyond a physical establishment. *See id.* at 1319. In ruling for the Defendant, the district court, with the Eleventh Circuit affirming, held that the Plaintiff’s nexus argument failed not because there was no nexus between southwest.com and

to the Acts of Congress”, the narrow, textualist interpretation limits places of public accommodation to physical locations in order to prevent a statutory construction broader than what Congress intended.⁶⁵

While the Eleventh Circuit has positioned itself on the narrow interpretation side of the circuit split, its judicial history leading up to the decision in *Gil v. Winn-Dixie Stores, Inc.*,⁶⁶ lends valuable insight into the current analysis governing Title III.⁶⁷ In *Rendon v. Valleycrest Prods.*,⁶⁸ a group of disabled plaintiffs brought suit against producers of the show “Who Wants To Be A Millionaire”, alleging that the telephone selection process screened them out on the basis of their respective disabilities.⁶⁹ Reasoning that Title III covers tangible barriers in the form of physical and architectural barriers, as well as intangible barriers such as eligibility requirements, screening rules, or discriminatory policies, the court rejected the defendant’s assertion that discrimination via an intangible barrier must occur on-site.⁷⁰ While it is debatable if this decision endorsed a nexus analysis in Eleventh Circuit rulings before *Gil*, *Rendon* made it clear that the Eleventh Circuit requires a

a physical location, but because the plaintiffs never attempted to establish such a link in the first place. *See Access Now*, 385 F.2d at 1328.

⁶⁵ *See Jarecki*, 367 U.S. at 307 (providing rationale for *noscitur a sociis*). The doctrine of *noscitur a sociis* construes a term within the context of its accompanying words as a vehicle to accurately interpret statutes in the manner Congress intended. *See id.* As such, the Third and Sixth Circuits limit places of public accommodation as to avoid a broad interpretation of the term, in the case that Congress did not intend it as such. *See* sources cited *supra* note 59 and accompanying text (detailing Third and Sixth Circuit holdings).

⁶⁶ 993 F.3d 1266, 1266 (11th Cir. 2021).

⁶⁷ *See id.* at 1277 (holding place of public accommodation must be physical location); *see also* *Rendon v. Valleycrest Prods.*, 294 F.3d 1279, 1285-86 (11th Cir. 2002) (laying groundwork for Title III analysis later used in *Gil*).

⁶⁸ 294 F.3d 1279, 1279 (11th Cir. 2002).

⁶⁹ *See id.* at 1280 (explaining procedural posture of case). For prospective contestants to be selected for appearance on the television show, they needed to call a pre-recorded line, which prompted them to answer a series of trivia questions. *See id.* Participants answered the questions by pressing keys on their telephone keypads, and the callers who answered all the questions correctly were randomly selected to advance to the next round. *See id.* This round of questioning was ironically named the “fast finger process”. *See id.*

⁷⁰ *See id.* at 1283 (interpreting Title III to require physical location but not on-site discrimination); *see also* 42 U.S.C. § 12182(b)(2)(A)(iv) (prohibiting intangible discrimination). The Eleventh Circuit held that the statute specifically prohibits the imposition of eligibility criteria that screen out disabled individuals from fully and equally enjoying the offerings of the defendant. *See Rendon*, 294 F.3d at 1283-84. The court noted the inconsistencies which would result if Title III jurisprudence limited intangible discrimination only to that sustained on the site of the physical accommodation. *See id.* at 1285. It would be in clear violation of the ADA if the defendant screened potential contestants “just outside the studio” and refused them on the basis of their disability, and the court in *Rendon* saw no difference for off-site intangible barriers. *See id.* The court concluded that the telephonic system requiring speed and motor precision to be selected for “Who Wants To Be A Millionaire” actively screened out disabled individuals from fully and equally enjoying the defendant’s offerings. *See id.*

physical place of public accommodation, but does not limit Title III violations to tangible, on-site discrimination.⁷¹

The third approach, adopted by the Ninth Circuit, allows for Title III to apply when a sufficient “nexus” exists between the offered good or service and an actual, physical location.⁷² The nexus test, which holds that a non-physical offering can fall under Title III *if* it is connected to an existing physical place of public accommodation, offers a doctrinal middle ground to the opposing interpretations adopted by the broad and narrow approach circuits.⁷³ While some early cases originating in the Ninth Circuit seeking ADA protection for digital accessibility ultimately failed, the Circuit later

⁷¹ See *Rendon*, 294 F.3d at 1286 (reversing and allowing plaintiffs’ Title III claim to move forward on remand). While there was no explicit mention of a nexus test in the *Rendon* opinion beyond a footnote citing other circuit precedent, the court resolved that the place of public accommodation was a physical site, and then determined how the off-site intangible barriers were in violation of Title III. See *id.* at 1285; see also *Gil*, 993 F.3d at 1281 (holding Eleventh Circuit had not established nexus standard in *Rendon*). Noting that the *Rendon* court never examined the specific link between the off-site discrimination and the physical location, the *Gil* court stated that it “did not adopt or otherwise endorse a ‘nexus’ standard in *Rendon*.” See *id.*

⁷² See Mullen, *supra* note 7, at 758 (defining nexus approach); see also Nat’l Fed’n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 953-54 (N.D. Cal. 2006) (establishing nexus for plaintiff’s claims). In *Target*, the plaintiff brought a Title III suit against Target, claiming that their website was inaccessible to the blind. See Nat’l Fed’n of the Blind, 452 F. Supp. 2d at 949-50. The trial court, endorsing the Ninth Circuit’s determination that places of public accommodation are strictly physical locations, similarly declined to join courts which give a more expansive meaning to the statute. See *id.* at 952 (citing *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000)). The *Target* court went on to acknowledge that it would be nonsensical to limit Title III protections exclusively to discrimination that occurs on-site, and the nexus theory allows for protection against off-site discrimination in the form of intangible barriers to equal enjoyment, if it is sufficiently tied to the physical location itself. See *id.* at 954. Ultimately holding that Target’s website was not, in and of itself, a place of public accommodation, the court allowed the plaintiff to proceed with claims from the parts of the website that impede the enjoyment of goods and services offered in physical Target stores, but struck down the portion of the claim that alleged discrimination unconnected to Target’s physical locations. See *id.*

⁷³ See Richard E. Moberly, *The Americans with Disabilities Act in Cyberspace: Applying the “Nexus” Approach to Private Internet Websites*, 55 MERCER L. REV. 963, 978 (2004) (advocating for nexus test). Although the nexus approach allows Title III application to non-physical websites, it requires a connection to a physical place of public accommodation, because the “fairest reading of the statutory and regulatory language” of the ADA says that such places must be physical locations. See *id.* This analysis contains elements that reconcile the opposing positions taken by the broad and narrow approach circuits. See *id.* The first step of a nexus analysis is rooted in the narrow approach that requires a physical entity for ADA application. See *id.* The second step of the analysis borrows from the broad approach circuit courts, that non-physical offerings can be bound by Title III, as long as those offerings retain a sufficient nexus to the physical entity. See *id.*

recognized and applied the nexus test.⁷⁴ In *Robles v. Domino's Pizza, LLC*,⁷⁵ however, the Ninth Circuit's nexus holding applied Title III protections to a website and mobile application, solely based on the relationship between the offering and the physical location to which it is connected.⁷⁶ The decision in *Robles* marks a positive shift in current nexus jurisprudence, extending Title III protections to the online offerings of brick-and-mortar stores and restaurants upon a court finding sufficient connection between the two.⁷⁷

Another interpretation, one that has not yet been tested in the judiciary, offers an alternative approach that seeks to apply Title III to commercial websites which fall under one of its twelve categories of public accommodation.⁷⁸ The commerce and character-based test suggests that websites should be viewed independently as places of public accommodation,

⁷⁴ See *Earll v. eBay, Inc.*, No. 13-15134, 2015 U.S. App. LEXIS 5256, at *2 (9th Cir. Apr. 1, 2015) (holding plaintiff was unable to establish nexus). A deaf plaintiff, alleging eBay violated Title III for inaccessibility in their telephonic verification system, failed to assert discrimination as a matter of law because "eBay's services [were] not connected to 'any actual, physical place'." See *id.* (quoting *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000); see also *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017, 1024 (holding plaintiff was unable to establish nexus), *dismissed*, No.: 5:11-CV-01199-EJD, 2013 U.S. Dist. LEXIS 4246, at *2 (N.D. Cal., Jan. 10, 2013), *aff'd*, 2015 U.S. App. LEXIS 5257, at *2 (9th Cir. 2015). Similarly in *Cullen*, a deaf plaintiff brought an ADA claim against Netflix upon the streaming service's failure to provide closed captioning. See *Cullen*, 880 F. Supp. 2d at 1020 (detailing facts of alleged discrimination). On appeal, the Ninth Circuit again held Netflix was not subject to the ADA because none of their services were connected to an actual, physical place. See 2015 U.S. App. LEXIS 5257, at *2. This decision stands in direct opposition to *Nat'l Ass'n. of the Deaf*, a factually identical case in which Netflix was also a defendant. See *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 200 (D. Mass. 2012) (holding Netflix was bound by Title III). The First Circuit determined that Netflix's website can be considered a place of public accommodation under Title III. See *id.* The two opposing Netflix judgments illustrate the confusion and incompatible judgments regarding Title III application to online content. See Pavlicko, *supra* note 12, at 954 (highlighting inconsistencies of current Title III jurisprudence).

⁷⁵ 913 F.3d 898, 898 (9th Cir. 2019).

⁷⁶ See *id.* at 905 (discussing nexus connection between app and restaurants). In *Robles*, the court stated that the "nexus between Domino's website and app and physical restaurants . . . [wa]s critical to [their] analysis." See *id.* The Ninth Circuit acknowledged that the ADA exclusively covers physical places where goods or services are offered to the public, but because the website and app facilitate access to the goods and services in places of public accommodation, those being their physical restaurants, they are similarly bound by Title III regulations. See *id.* Reiterating language espoused by both nexus and broad interpretation jurisdictions, the Ninth Circuit stated that the ADA applies to the "services of a public accommodation, not services in a place of public accommodation." See *id.* at 904. The website and mobile app in question connects customers to the goods and services of Domino's physical restaurants. See *id.* (emphasis added).

⁷⁷ See *id.* (noting relationship between Domino's online ordering technology and physical stores); see also Pavlicko, *supra* note 12, at 965 (noting importance of *Robles* decision on nexus approach going forward).

⁷⁸ See Nikki D. Kessling, Comment, *Why the Target "Nexus Test" Leaves Disabled Americans Disconnected: A Better Approach to Determine Whether Private Commercial Websites are "Places of Public Accommodation"*, 45 HOUS. L. REV. 991, 1024 (2008) (explaining commerce-and character-based test for websites).

provided they meet the commerciality and character standards that Title III already has in place.⁷⁹ Just as Title III requires physical places of public accommodation to be private entities affecting commerce, qualifying websites meeting the commerciality standard would have to demonstrate the same.⁸⁰ To satisfy the character analysis portion of the test, the website in question must resemble one of the twelve existing categories of public accommodations.⁸¹ Instead of focusing on the venue of the goods or services provided, this test looks specifically at the content of the website itself for Title III application.⁸²

IV. ANALYSIS

The differences in ADA interpretations regarding the applicability of Title III to online content presents both an unpredictable solution for businesses seeking to comply with the law, and leaves millions of individuals with disabilities across the United States lacking uniform protection.⁸³ As the internet operates irrespective of federally defined jurisdictional boundaries, the incompatible rulings across circuits may lead to a wasteful and inefficient allocation of resources for American businesses with significant e-commerce reach.⁸⁴ In addition to Supreme Court inaction, a desire for

⁷⁹ See *id.* (advocating for new approach while using existing language of Title III).

⁸⁰ See *id.* (noting identical test for websites as physical places of public accommodation). The author writes that such a determination would automatically rule out purely informational websites that do not affect commerce. See *id.*; see also *supra* note 6 and accompanying text (outlining Title III commerce requirements).

⁸¹ See Kessling, *supra* note 77, at 1025-27. (explaining character analysis of website). Analyzing the core purpose of the website, a court can determine if the digital offering falls into one of the twelve categories. See *id.* at 1026; see also Schwarz, *supra* note 16, at 380 (describing test generally). The test employs the already-enumerated language and structure of Title III to ask whether a website similarly acts as a place of public accommodation. See Schwarz, *supra* note 16, at 380.

⁸² See Kessling, *supra* note 77, at 1027 (describing content-based analysis for Title III application); see also Schiff, *supra* note 19, at 2346 (advocating for similar content test). Although a different name, this “content” test similarly looks to the goods and services provided by the website in determining whether it subsequently falls under one of the enumerated categories. See Schiff, *supra* note 19, at 2346.

⁸³ See Kessling, *supra* note 77 at 1028 (criticizing current approaches). Kessling writes that the arbitrary line-drawing that currently exists “confuses everyone and leaves many excluded people with no remedy at all.” See *id.*

⁸⁴ See Pavlicko, *supra* note 12, at 964 (advocating for uniformity in Title III jurisprudence). As Pavlicko explains, a national retail chain that sells goods in all fifty U.S. states cannot effectively operate its mobile offerings in light of the different rules existing in several circuits. See *id.* Nor does Title III provide an equitable solution for the individuals with disabilities living in these different areas, and it can be said with near certainty that it was not Congress’s intention to provide vastly different protections against discrimination depending on which state one happens to live in. See *id.* After the Ninth Circuit ruling in *Robles v. Domino’s Pizza*, which established a nexus

uniformity by way of legislative measures has also fizzled out, with the proposed Online Accessibility Act failing to gain traction in Congress.⁸⁵ In light of these legislative hurdles, it is imperative that the federal circuit courts of appeal provide a uniform interpretation of Title III, and this note advocates for a middle-ground nexus solution until Congressional action settles the matter.⁸⁶ While the author concedes that nexus analysis is not without its fair share of shortcomings, this approach best reflects judicial deference to legislative intent, while realistically adapting the law to the challenges brought on by twenty-first century technological change.⁸⁷

Regardless of the interpretation that a legislative action or Supreme Court decision may yield in the future, there must be an emphasis on uniformity in Title III application to web-derived content in order to mitigate the inconsistencies befalling businesses and individuals under the current standards.⁸⁸ A restaurant chain that has locations in Indiana and Ohio should not be subject to vastly different requirements for designing their online ordering systems, nor should disabled consumers living in those states be faced with disparate ADA protections, merely because their respective circuit courts differ in their interpretation of Title III.⁸⁹ The harmful inconsistencies of current ADA guidance for trans-jurisdictional businesses, like Netflix, has left them with incompatible legal judgments that depend solely on which

approach for online retailers with a significant connection to a brick-and-mortar location, petition for writ of certiorari to the United States Supreme Court was denied in 2019. *See Robles v. Domino's Pizza*, 913 F.3d 898, 905 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 122 (2019).

⁸⁵ *See* Pavlicko, *supra* note 12 at 964 (describing proposed Online Accessibility Act). The Act, if ratified, would add a Title VI to the ADA that applies to “consumer facing websites and mobile applications owned or operated by a private entity.” *See id.* (quoting H.R. 8478 § 604(2)). The proposed Title VI would provide uniform online accessibility standards for commercial websites and applications, which, if ratified, would eliminate the circuit split that currently exists. *See id.*

⁸⁶ *See* Peebles & Sheppard III, *supra* note 18, at 233 (endorsing uniformity in future Title III rulings).

⁸⁷ *See* sources cited *infra* notes 115-118 and accompanying text (explaining shortcomings of nexus analysis); *see also* sources cited *supra* notes 67-72 and accompanying text (defining nexus approach).

⁸⁸ *See* Peebles & Sheppard III, *supra* note 18, at 233 (advocating for future uniformity in Title III rulings).

⁸⁹ *See generally* Pavlicko, *supra* note 12, at 964 (illustrating impracticality of circuit split for businesses and individuals). In passing the ADA, it certainly was not Congress’s intent to allow a blind plaintiff living in Indiana to successfully bring suit for an inaccessible website, where a similarly situated plaintiff living ten miles away in Ohio has no Title III protection for the same problem. *See id.* This preceding example is illustrative of practical challenges that may ensue because of the dissimilar Circuit rulings, and the same is true for others whose jurisdictions lie in neighboring geographic proximity to one another. *See* sources cited *supra* notes 47-66 and accompanying text (explaining broad and narrow approach circuits).

circuit the complaint was filed in.⁹⁰ The two Netflix decisions are representative case studies of the issue, with the polar opposite judgments a by-product of the contrasting interpretations of the First and Ninth Circuits.⁹¹

As a direct result of the uncertainty regarding the ADA and its application to website accessibility, Title III lawsuits have flooded courts in the last few years.⁹² With the number of federal ADA claims more than quadrupling from 2013 to 2019, it is clear that Title III is in desperate need of Congressional or Supreme Court clarification.⁹³ In addition to a general increase in ADA-related litigation resulting from inconsistent application of Title III, commentators also note a troubling proliferation of predatory litigation.⁹⁴ These so-called “surf-by” lawsuits – the lion’s share filed by the same small group of plaintiffs and attorneys – take advantage of low administrative barriers to file claims, and seek early settlements from unsuspecting

⁹⁰ See *Nat’l Ass’n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 199 (D. Mass. 2012) (reiterating First Circuit approach that extends Title III protections to online content). In this case, plaintiffs brought suit against the streaming service for a failure to provide equal access for deaf and hearing-impaired individuals through closed captioning. See *id.* at 198. Seeking a motion for judgment on the pleadings, Netflix argued that its streaming site is not a place of public accommodation under Title III. See *id.* at 199. Denying the motion, the court cited First Circuit precedent in extending Title III to non-physical, online content. See *id.* at 200-01; see also *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017, 1023-24 (N.D. Cal. 2012) (applying physical place requirement to Netflix’s website), *dismissed*, No.: 5:11-CV-01199-EJD, 2013 U.S. Dist. LEXIS 4246, at *2 (N.D. Cal., Jan. 10, 2013), *aff’d*, 2015 U.S. App. LEXIS 5257, at *2 (9th Cir. 2015). In *Cullen*, a deaf plaintiff brought suit against Netflix for failure to provide closed captioning. See *Cullen*, 880 F. Supp. 2d at 1021. The court, adhering to Ninth Circuit nexus precedent, did not regard Netflix’s website, in and of itself, as a place of public accommodation under Title III, and the defendant’s motion to dismiss was granted. See *id.* at 1023, 1025.

⁹¹ See *Netflix*, 869 F. Supp. 2d at 199 (denying Netflix’s motion to dismiss). Here, the Massachusetts court denied the streaming service’s motion to dismiss on account of First Circuit precedent which extended Title III protections beyond physical places of public accommodation, to include web-derived content. See *id.* at 199-200. But see *Cullen*, 880 F. Supp. 2d at 1029 (granting Netflix’s motion to dismiss). In *Cullen*, the California district court granted Netflix’s motion to dismiss based on Ninth Circuit case law which requires a place of public accommodation to be a physical location. See *id.* at 1023.

⁹² See generally sources cited *supra* note 18 and accompanying text (shedding light on recent wave of Title III lawsuits).

⁹³ See *Peebles & Sheppard III*, *supra* note 18, at 231 (highlighting ADA lawsuit statistics). ADA claims filed in federal court rose from 2,722 in 2013 to over 11,000 in 2019. See *id.*; see also *Zehentner*, *supra* note 18, at 710 (noting similar rise of website accessibility lawsuits). *Zehentner* points out that in 2018 there were at least 2,258 Title III lawsuits filed in federal court, which represented a 177 percent increase from the prior year. See *Zehentner*, *supra* note 18, at 710.

⁹⁴ See *Zehentner*, *supra* note 18, at 710 (illuminating trend of Title III predatory litigation); see also *Peebles & Sheppard III*, *supra* note 18, at 233 (explaining economic incentives of ADA litigation). Stating that ADA website accessibility lawsuits have become a “cottage industry” in recent years, *Peebles & Sheppard III* opine that the lack of consistent guidance from both the judiciary and the legislature has fostered the current proliferation of Title III litigation. See *Peebles & Sheppard III*, *supra* note 18, at 233. The authors add that ADA lawsuits will continue to flood in unless Congress or the Supreme Court issues a clarifying decision. See *id.*

businesses, or attorney's fees and injunctive relief in the event of a successful claim.⁹⁵ With Title III settlements averaging \$16,000, plaintiffs are taking advantage of the inconsistent and confusing judicial standards of Title III, and these guidelines cloud the ADA's original efforts to protect disabled individuals from discrimination by places of public accommodation.⁹⁶

A. Nexus

Absent legislative action that may further define and clarify the relationship of Title III to online content, the nexus middle-ground approach best reflects the statutory intent of Congress and is the most appropriate judicially-defined interpretation to govern website accessibility under the ADA.⁹⁷ While the nexus approach is not without its fair share of shortcomings, the approach best reconciles the two extremes adopted by the broad and narrow interpretation circuits, and pays significant deference to statutory language and overarching Congressional goals.⁹⁸ The middle-ground nature of the nexus test is such that: (1) the required sufficient link to a physical location is rooted in the narrow, textualist understanding that places of public accommodation are exclusively physical places; and (2) the application of Title III to the web-derived content of the physical place is rooted in the broad approach that seeks to extend Title III to internet websites.⁹⁹

⁹⁵ See Zehentner, *supra* note 18, at 710 (explaining where "surf-by" term originates). Comparing this recent trend with early Title III lawsuits in which hopeful plaintiffs and attorneys drove around town to find "physical places that had minor ADA violations", today's "surf-by" lawsuits consist of a similar strategy, scouring the internet for inaccessible websites. See *id.* The "cookie-cutter" nature of these lawsuits makes them a minimal time and cost investment for plaintiffs' attorneys. See *id.* at 709. It should be noted that the exclusive remedy under Title III is injunctive relief, not damages, but successful plaintiffs can recover attorney's fees in the event of a successful claim. See *id.* Not surprisingly, the same group of plaintiffs and attorneys are responsible for the majority of these predatory claims. See *id.* at 711. The author notes that within an eighteen-month period, a single plaintiff filed more than 150 lawsuits, and their attorney said that "90 percent of his business is from the same approximately twelve disabled clients." See *id.* (citing Carol J. Williams, *Legal Hell on Wheels*, L.A. TIMES (Jan. 5, 2009), <https://perma.cc/4MGP-MHDK>).

⁹⁶ See Zehentner, *supra* note 18, at 709-10 (illustrating financial incentives to file a Title III claim and settle before trial). The trend of "professional plaintiffs" has always been a problem in ADA litigation and is only compounded by the current circuit split. See *id.* at 711-12.

⁹⁷ See Goldfarb, *supra* note 57, at 1336 (advocating for nexus approach).

⁹⁸ See Moberly, *supra* note 68, at 966 (expressing hesitation to adopt broad or narrow interpretations). As the author puts it, the nexus approach "more accurately reflects the statutory language of the ADA while it appropriately recognizes the nature of the internet and its use in the commercial context." See *id.* The nexus test lands somewhere in the middle of the two approaches, by saying that Title III applies to "some, but not all" internet sites. See *id.* at 965; see also sources cited *infra* notes 115-118 and accompanying text (identifying shortcomings of nexus approach).

⁹⁹ See Moberly, *supra* note 68, at 978 (laying out two-part justification for nexus middle ground). The mutually exclusive and contrasting approaches of the narrow and broad interpretation circuits become reconciled with the nexus test. See *id.* While the narrow approach limits places of

As contemplated by the Third, Sixth, Ninth, and Eleventh Circuits, the statutory language of Title III of the ADA makes it clear that Congress did not intend to define places of public accommodation beyond physical locations.¹⁰⁰ Beginning with the plain language of Title III itself, none of the enumerated twelve categories of public accommodations are internet websites, nor does the statute make any reference to web content.¹⁰¹ The fundamental canon of statutory construction states that courts “must presume that a legislature says in a statute what it means and means in a statute what it says there.”¹⁰² Furthermore, the Code of Federal Regulations defines “place” of public accommodation as a “facility operated by a private entity whose operations affect commerce” and fall within at least one of the twelve enumerated categories.¹⁰³ The word “facility” is then defined as “all or any portion of buildings, structures, sites . . . where the building, property, structure, or equipment is located.”¹⁰⁴ By defining a “place” of public accommodation as a “facility,” which is then exclusively defined as a physical location, to extend places of public accommodation beyond the mere physical would be to deviate from the text of the federal regulations.¹⁰⁵

public accommodation to the mere physical, and the broad approach extends places of public accommodation beyond physical locations, the nexus standard limits places to the physical entity, while extending the protection of the physical entity to online content, as long as it retains a sufficient link. *See id.*

¹⁰⁰ *See* sources cited *supra* notes 53-72 and accompanying text (establishing physical place requirement of narrow and nexus interpretation).

¹⁰¹ *See* 42 U.S.C. § 12181(7) (enumerating twelve types of places of public accommodation); *see also* *Parker v. Metro. Life Ins.*, 121 F.3d 1006, 1010 (6th Cir. 1997); *see also* *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000) (holding statute is explicit in limiting public accommodations to physical places). The Ninth Circuit in *Weyer* explained that the first step in interpreting a statute is to determine whether “the language at issue has a plain and unambiguous meaning.” *See Weyer*, 198 F.3d at 1111 (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). Determining that the statutory language was unambiguous, the court held that all of the items on the list were actual, physical places. *See id.* at 1114. While it can be said that the infancy of the internet at the time of the ADA’s ratification explains its absence in the statute, it is not the role of the courts to determine what Congress might have included in Title III, had the statute been passed ten years later. *See* sources cited *supra* notes 9-11 and accompanying text (discussing infancy of internet technology).

¹⁰² *See* *Gil v. Winn-Dixie Stores, Inc.*, 993 F.3d 1266, 1276 (11th Cir. 2021) (quoting *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)) (providing statutory interpretation of unambiguous terms).

¹⁰³ *See* 28 C.F.R. § 36.104 (defining “place” in place of public accommodation). The Department of Justice is responsible for enforcing ADA regulations and is bound by the rules codified by executive departments of the federal government in the Code of Federal Regulations. *See* 28 C.F.R. §§ 36.501-36.508.

¹⁰⁴ *See* 28 C.F.R. § 36.104. (defining “facility” as physical, concrete location). The words in the regulation that define facility are exclusively physical entities. *See id.*

¹⁰⁵ *See id.* (providing definitions in C.F.R.); *see also* *Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312, 1318 (S.D. Fla. 2002) (restating Congressional intent), *appeal dismissed* 385 F.3d 1324, 1335 (11th Cir. 2004). The interpretation of the language of the ADA and

Applying the statutory canon of construction of *noscitur a sociis*, which interprets the meaning of an ambiguous term within the context of its accompanying words as to “avoid the giving of unintended breadth to the Acts of Congress”, courts have limited Title III to physical places.¹⁰⁶ Similarly, federal courts apply the doctrine of *ejusdem generis*, which limits general terms in a statute to the specifically enumerated words following it; general terms in Title III, such as “sales establishment”, have been limited by federal courts to their corresponding and specifically enumerated terms including “bakery” and “grocery store”.¹⁰⁷ In applying these two construction doctrines, federal circuit courts have declined to construe places of public accommodation to include non-physical, internet websites.¹⁰⁸

As discussed, the limitation of places of public accommodation to physical locations is the most accurate reading of the ADA’s statutory language, and the broad interpretation’s widespread application of Title III represents both an untenable reading of the statute, and a speculative effort that should be left to Congress.¹⁰⁹ Although courts employing a broad approach cite the proliferation of the internet in the years after the ADA’s ratification as support that Congress intended the Act to fluidly adapt to technological change, the mere fact that the internet was in its infancy is evidence applying Title III to the web was outside of Congressional contemplation.¹¹⁰

its applicable federal regulations demonstrates Congress’s “clear intent” that Title III solely governs access to “physical, concrete places of public accommodation.” See *Access Now*, 227 F. Supp. 3d. at 1318; see also *Parker*, 121 F.3d. at 1010, 1014 (limiting Title III to physical, concrete places).

¹⁰⁶ See *Parker*, 121 F.3d at 1014; *Weyer*, 198 F.3d at 1114; *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 614 (3d Cir. 1998) (applying statutory canon of construction to interpretation of “public accommodation”). Any purported ambiguity in terms like “public display” or “travel service” is scrutinized by the accompanying terms within the statute, terms such as “gas station”, “museum”, “library”, and “laundromat”. See Moberly, *supra* note 68, at 979-80 (identifying a term’s accompanying words and their importance). Because these surrounding terms are all physical places, this doctrine suggests that “public display” and “travel service” are also actual physical places. See Moberly, *supra*, at 980 (applying doctrine of *noscitur a sociis*).

¹⁰⁷ See 42 U.S.C. § 12181(7) (listing places of public accommodation); see *Access Now v. Southwest Airlines*, 227 F. Supp. 2d 1312, 1318 (S.D. Fla. 2002) (employing *ejusdem generis*), *appeal dismissed* 385 F.3d 1324, 1335 (11th Cir. 2004); see also Moberly, *supra* note 68, at 980-81 (detailing *ejusdem generis* example).

¹⁰⁸ See, e.g., *Access Now*, 227 F. Supp. 2d at 1318 (“To expand the ADA to cover ‘virtual’ spaces would be to create new rights without well-defined standards.”); *Parker*, 121 F.3d at 1014 (concluding long-term disability plan administered by insurance company does not fall within Title III); *Weyer*, 198 F.3d at 1114-15 (holding insurance company administering employer disability plan does not constitute “place of public accommodation”); *Ford*, 145 F.3d at 613-14 (confining “public accommodation” to places requiring physical access).

¹⁰⁹ See sources *supra* notes 47-52 and accompanying text (explaining broad approach circuits).

¹¹⁰ See *Nat’l Ass’n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 200-01 (D. Mass. 2012) (stating Congress intended ADA should adapt to technological change). But see Moberly, *supra* note 68, at 979 (opining on speculative nature of broad interpretation). The unforeseen and

Additionally, citing the intentionally broad goals and objectives of the ADA as support in applying Title III to all internet websites is too tenuous a reason to vastly expand the regulatory scope of the ADA, and is a decision which should be left to Congress.¹¹¹ As the court in *Access Now* puts it, expanding the ADA to apply to web-based content would be to “create new rights without well-defined standards.”¹¹² Practically, the blanket categorization of internet websites as places of public accommodation extends the regulatory arm of the ADA to businesses the statute did not intend to cover.¹¹³ While there are certainly merits to judicial application of Title III to virtual content, such application relies on a statutory justification that is at best speculative, and Congress is most appropriately suited to make such determinations.¹¹⁴

The nexus approach considers the uncertainties of rapid technological change as it relates to potentially outdated ADA regulations, without running afoul of sensible statutory construction.¹¹⁵ In addition to protecting against tangible discrimination in the form of architectural barriers, Title III also covers intangible barriers that may occur off-site, such as eligibility

revolutionary effects of the internet in the years following ADA ratification is indicative of a purely speculative statutory interpretation by broad circuits. See Moberly, *supra* note 68, at n. 106.

¹¹¹ See 42 U.S.C. § 12101(b)(1) (defining central purpose of ADA). The ADA’s central purpose is to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities” See *id.*; see also *Access Now*, 227 F. Supp. 2d at 1318 (discussing role of judiciary). The court, holding that Congress has created specifically enumerated rights and expressed clear intent as to the definition of Title III, explains that “courts must follow the law as written and wait for Congress to adopt or revise legislatively-defined standards that apply to those rights.” See *Access Now*, 227 F. Supp. 2d at 1318; see also *Neflix*, 869 F. Supp. 2d at 201 (describing legislative history and goals of ADA as support to extend protections). The fact of the matter is the internet is not mentioned anywhere in the language of Title III. See Moberly, *supra* note 68, at 979 (analyzing statute).

¹¹² See *Access Now*, F. Supp. 2d at 1318 (expressing hesitation at broad circuits’ reach); see *id.* at n.13 (advocating for separation of powers). The court explains that it is the role of Congress, not itself, to specifically expand the definition of places of public accommodation to include virtual places. See *id.*

¹¹³ See Moberly, *supra* note 68, at 1001 (noting monumentality of broad application to internet). Applying Title III to websites would place the entirety of the internet under its regulatory umbrella, as long as the sites are privately owned and affect commerce in some way. See *id.* at 1003. For example, an online-only t-shirt manufacturer, which sells a few shirts a year across state lines would presumably be bound by the ADA. See *id.* Applying Title III to websites of the like may be a costly burden on small businesses who do not have the resources to conform their websites to ADA accessibility standards. See Goldfarb, *supra* note 57, at 1335. Although Title III contains built-in defenses like “undue burden” and “fundamentally alter,” accessibility modifications are still costly endeavors for small businesses. See *id.*

¹¹⁴ See Moberly, *supra* note 68, at 999, 1000 (considering role of Congress). Made up of elected officials, the legislature’s role is to “weigh, on a national scale, the costs and benefits of burdening businesses with additional regulation.” See *id.* Additionally, nexus jurisprudence provides Congress with a “test run” for Title III internet application, without the overbreadth that potentially occurs under a blanket application to all internet websites. See *id.* at 1004.

¹¹⁵ See *Parker v. Metro. Life Ins.*, 121 F.3d. 1006, 1006 (6th Cir. 1997) (identifying textual grounds for physical place requirement) *cert. denied*, 522 U.S. 1084 (1998).

requirements, screening rules, or failures to provide an auxiliary aid.¹¹⁶ As such, nexus jurisdictions find a textual basis to extend Title III to the off-site, online content of physical places of public accommodation, so long as the alleged intangible barriers restrict a plaintiff's ability to enjoy the place of accommodation's goods and services.¹¹⁷ From there, courts may begin to appropriately address issues surrounding online accessibility when a physical place of public accommodation fails to furnish auxiliary aids to disabled plaintiffs.¹¹⁸ With the unmitigated expansion of the internet in the last few decades, as well as the growth of "click and mortar" business models, nexus jurisdictions adjudicate the intangible barriers that enumerated public accommodations fail to remove.¹¹⁹

As discussed, the nexus middle-ground is a practical solution rooted in statutory deference and realistic application to the online offerings of physical accommodations, but the approach leaves inconsistencies which only Congress can resolve.¹²⁰ A primary criticism of the nexus interpretation's rejection of Title III coverage to websites is that the test does not include major internet companies which operate without brick-and-mortar locations.¹²¹ While it is safe to assume that companies such as Facebook, Amazon, or Twitter already provide accessible usage on their digital platforms, a disabled plaintiff would not obtain court-ordered relief for any intangible barriers that prevent equal enjoyment of their offerings.¹²² Although

¹¹⁶ See 42 U.S.C. § 12182(b)(2)(A) (prohibiting intangible discrimination); see also *Rendon v. Valleycrest Prods.*, 294 F.3d 1279, 1283-84 (11th Cir. 2002) (explaining discrimination is not limited to physical site). The Eleventh Circuit noted that the "paradigmatic example contemplated in the statute[]" is the extension of Title III to off-site intangible discrimination. See *Rendon*, 294 F.3d at 1285. The court articulated that nothing in the statute suggested "discrimination via an imposition of screening or eligibility requirements must occur on site to offend the ADA." See *id.* at 1283-84.

¹¹⁷ See Goldfarb, *supra* note 57, at 1331-32 (explaining nexus approach); see also *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 954 (N.D. Cal. 2006) (defining intangible barrier analysis).

¹¹⁸ See 28 C.F.R. § 36.303(c)(1) (2022) (describing effective communication through auxiliary aids). U.S. Department of Justice regulations state that a public accommodation must "furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities." See *id.*; see also *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 905 (9th Cir. 2019) (finding application of Title III to off-site discrimination) *cert. denied*, 140 S. Ct. 122 (2019). The Ninth Circuit held that Domino's website failed to ensure effective communication with the blind plaintiff, as the Domino's website lacked auxiliary aids. See *id.* at 905-06.

¹¹⁹ See Alexandra Twin, *Click and Mortar*, INVESTOPEDIA (Mar. 31, 2021), <https://perma.cc/LE4J-4EDT> (explaining "click and mortar"); see also Schwarz, *supra* note 16, at 373-74 (illuminating explosion of internet and subsequent accessibility gap).

¹²⁰ See Moberly, *supra* note 68, at 999 (identifying major criticisms of nexus approach).

¹²¹ See Schwarz, *supra* note 16, at 391 (applying current tests from insurance cases to major internet companies).

¹²² See Schiff, *supra* note 19, at 2344 (stating nexus approach produces irrational results). Critics of the nexus approach justifiably explain that in the situation where two websites sell

this is certainly a practical shortcoming of the nexus approach, it does not change the fact that a blanket application of Title III to all internet websites is an unjustifiable extension of congressional intent, which is a decision that should be left to the devices of the legislature to modify as it sees fit.¹²³

*B. Rethinking Gil v. Winn-Dixie, Inc.*¹²⁴ with the Nexus Approach

The Eleventh Circuit, disagreeing with Juan Carlos Gil's ("Gil") claim that Winn-Dixie's inaccessible website constituted a violation of Title III of the ADA, endorsed the narrow view that places of public accommodation are exclusively limited to physical locations.¹²⁵ In deciding that the website itself was not a place of public accommodation, the court distinguished the auxiliary aids cited by Gil, eventually dismissing his claim on account that Winn-Dixie's website is dissimilar to the intangible barrier outlined in *Rendon*.¹²⁶ Despite the Eleventh Circuit's conclusion in *Rendon* that the phone system at issue was the sole access point for a contestant to access the privilege of a physical place of public accommodation (the game show), the court in *Gil* held that Winn-Dixie's limited use website does not function as a similar intangible barrier.¹²⁷ Noting that the website is non-transactional and does not prevent Gil from accessing the goods, services, privileges, and advantages of the physical store, the court concluded it did not violate Title III.¹²⁸

While the court's holding is rooted in the narrow interpretation of Eleventh Circuit textualism, the majority explicitly declined the opportunity to adopt a nexus standard, and clarified that it did not otherwise adopt it in *Rendon*.¹²⁹ Although the nexus approach, like the court's holding, limits public accommodations to physical locations, it applies Title III to the online

identical products, but only one has an accompanying physical location, only the website with a physical location would be bound by Title III under this test. *See id.*

¹²³ *See Moberly, supra* note 68, at 1004 (reiterating Congress's ability to balance costs and benefits of the ADA under nexus approach).

¹²⁴ 993 F.3d 1266 (11th Cir. 2021).

¹²⁵ *See id.* at 1284 (endorsing narrow interpretation of Title III).

¹²⁶ *See id.* at 1278-79 (distinguishing facts from *Rendon*) (citing *Rendon v. Valleycrest Prods.*, 294 F.3d 1279, 1283-84 (11th Cir. 2002)). Plaintiffs brought suit against the producers of "Who Wants To Be A Millionaire," alleging the dial-in process for contestant selection discriminated against disabled participants. *See Rendon*, 294 F.3d at 1281. The Eleventh Circuit agreed with the plaintiffs, holding that the off-site process screened out disabled candidates and represented an intangible barrier in violation of Title III. *See id.* at 1286.

¹²⁷ *See Gil*, 993 F.3d at 1279 (explaining limited functionality of Winn-Dixie website).

¹²⁸ *See id.* at 1280 (holding website is not intangible barrier).

¹²⁹ *See id.* at 1281-82 (declining to adopt nexus). The court also noted that Gil erroneously assumes *Rendon* established a nexus, when the only actual mention of nexus is in a brief footnote explaining precedent from other circuits. *See id.*

offerings that facilitate equal enjoyment of a place's goods and services, and protects against the intangible barriers that prohibit full and equal enjoyment.¹³⁰ Despite acknowledging Winn-Dixie's website is non-transactional, the court noted that Gil attempted to use the inaccessible website to refill prescriptions, redeem coupons, and utilize the store locator feature.¹³¹ Moreover, the majority explained that the nexus application utilized by the Ninth Circuit in *Robles* was predicated on the point of sale feature on Domino's website and app, whereas here, the Winn-Dixie website is non-transactional – limited in its use to the services discussed above.¹³² In reasoning that Gil's inability to access the limited online functions did not erect an intangible barrier to his ability to enjoy the goods and services of the physical stores, the court completely detached the website's use from the in-store location.¹³³

By holding that Gil was not denied full and equal access to Winn-Dixie's offerings, the court overlooked what constitutes the services, privileges, and advantages of a place of public accommodation by misinterpreting the relationship between the website and the store.¹³⁴ Had the court viewed Gil's use of the Winn-Dixie website in a nexus light, that the coupon redeeming and prescription refill services sufficiently link to the physical location, it would have come to a different conclusion.¹³⁵ The majority, somewhat nonsensically, explained that online express prescription refills and coupon redemptions do not constitute "services," "privileges," or "advantages" of Winn-Dixie stores, because they are merely time-saving measures that do not impede Gil's actual enjoyment of Winn-Dixie's physical stores.¹³⁶ However, as Justice Pryor noted, the ability to request express prescription refills and redeem coupons to one's rewards card is an in-store privilege and

¹³⁰ See *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 905 (9th Cir. 2019) (explaining nexus application), *cert. denied*, 140 S. Ct. 122 (2019).

¹³¹ See *Gil*, 993 F.3d at 1272 (recounting Gil's attempted interactions with website).

¹³² See *id.* at 1283 (distinguishing Winn-Dixie website from *Robles*' nexus application).

¹³³ See *id.* at 1280 (holding no intangible barrier existed).

¹³⁴ See *id.* at 1294 (Pryor, J., dissenting) (explaining flaws of majority's analysis); see also 42 U.S.C. § 12182(a) (defining discrimination under ADA). The statute prohibits the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." See *Gil*, 993 F.3d at 1294 (Pryor, J., dissenting).

¹³⁵ See *Gil*, 993 F.3d at 1294 (Pryor, J., dissenting) (criticizing opinion separating website from store). Justice Pryor opined that it made no sense for the majority to regard the prescription service as "completely untethered from the website." See *id.*

¹³⁶ See *id.* at 1282 (majority opinion) (distinguishing between "reasonable" and "necessary"). The majority regarded any convenience benefits derived from the website as "reasonable", but not "necessary" to ensure a disabled individual is not discriminated against, as required by the statute. See *id.*

advantage that is exclusively offered through its inaccessible website.¹³⁷ The majority's insistence that the services available on the store's website are distinct from those offered in-store was misguided, and there is a sufficient link between the two to survive a nexus analysis, even in the absence of a transactional dimension and sole point of access.¹³⁸

To reiterate, the majority held that Winn-Dixie did not violate § 12182(a) because Gil was not prohibited from fully and equally enjoying the goods, services, privileges, and advantages of the *physical* Winn-Dixie store.¹³⁹ However, using a nexus analysis – which emphasizes the link between the online offering and the physical location – Title III applies to the services “of” a physical place of public accommodation, not services “in” a place of public accommodation.¹⁴⁰ As such, the link between the inaccessible website and Winn-Dixie locations caused Gil's inability to fully and equally enjoy the privileges and advantages of the physical stores – benefits that sighted individuals could access without issue.¹⁴¹

Federal regulations require that public accommodations “furnish auxiliary aids where necessary to ensure effective communication” to disabled individuals, yet the majority explained this section was inapplicable because Gil could manually perform those tasks in Winn-Dixie's physical stores.¹⁴² However, the nexus established between the chain's website and its physical locations through the digital tools that Gil attempted to access renders a flawed majority analysis, as the inextricability of the two demonstrate that Gil, clearly, could not effectively communicate with the public accommodation.¹⁴³ Unlike non-disabled customers, who could communicate with a Winn-Dixie store to have a “specific prescription refilled at a specific time,” the inaccessibility of the website wholly prevented Gil from effectively communicating with Winn-Dixie's physical stores, regardless of the fact that he could perform those tasks in-person.¹⁴⁴ Precedent case law,

¹³⁷ See *id.* at 1297 (Pryor, J., dissenting) (arguing prescription refill service is unquestionably a privilege or advantage). While sighted patrons of Winn-Dixie could access the prescription refill services and redeem their coupons digitally, Gil received no such benefit. See *id.* at 1296.

¹³⁸ See *id.* at 1297-99 (distinguishing reasoning from majority).

¹³⁹ See *id.* at 1280 (emphasis added) (disregarding violation of ADA).

¹⁴⁰ See *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 905 (9th Cir. 2019) (explaining and applying nexus approach to issue), *cert. denied*, 140 S. Ct. 122 (2019).

¹⁴¹ See *Gil*, 993 F.3d at 1296 (Pryor, J., dissenting) (expressing disapproval of majority's analysis).

¹⁴² See 28 C.F.R. § 36.303(c)(1) (2022) (defining auxiliary aid requirement).

¹⁴³ See *Gil*, 993 F.3d at 1297 (Pryor, J., dissenting) (objecting to majority's finding). By disagreeing with the majority's position that the offerings of the website are “untethered” to the physical store, Justice Pryor seems to implicitly admit a sufficient nexus relationship exists. See *id.*

¹⁴⁴ See *id.* at 1298 (pointing to effective communication). The dissent argued that the website's inaccessibility prevented Gil from (1) accessing the information that Winn-Dixie was conveying to its sighted customers, and (2) conveying information to Winn-Dixie. See *id.*

of which the majority does not dispute, holds that Title III violations can result from intangible barriers that occur off-site, and not at the physical place of public accommodation.¹⁴⁵ Under the nexus interpretation of the Ninth Circuit, the auxiliary aid requirement applies to websites when “their inaccessibility impedes access to a physical location’s services”¹⁴⁶ Winn-Dixie’s failure to furnish auxiliary aids on their website in the form of screen-reading technology was violative of Title III, and a reformulation of the court’s analysis in a light favorable to the nexus approach would afford Juan Carlos Gil the Title III protection that he so deserved.¹⁴⁷

V. CONCLUSION

As compounded by the immeasurable reliance on digital technologies during the COVID-19 pandemic, the ubiquity of the internet in our society has exposed discrepancies in ADA jurisprudence that need to be addressed by a Supreme Court ruling or Congressional action. The differences in current Title III interpretations have left disabled individuals with disparate protections based on arbitrarily defined jurisdictional constraints and have provided American businesses with inconsistent guidance on the accessibility of their online offerings. In lieu of present uniformity, the nexus approach is the most appropriate judicial mechanism to reconcile these disparate frameworks. By extending the protections of Title III to online offerings that have a sufficient nexus to physical places of public accommodation, this approach best adheres to the statutorily defined language of the ADA, while reflecting the desperate need to modernize outdated legal standards which leave disabled individuals without recourse for discriminatory web content. Furthermore, a blanket application extending Title III to non-physical places of public accommodation relies on a tenuous statutory justification – which would extend the regulatory scope of the ADA well-beyond congressional contemplation. As such, Congress is most appropriately equipped to make a final determination on the matter. For a plaintiff like Juan Carlos Gil, who failed to receive Title III protection in the face of

¹⁴⁵ See *Rendon v. Valleycrest Prods.*, 294 F.3d 1279, 1285 (11th Cir. 2002) (extending Title III to off-site discrimination). The Eleventh Circuit noted it was inconsistent and nonsensical to limit Title III to the discrimination which occurs on the physical location of a place of public accommodation. See *id.*

¹⁴⁶ *Gil*, 993 F.3d at 1295 (Pryor, J., dissenting) (discussing auxiliary aid requirement); see also *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898, 905 (9th Cir. 2019) (applying auxiliary aid provision to websites), *cert. denied*, 140 S. Ct. 122 (2019). The court states that even though customers predominantly access these auxiliary aids away from the physical restaurant, the fact that the statute applies to the services “of,” rather than “in” a place of public accommodation, the auxiliary aid requirement applies to the website and mobile app. See *id.*

¹⁴⁷ See *Gil*, 993 F.3d at 1299 (Pryor, J., dissenting) (explaining dissent’s holding).

discriminatory online access, reconciling the disparate standards of current ADA jurisprudence is critical to providing disabled individuals across the United States with the civil rights that they are entitled to receive.

Benjamin Holman