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THE WEBSITE ACCOMMODATIONS TEST: APPLYING THE AMERICANS WITH DISABILITIES ACT TO WEBSITES

ASHLEY CHEFF*

In 2017, 814 lawsuits were filed alleging discrimination under the Americans with Disabilities Act (ADA) due to website inaccessibility, up from 262 in the previous year. Beginning in July 2010, the federal Department of Justice (DOJ) considered issuing regulations under ADA Title III related to website accessibility. However, no changes have been made to date, leaving courts split over whether websites constitute places of public accommodation via the ADA. Dispositive to some jurisdictions' holdings is whether a website has a nexus to a physical place, which may lend toward viewing the site as a public accommodation. Other jurisdictions provide that all websites are public accommodations under the ADA. The current approaches conflict with the Congressional intent of the ADA and provide little guidance to website owners. Thus, neither approach is sufficient for the uniform application of ADA protections. Absent Congressional action, courts should utilize a new "website accommodations test" (WAT) in applying the ADA to websites.

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INTRODUCTION

The Americans with Disabilities Act (ADA) aims to eliminate barriers to the enjoyment of goods or services by persons with physical

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and mental disabilities.¹ Take Alex, for example, who has been a reporter for more than twenty years.² Alex developed a repetitive strain injury that makes it painful to use a mouse or type for extended periods.³ Assistive technologies allow Alex to work with less pain; however, some websites are incompatible with such technologies.⁴ As such, Alex is unable to navigate a number of websites without pain.⁵

Alex's story is just one example of the website barriers faced by individuals with disabilities.⁶ Between 1984 and 2015, the number of Americans owning a computer rose by 71%.⁷ While 79% of Americans without a disability access the internet daily, only 50% of those with a disability use the internet each day.⁸ These figures suggest that website inaccessibility inhibits the disabled population from accessing the internet. In 2017, 814 lawsuits were filed alleging website inaccessibility in violation of the ADA.⁹ Only 262 such lawsuits were filed the previous year.¹⁰ The rise in lawsuits related to website inaccessibility requires the courts to determine how, if at all, the ADA applies.

Passed in 1990, the ADA is among the first comprehensive, national laws addressing equality for all Americans with disabilities.¹¹ Its passage responded to Congressional findings that mental and physical disabilities should not “diminish a person’s right to fully participate in all aspects of society”¹² For decades, disability discrimination “persist[ed] in . . . critical areas [such] as employment, housing, public accommodations, education, transportation, . . . health services, [and] voting.”¹³

1. 42 U.S.C. § 12101(b)(1) (1990).

2. *Stories of Web Users*, W3C, <https://w3.org/WAI/people-use-web/user-stories> [<https://perma.cc/F7RJ-2M9S>] (last visited Nov. 24, 2019).

3. *Id.*

4. *Id.*

5. For example, on some websites it is difficult to skip content and navigate to a particular section without using many keyboard commands. *Id.*

6. Under the ADA, a disability is defined as “a physical or mental impairment that substantially limits one or more major life activities.” 42 U.S.C. § 12102.

7. CAMILLE RYAN, U.S. CENSUS BUREAU, COMPUTER AND INTERNET USE IN THE UNITED STATES: 2016, 1 (2018), <https://www.census.gov/content/census/en/library/publications/2018/acs/acs-39.html> [<https://perma.cc/SX35-WMTW>].

8. Monica Anderson & Andrew Perrin, *Disabled Americans are Less Likely to Use Technology*, PEW RESEARCH CTR. (Apr. 7, 2017), <https://www.pewresearch.org/fact-tank/2017/04/07/disabled-americans-are-less-likely-to-use-technology> [<https://perma.cc/DK6X-YXFD>].

9. Darren Guarnaccia, *The Inexorable Rise in ADA Website Accessibility Lawsuits and How to Ensure You’re Not Next*, CROWNPEAK (Nov. 12, 2018), <https://www.crownpeak.com/blog/web-accessibility/the-inexorable-rise-in-ada-website-accessibility-lawsuits-and-how-to-ensure-youre-not-next> [<https://perma.cc/E2L5-Y3QD>].

10. *Id.*

11. *ADA—Findings, Purpose, and History*, ADANATLNETWORK, https://www.adaanniversary.org/findings_purpose [<https://perma.cc/7YL2-J6U4>] (last visited Nov. 24, 2019).

12. 42 U.S.C. § 12101(a)(1).

13. *Id.* § 12101(a)(3).

Overall, Title III of the ADA prohibits discrimination against individuals with disabilities in places of public accommodation, including government buildings, restaurants, hotels, and theaters.¹⁴ Any private business whose operations affect interstate commerce and fall within a long list of categories is a place of public accommodation.¹⁵ Congress intended for any listing of public accommodations to be illustrative, but not exhaustive.¹⁶ So long as a business fell within Congress's intended aim of the ADA, it generally should be considered a place of public accommodation.¹⁷ For example, "places of exercise or recreation" include golf courses but not tennis or basketball facilities according to the C.F.R. list.¹⁸ However, including such facilities is consistent with the goals of the ADA.¹⁹

Less clear is the ADA's application to non-physical "places," specifically websites. Websites are not mentioned directly in the ADA or its supporting regulations. Nearly a decade ago, the Department of Justice (DOJ) recognized this gap in coverage but opted not to fill it.²⁰ The Equal Employment Opportunity Commission (EEOC), which enforces the ADA, has not weighed in on website accessibility.²¹

During the 1990s, courts first began hearing arguments that non-physical places qualified as public accommodations under the ADA.²² Initial cases turned on whether a benefit plan constitutes a public accommodation.²³ Whether websites constitute such places is

14. 42 U.S.C. § 12182(a).

15. 28 C.F.R. § 36.104 (1991). The C.F.R. includes a list of twelve categories constituting public accommodations. The list includes but is not limited to hotels, restaurants, theaters, stores, and schools. *Id.*

16. H.R. Rep. No. 101-485, pt. 2, at 335, 373 (1990).

17. *Id.* at 373.

18. *Id.*

19. *Id.*

20. Minh N. Vu, *DOJ Nixes All Pending ADA Rulemakings, Including Website Access Rule*, SEYFARTH SHAW (Dec. 22, 2017), <https://www.adatitleiii.com/2017/12/doj-nixes-all-pending-ada-rulemakings-including-website-access-rules> [<https://perma.cc/6TD4-KWP3>]. In 2010, the DOJ issued an Advanced Notice of Proposed Rulemaking (ANPR) for the inclusion of websites in Title III of the ADA. *Id.* The DOJ explained that websites are generally inaccessible to the disabled population, and current court standards are confusing. *Id.* However, in 2017, the DOJ moved the ANPR to the inactive list, stating that withdrawal would allow for more time to evaluate whether regulations for website accessibility are necessary. *Id.*

21. EEOC resources suggest that job application materials available in print must accommodate those with disabilities. This requirement may impact web-based job applications. See *Job Applicants and the Americans with Disabilities Act*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/facts/jobapplicant.html> [<https://perma.cc/4X77-L747>] (last visited Nov. 24, 2019).

22. See *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England*, 37 F.3d 12, 19 (1st Cir. 1994). Typically, the non-physical places in these cases involve insurance benefit plans issued by an employer through an insurance agency. *Id.*

23. *Id.* at 19–20.

undefined in the ADA or its regulations.²⁴ As a result, judicial opinions are divergent on website accessibility.²⁵ Some courts hold that websites are public accommodations.²⁶ Others apply a “nexus test” to determine which websites constitute a public accommodation.²⁷ The nexus test requires the goods or services on a website to have some nexus, or relationship, to a physical place.²⁸

Neither judicial approach is sufficient. Finding that websites are public accommodations conflicts with the Congressional intent behind the ADA. Congress did not intend for the ADA to interfere with regular business operations; however, because the ADA is silent on websites, compliance is difficult and does interfere with such operations.²⁹ The nexus test allows for the exclusion of many websites, which contravenes the goals of the ADA.³⁰ Increases in online-only businesses render the nexus test outdated, as the nexus test does not require compliance absent a relationship to a physical place.³¹ Thus, the disabled population is effectively excluded from accessing goods or services made available by online-only businesses.

Absent Congressional amendment of the ADA, judicial implementation of the “website accommodations” test (WAT) would better determine whether websites constitute public accommodations.³² The test considers (1) whether the website provides goods or services that are or could be provided by a physical place, and (2) whether accessibility is readily achievable.³³ Websites meeting these criteria are public accommodations and thus, subject to ADA compliance.

24. See *Nat'l Fed'n of the Blind v. Scribd*, 97 F. Supp. 3d 565, 568–69 (D. Ver. 2015).

25. Compare *id.* at 576 with *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1110 (N.D. Cal. 2011).

26. See *Nat'l Fed'n of the Blind*, 97 F. Supp. 3d at 575–76; *Nat'l Ass'n of the Deaf v. Netflix*, 869 F. Supp. 2d 196, 201–02 (D. Mass. 2012).

27. *Castillo v. Jo-Ann Stores, LLC*, 286 F. Supp. 3d 870, 878–80 (N.D. Ohio, 2018).

28. See *id.* at 880; *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017, 1023–24 (N.D. Cal. 2012); *Young*, 790 F. Supp. 2d at 1115–16; *Access Now, Inc. v. Southwest Airlines Co.*, 227 F. Supp. 2d 1312, 1321 (S.D. Fla. 2002).

29. See Nikki D. Kessler, *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, 1027 (2008).

30. *Id.* at 1024.

31. *Id.* at 995.

32. See *id.* at 1024. In light of the current confusing standards on website accessibility, Congress should act to amend the ADA. Congressional action would allow for greater consistency across websites and disabilities. Currently, litigation only resolves accessibility issues related to a particular website and a particular disability. Further, courts apply different rules to the same services, reaching conflicting results. Compare *Cullen*, 880 F. Supp. 2d at 1017 (holding that Netflix is not a public accommodation under the ADA) with *Nat'l Fed'n of the Blind*, 869 F. Supp. 2d at 196 (holding that Netflix is a public accommodation under the ADA).

33. Kessler, *supra* note 29, at 1024–27.

I. LITIGATION RELATED TO NON-PHYSICAL PLACES & THE ADA

Courts heard discrimination challenges in other non-physical entities before hearing cases related to websites.³⁴ Many cases analyzed whether insurance benefit plans constitute places of public accommodation under the ADA.³⁵ The courts split on the issue: some applied a nexus test to non-physical entities, and others did not.³⁶ The court split regarding the application of Title III to non-physical entities, such as benefit plans, laid the groundwork for the split regarding website accessibility.³⁷

A. Pre-website Era: Insurance Plan Litigation

In 1994, the First Circuit Court of Appeals held that Title III of the ADA was not limited to physical places.³⁸ In *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Association of New England*, the plaintiff employer provided reimbursements of medical expenses through Automotive Wholesaler's Association of New England.³⁹ Effective January 1991, the defendant announced a cap on their reimbursement plan for AIDS-related illnesses at \$25,000.⁴⁰ Thereafter, an employee of the plaintiff suffered from numerous HIV-related health issues which the defendant refused medical reimbursement.⁴¹ The plaintiff challenged the defendant's reimbursement practices under Title III of the ADA.⁴²

The court held that the plain meaning of the list of services constituting "public accommodations" did not require the existence of a physical entity.⁴³ "It would be irrational," surmised the court, "to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not."⁴⁴ Courts later rely on

34. *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England*, 37 F.3d 12, 18–19 (1st Cir. 1994).

35. *See, e.g., id.* at 20; *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1010 (6th Cir. 1997).

36. *See Nat'l Fed'n of the Blind v. Scribd*, 97 F. Supp. 3d 565, 568–71 (D. Ver. 2015).

37. *Kesslering, supra* note 29, at 1023–24.

38. *Carparts*, 37 F.3d at 20.

39. *Id.* at 14.

40. *Id.*

41. *Id.*

42. *Id.* The plaintiff alleged that the defendant knew of the employee's disability when instituting the new policy and that he was denied the full enjoyment of services due to his disability. *Carparts*, 37 F.3d at 14.

43. *Id.* at 20.

44. *Id.* at 19. For example, the court explained that the inclusion of a "travel service" on the list demonstrates that a physical place is not a requirement of a public accommodation. *Id.*

this rationale to apply the ADA to other non-physical entities, such as websites.

By contrast, the Sixth Circuit held in *Parker v. Metropolitan Life Insurance Co.*, that public accommodations require the existence of a physical place.⁴⁵ The plaintiff received disability benefits issued by Metropolitan Life.⁴⁶ The policy suspended disability coverage after twenty-four months unless the individual was hospitalized or receiving inpatient care for a disorder.⁴⁷ Thus, at the end of the twenty-four-month period, the defendant withdrew disability coverage for the plaintiff.⁴⁸ The plaintiff alleged discrimination under Title III of the ADA.⁴⁹

The court held that while an insurance office is a public accommodation, the plaintiff was not seeking goods and services from an insurance office.⁵⁰ Instead, the service at issue was a benefit plan provided by an employer and issued by the defendant.⁵¹ Accordingly, there was “no nexus between the disparity in benefits and the services” offered through the defendant’s office.⁵² The court held that a place of public accommodation under the ADA is a “facility, [] operated by a private entity, [] whose operations affect commerce and [] fall within at least one of the twelve ‘public accommodation’ categories.”⁵³ A “facility,” according to the court, is a physical place.⁵⁴

B. Websites Era: Applying ADA Title III to Websites

Over the last twenty years, internet growth led to many ADA challenges related to websites. In 2010, the National Association of the Deaf sued Netflix, a video rental and streaming company, for providing closed captioning on only a small portion of its content.⁵⁵ A federal district court in Massachusetts cited *Carparts*, stating that it is irrational to protect those purchasing goods or services from an office but not individuals purchasing the same goods or services over the telephone or by mail.⁵⁶ The court held that Netflix was a place

45. 121 F.3d 1006, 1014 (6th Cir. 1997).

46. *Id.* at 1008.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Parker*, 121 F.3d at 1010.

51. *Id.* at 1014.

52. *Id.* at 1011.

53. *Id.* at 1019; *see also* *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000) (holding that a non-physical entity could not be a place of public accommodation unless there is some connection between the good or service and a physical place).

54. *Parker*, 121 F.3d at 1011.

55. *Nat'l Ass'n of the Deaf v. Netflix*, 869 F. Supp. 2d 196, 199 (D. Mass. 2012).

56. *Id.* at 200; *see also* *Nat'l Fed'n of the Blind v. Scribd*, 97 F. Supp. 3d 565, 575–76 (D. Ver. 2015) (holding that websites constitute public accommodations, and to hold

of public accommodation under the ADA⁵⁷ even though Congress could not foresee the existence of websites such as Netflix at the time the ADA was passed.⁵⁸ Additionally, the court noted how ADA coverage of services “of,” not “at” or “in,” a place of public accommodation includes entities that provide services accessible in one’s home, even though the home itself is not a public accommodation.⁵⁹

Other courts adjudicating similar issues rely on the holding in *Parker*, requiring a nexus between a physical place and the goods and services of the website.⁶⁰ In *Cullen v. Netflix*, a federal district court in California applied the nexus test to Netflix.⁶¹ Plaintiff’s complaint alleged that the failure to provide captioning and subtitles on videos amounted to discrimination.⁶² The court, applying benefit plan jurisprudence, found no sufficient nexus between the streaming of videos in one’s home and a physical place for Netflix to constitute a public accommodation.⁶³

A district court in Florida reached a similar conclusion regarding a Southwest Airlines website.⁶⁴ In *Access Now*, plaintiffs alleged ADA discrimination because blind persons could not navigate the website.⁶⁵ A lack of nexus between the website and a physical place meant the website was not a place of public accommodation.⁶⁶ The court found that the Southwest website did not impede access to a physical place, such as a ticket counter.⁶⁷ Applying the ADA to virtual spaces, the court cautioned, would “create new rights without well-defined standards.”⁶⁸

otherwise would “run afoul to the purposes of the ADA and would severely frustrate Congress’s intent that individuals with disabilities fully enjoy the goods . . .” available to other members of society).

57. *Netflix*, 869 F. Supp. 2d at 202.

58. *Id.* at 200.

59. *Id.* at 201–02.

60. 121 F.3d at 1011.

61. 880 F. Supp. 2d 1017, 1023–24 (N.D. Cal. 2012).

62. *Id.* at 1020–22. Plaintiffs further alleged that statements made by Netflix’s Director of Communications conveyed that captions and subtitles would become available within a reasonable time period. *Id.* at 1021. As a result, plaintiffs purchased a Netflix subscription in reliance on such statements. *Id.*

63. *Id.* at 1023–24; *see also* *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1115 (N.D. Cal. 2011) (holding that Facebook is not a place of public accommodation because it operates only in cyberspace).

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

65. *Id.* at 1316.

66. *Id.* at 1319–21.

67. *Id.* at 1321. *But see* *Castillo v. Jo-Ann Stores, LLC*, 286 F. Supp. 3d 870, 877, 881 (N.D. Ohio, 2018) (holding that because the website could not effectively communicate information about the goods available for sale at the physical store, there was a sufficient nexus between the goods sought and the website for the ADA).

68. *Id.* at 1318.

II. THE INADEQUACIES OF CURRENT APPROACHES

There are several issues with the current approaches to applying Title III of the ADA to websites. First, the nexus test runs afoul to Congressional intent.⁶⁹ Forcing websites to conform to the ADA without clear standards interferes with regular business operations. Next, the nexus test excludes online-only businesses, and is applied inconsistently across jurisdictions.⁷⁰ For example, cases in two different jurisdictions reached conflicting holdings regarding the same service: Netflix.⁷¹

A. Labeling All Websites Public Accommodations

Viewing websites without regard to a relationship between the website and a physical place is contrary to both the plain language and the congressional intent of the ADA.⁷² While Congress sought to eliminate discrimination on the basis of disability, it did not intend to interfere with the regular operation of businesses.⁷³ Labeling websites “public accommodations” interferes with the ordinary functions of the internet. For example, several issues arise if YouTube, a video streaming site, constitutes a place of public accommodation under the ADA.⁷⁴ YouTube allows for the transmission of information globally and engages in interstate commerce.⁷⁵ Therefore, the ADA applies to YouTube under Congress’s interstate commerce power.⁷⁶ However, requiring YouTube to meet the accessibility requirements of the ADA is problematic, especially in the absence of clear accessibility standards.

YouTube does not own any of the content that users post.⁷⁷ Thus, it is unclear whether YouTube itself must implement the accessibility features, or whether those uploading the videos must do so with

69. See *supra* notes 11–19 and accompanying text.

70. Kessler, *supra* note 29, at 1023–24.

71. Compare *Cullen v. Netflix*, 880 F. Supp. 2d 1017, 1024 (N.D. Cal. 2012) (holding Netflix is not a public accommodation), with *Nat’l Ass’n of the Deaf v. Netflix*, 869 F. Supp. 2d 196, 202 (D. Mass. 2012) (holding Netflix is a public accommodation).

72. See *supra* notes 11–19 and accompanying text.

73. Congress does not force businesses to implement accessibility features that are not readily achievable. See 42 U.S.C. § 12182 (2)(A)(iv–v).

74. YouTube is a website that allows users to watch and post video content of just about anything. YOUTUBE, <https://www.youtube.com> [<https://perma.cc/AEL7-35KA>] (last visited Nov. 24, 2019).

75. See *U.S. v. MacEwan*, 445 F.3d 237, 244 (3d Cir. 2006) (analyzing internet videos under the Commerce Clause).

76. See *id.*

77. Grant Crowell, *Who Owns Your YouTube Video? You, YouTube, or Someone Else Entirely?*, TUBULAR INSIGHTS (Feb. 3, 2011), <https://tubularinsights.com/youtube-copy-right-ownership> [<http://perma.cc/6SAC-HSUA>].

accessibility features already in place.⁷⁸ If users are forced to bear the costs of accessibility, the additional time and resources required may reduce the amount of content posted.⁷⁹ If YouTube is responsible for accessibility, it may offset accessibility costs by charging a subscription fee to viewers.⁸⁰ In the alternative, YouTube may increase the costs for businesses to advertise on its website. As a result, advertisers may be less inclined to advertise on YouTube, in turn affecting users who derive income from displaying ads before their videos. Thus, the nature of YouTube changes regardless of which party bears the burden of accessibility. Regulations that fundamentally change YouTube pose a few disadvantages. For example, YouTube is a widely used tool in education.⁸¹ YouTube videos supplement class material or teach subscribers wholly new material.⁸² Imposing new obligations on YouTube videos absent clear standards may discourage using the site for educational or other benefits, thereby interfering with its regular operations.⁸³

However, a poorly designed website creates unnecessary barriers for individuals with disabilities.⁸⁴ Website barriers parallel those resulting from poorly designed buildings.⁸⁵ Thus, if businesses cannot place unnecessary obstacles to the physical access of their goods and services, it is illogical to allow the same businesses to circumvent the ADA by operating inaccessible websites.⁸⁶ Still, federal law clarifies mechanisms that must be in place for a physical building to be “accessible” under the ADA.⁸⁷ By contrast, there is no sufficient federal guidance for website owners in meeting ADA requirements.⁸⁸ Lacking

78. See Mara D. Smith, *Application of the ADA to Websites: Congress Should Rely on the Standards Created by the World Wide Consortium*, 17 INTELL. PROP. L. BULL. 137, 147 (2013).

79. See Ali Abrar & Kerry J. Dingle, *From Madness to Method: The Americans with Disabilities Act Meets the Internet*, 44 HARV. C.R.-C.L. L. REV. 133, 161 (2009).

80. Currently, YouTube provides an option for subscribing to YouTube Premium that allows for ad-free access to content on the website. However, users may, and do, still choose to watch for free. YOUTUBE, <https://www.youtube.com/premium> [<https://perma.cc/YNW6-UGXV>] (last visited Nov. 24, 2019).

81. Karen Hua, *Education as Entertainment: YouTube Sensations Teaching the Future*, FORBES (June 23, 2015, 12:28 PM), <https://www.forbes.com/sites/karenhua/2015/06/23/education-as-entertainment-youtube-sensations-teaching-the-future/#1df31f6a47c2> [<https://perma.cc/WUY3-5TV8>] (describing the Khan Academy, which provides a number of free lectures to students).

82. *Id.*

83. See Abrar & Dingle, *supra* note 79.

84. See *Website Accessibility Under Title II of the ADA*, ADA.GOV, <https://www.ada.gov/pcatoolkit/chap5toolkit.htm> [<https://perma.cc/N4QK-N7UA>] (last visited Nov. 24, 2019).

85. *Id.*

86. See *Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England*, 37 F.3d 12, 19 (1st Cir. 1994).

87. 28 C.F.R. § 36.301–36.311 (1991).

88. JOAN FARRELL, ADA COMPLIANCE GUIDE ¶ 586 WEB ACCESSIBILITY (Supp. 2018).

clear regulations for websites, assistive technologies may apply inconsistently across websites to the detriment of users.⁸⁹ Labeling all websites as places of public accommodation may compromise key facets and benefits of current internet use in contravention of Congressional intent and the language of the ADA.

B. *The Nexus Test*

The courts' application of a nexus test to resolve ADA issues related to websites runs afoul of Congressional intent. The nexus test excludes online-only businesses from ADA compliance altogether.⁹⁰ Online-only businesses do not satisfy the nexus test because they do not exist in physical form.⁹¹ Excluding online-only businesses from ADA compliance is problematic for several reasons.

The use of websites to purchase goods or services is widespread. Between 1984 and 2015, computer ownership and internet usage rose by 71%.⁹² Increased access to websites led to the overall growth of the internet.⁹³ However, individuals with disabilities use the internet far less than the general population.⁹⁴ Thus, physical and mental disabilities are a factor in determining how central the internet is to an individual's life. Effectively excluding individuals with disabilities from online shopping deprives the disabled of the full enjoyment of the internet, a form of discrimination under the ADA.⁹⁵

Amazon, for example, exists mostly in website form.⁹⁶ Under the nexus test, the ADA would not apply to its website.⁹⁷ However,

89. Arjeta Albani, *Equality in the Age of the Internet: Websites Under Title III of the Americans with Disabilities Act*, 13 J. BUS. & TECH. L. 97, 97–98 (2017).

90. See Kessler, *supra* note 29, at 1006–07.

91. *Id.* at 995–96.

92. RYAN, *supra* note 7, at 1.

93. *Id.*

94. Sarah Perez, *79 Percent of Americans Now Shop Online, But It's Cost More than Convenience That Sways Them*, TECHCRUNCH (Dec. 19, 2016, 1:36 PM), <https://techcrunch.com/2016/12/19/79-percent-of-americans-now-shop-online-but-its-cost-more-than-convenience-that-sways-them> [<https://perma.cc/E798-FXYT>].

95. Kessler, *supra* note 29, at 1028–29.

96. While Amazon has recently opened up physical locations, the majority of their business comes through online purchases. Additionally, most of their physical stores are not Amazon stores, and instead are Whole Foods. See generally Russel Redman, *Amazon's Sales Jump in Q3, but not at Physical Stores*, SUPERNET NEWS (Oct. 26, 2018), <https://www.supermarketnews.com/online-retail/amazon-s-sales-jump-q3-not-physical-stores> [<https://perma.cc/U8WR-3MYG>].

97. While it may seem far-fetched to conclude that Amazon is not a public accommodation under the ADA, a court held that Target.com itself was not a public accommodation. See *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 956 (N.D. Cal. 2006). There, the court stated that while Target is a public accommodation, the plaintiff failed to state a claim under the ADA regarding information and services on the site that do not affect the goods and services in stores. *Id.* at 951–56. Thus, where a website satisfies the nexus test, portions of the site that do not directly relate to a physical place are exempt from ADA compliance. Kessler, *supra* note 29, at 995.

Amazon provides a dominant route to purchasing a wide variety of goods.⁹⁸ Protecting individual access to a physical store while excluding access to Amazon conflicts with the intent of the ADA.⁹⁹ Confining individuals to physical stores sacrifices the price points and convenience of Amazon and thus serves as a deprivation of the full enjoyment of goods and services.¹⁰⁰

Similarly, several smaller websites serve as businesses that exist in online-only format. Etsy is a popular website for selling artisan goods.¹⁰¹ The nexus test excludes Etsy from ADA compliance because the site does not have a nexus to a physical place.¹⁰² Excluding Etsy from ADA compliance is discrimination in that goods sold by millions of Etsy users are largely inaccessible to the disabled population.¹⁰³

The court's decision in *Access Now* resounds the aforementioned challenges of the nexus test. There, the court held that the ADA only applies to a physical, concrete structure.¹⁰⁴ The court reasoned that Southwest's website served as a "virtual ticket counter[.]" not a physical place.¹⁰⁵ Therefore, ADA compliance was not required.¹⁰⁶ Courts may find that Amazon and Etsy's physical presence is insufficient to satisfy the nexus test similar to the Southwest Airlines website.¹⁰⁷ However, inhibiting individuals with disabilities from using the Southwest website is discrimination under the ADA.¹⁰⁸ The Southwest Airlines website provides a service—namely the ability to use the website to plan a trip—and the only alternative is calling Southwest Customer Service.¹⁰⁹ There are several advantages to using the

98. Chris Willer, *Amazon Makes Up 43 Percent of All Online Sales (and 6 Other Insane Stats About Jeff Bezos's Company)*, INC. (Sept. 8, 2017), <https://www.inc.com/business-insider/facts-about-amazon-jeff-bezos-seattle-2017.html> [<https://perma.cc/8ZDV-NX2D>]. Amazon is the fourth largest company in the world, and its sales account for 43% of all online sales. *Id.*

99. *See* *Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England*, 37 F.3d 12, 20 (1st Cir. 1994).

100. *Id.* at 20. While Amazon does maintain warehouses where goods are stored, both *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1011 (6th Cir. 1997) and *Access Now, Inc. v. Southwest Airlines Co.*, 227 F. Supp. 2d 1312, 1319–21 (S.D. Fla. 2002) demonstrate how courts may find that the connection between goods and services and a website is insufficient to satisfy the nexus test. In *Access Now*, the court held that the plaintiffs failed to allege that the Southwest website impedes their access to a physical place, such as the ticket counter or travel agent. 227 F. Supp. 2d at 1321.

101. *See generally* ETSY, <https://www.etsy.com> [<https://perma.cc/JF7V-Q6SR>].

102. Kessler, *supra* note 29, at 1022.

103. *See id.* at 1025–26.

104. *Access Now*, 227 F. Supp. 2d at 1321.

105. *Id.* at 1314.

106. *Id.* at 1321–22.

107. *See id.* at 1319–21.

108. *But see id.* at 1321–22.

109. SOUTHWEST AIRLINES BOOK A FLIGHT, <https://www.southwest.com/air/booking> [<https://perma.cc/275F-QWBU>] (last visited Nov. 24, 2019).

website to book a flight as opposed to using the phone, such as saving time.¹¹⁰

Thus, excluding individuals with disabilities from the Southwest Airlines website interferes with their full use of the benefits and privileges of Southwest services and forces these individuals to enjoy a separate benefit.¹¹¹ Under the ADA, a separate benefit constitutes discrimination.¹¹² The same is true when individuals with disabilities are unable to access online-only businesses, such as Amazon or Etsy, as is the result of applying the nexus test.¹¹³

Courts also inconsistently apply the nexus test in like cases. In the same year, two different district courts reached conflicting holdings about Netflix.¹¹⁴ In *National Association of the Deaf*, the Court held that Netflix was a place of public accommodation whereas, in *Cullen*, the Court held that Netflix was not.¹¹⁵ Conflicting holdings regarding the same service cause confusion and further complicate the application of the ADA to websites.¹¹⁶

III. THE WEBSITE ACCOMMODATIONS TEST (WAT)

Inconsistent application of the ADA to websites is unacceptable in relation to promoting disability rights and compliance. Instead of applying a nexus test or labeling all websites “public accommodations” under the ADA, courts should apply WAT. WAT requires two central inquiries: (1) whether the good or service is, or could be, provided by a physical place; and (2) whether ADA accessibility is readily achievable.¹¹⁷ Websites meeting both criteria are public accommodations under the ADA.¹¹⁸

110. For example, using the Southwest website, users can regularly check airfare and schedules, as well as compare costs across airlines, without the hassle of being placed on hold. *See id.*

111. 42 U.S.C. § 12182 (b)(1)(A)(i)–(iii) (1990).

112. *Id.* § 12182 (b)(1)(a)(iii).

113. *See id.*; Kessler, *supra* note 29, at 1017.

114. *Cullen v. Netflix*, 880 F. Supp. 2d 1017, 1029 (N.D. Cal. 2012); *Nat’l Fed’n of the Deaf v. Netflix*, 869 F. Supp. 2d 196, 208 (D. Mass. 2012).

115. 880 F. Supp. 2d at 1023–24; 869 F. Supp. 2d at 201, 202.

116. Kessler, *supra* note 29, at 1023–24.

117. Notably, WAT is only applicable to commercial websites, as Congress lacks the authority to regulate non-commercial websites under the ADA. *See 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, 1335 (2005) (arguing that non-commercial, non-retail websites do not constitute interstate commerce for the purposes of the ADA).

118. *See Kessler, supra* note 29, at 1024–28.

A. Is or Could Be Provided by a Physical Place

The first prong of WAT determines whether the good or service provided by the website is, or could be, provided by a physical place.¹¹⁹ This inquiry is a central component of this test because it allows for the inclusion of online-only businesses and services but excludes websites that other approaches might include.¹²⁰ Under WAT, a website such as Amazon is subject to ADA requirements because a physical place could provide its goods.¹²¹ However, this approach does not allow for the inclusion of online blog websites or game websites.¹²²

Significantly, WAT diverges from the nexus test in that a physical place is not at all required.¹²³ That is, under WAT, a website must comply with the ADA absent the existence of a physical place if that website provides goods or services that could be provided by a physical place.¹²⁴ For example, Amazon provides goods that are also available in physical stores, such as Target.¹²⁵ Therefore, even in the absence of a physical Amazon store, Amazon must comply with the ADA under this test.

Multiple commentators argue that the courts should broadly interpret the list of public accommodations provided by Congress.¹²⁶ Specifically, the ADA should apply to websites with the character of the physical places listed by the C.F.R.¹²⁷ While Congress intended for a broad interpretation of the list of public accommodations, the interpretation in these cases would go too far and change the dynamic of the internet.¹²⁸

119. *Id.* at 1025.

120. *See, e.g., id.*

121. Nat Levy, *How Amazon's Expanding U.S. Brick-and-Mortar Footprint Stacks up Against Other Big Retailers*, GEEKWIRE (July 6, 2018, 9:22 AM), <https://www.geekwire.com/2018/amazons-expanding-u-s-mortar-footprint-stacks-big-retailers> [<https://perma.cc/J763-CPXD>].

122. *See* Kessler, *supra* note 29, at 1025–26. The courts are traditionally concerned with excluding individuals with disabilities from accessing services from non-physical places that are accessible in physical places. *See, e.g.,* Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, 37 F.3d 12, 20 (1st Cir. 1994) (holding that it would be “irrational” to allow individuals access to goods in a physical place and exclude access to the same goods when accessed over the phone or by mail).

123. *See* Kessler, *supra* note 29, at 995.

124. *See id.* at 1025–26.

125. Levy, *supra* note 121.

126. Kessler, *supra* note 29, at 1006–07 (arguing that courts should match the character of a website to the character of an accommodation listed in CFR when applying the ADA to websites).

127. *Id.* at 1013–14.

128. *Id.* at 1006–08.

For example, broad interpretation of the places listed in the ADA could allow for the inclusion of gaming websites as a place of entertainment.¹²⁹ There are several free and widely used gaming websites.¹³⁰ Implementation of accessibility features to such websites requires a great deal of research, time, and money.¹³¹ Thus, websites that provide free services may be less inclined to do so if forced to comply with the ADA.¹³² Further, gaming and blog websites provide services that do not ordinarily exist in physical form. Thus, the disabled population is not prohibited from accessing a service online that is accessible by a physical place, a common concern among courts.¹³³ Therefore, WAT increases internet access for the disabled while ensuring that the internet still functions as a place to share ideas and communicate freely and openly.

B. *Readily Achievable*

The second prong of WAT allows for an exception when accessibility is not readily achievable.¹³⁴ The EEOC does not require the removal of barriers to access when accessibility is not readily achievable.¹³⁵ “Readily achievable” is defined as “easily accomplishable and able to be carried out without much difficulty or expense.”¹³⁶ Multiple factors must be considered in determining whether accessibility is readily achievable.¹³⁷

129. *Id.* at 1026.

130. Stacy Fisher, *9 Best Websites for Playing Free Online Games*, LIFEWIRE (May 24, 2019), <https://www.lifewire.com/top-places-to-play-free-online-games-1357994> [<https://perma.cc/ZBV4-DFFF>].

131. Kristen Bachmeier, *How Much Does ADA Website Compliance Cost?*, ATILUS (May 1, 2019), <https://www.atilus.com/ada=website-compliance-cost> [<https://perma.cc/X59K-5YK6>].

132. Goldfarb, *supra* note 117, at 1334–35. While websites may increase the price of advertisement to compensate for accessibility costs, doing so may be undesirable, particularly for less popular websites, in fear that ad sales will decrease. *How Much to Charge for Advertising on Your Website?*, ADSPEED AD SERVER (Apr. 21, 2010), <https://www.adspeed.com/Blog/How-much-charge-advertising-website-1104.html> [<https://perma.cc/WF7A-U9RQ>].

133. *Carparts Distrib. Ctr., Inc. v. Auto Wholesaler’s Ass’n of New England*, 37 F.3d 12, 20 (1st Cir. 1994).

134. Kessler, *supra* note 29, at 1027–28.

135. The ADA: Questions and Answers, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/facts/adaqa2.html> [<https://perma.cc/ZW9E-KRRC>] (last modified Jan. 15, 1997).

136. *Id.*

137. 28 C.F.R. § 36.104 (1991). In determining whether accessibility is readily achievable, factors to consider include: (1) “[t]he nature and cost of the action needed under this part”; (2) “the overall financial resources of the site” or the impact of the action on the

The CFR provides examples of accessibility features that are readily achievable under the ADA.¹³⁸ For example, installing ramps and widening doorways are readily achievable accessibility features.¹³⁹ While these examples apply directly to physical places, they provide context for what constitutes “readily achievable” for websites.¹⁴⁰ For example, ramps provide an alternative option for entering a building or structure.¹⁴¹ Similarly, keyboard interface, which controls web content by keystrokes, allows for an alternative to navigating a website with a mouse.¹⁴² Similarly, installing a flashing alarm light is a readily achievable accommodation.¹⁴³ Flashing alarm lights provide an alternative means for deaf persons to internalize an emergency situation.¹⁴⁴ Similarly, subtitles for videos on websites provide an alternative for deaf persons to understand the content provided by a video.¹⁴⁵ Thus, video subtitles, like flashing alarm lights, are likely “readily achievable.”

In addition, EEOC excuses the implementation of accessibility features that require burdensome expense.¹⁴⁶ Accessibility features, such as automatic speech recognition (ASR),¹⁴⁷ are not expensive,¹⁴⁸

operation of the site; (3) “[t]he geographic separateness, and the administrative or fiscal relationship of the site . . . to any parent corporation or entity”; (4) the overall financial resources, size, and the number, type, and location of parent corporations; and (5) the type of operation(s) of any parent corporation or entity, such as the composition, structure, and functions of the workforce of the parent corporation or entity. *Id.*

138. 28 C.F.R. § 36.304(b).

139. *Id.*

140. See generally Jeffrey J. Maleska, *Business Wins Accessibility Case: Fixes Were Not Readily Achievable*, FELHABER LAW BULLETIN (Apr. 2, 2018), <https://www.felhaber.com/article/business-wins-accessibility-case-fixes-were-not-readily-achievable> [<https://perma.cc/CUC4-GLTU>].

141. 28 C.F.R. § 36.304(b)(1).

142. *Keyboard Accessible: Understanding Guideline 2.1*, W3C, <https://www.w3.org/TR/UNDERSTANDING-WCAG20/keyboard-operation.html> [<https://perma.cc/5GZF-95UV>] (last visited Nov. 24, 2019).

143. 28 C.F.R. § 36.304(b)(7).

144. *Id.*

145. *YouTube Closed Captioning for Accessibility: Why and How*, BUREAU OF INTERNET ACCESSIBILITY (Jan. 15, 2019), <https://www.bioa.org/blog/youtube-closed-captioning-for-accessibility-why-and-how> [<https://perma.cc/J4P2-Y2XR>].

146. Common Questions, ADA, <https://www.ada.gov/reachingout/factor.html> [<https://perma.cc/2B4S-KP86>] (last visited Nov. 24, 2019) (stating that the addition of extensive ramps or elevators that have burdensome costs are not readily achievable).

147. See, e.g., *Amazon Transcribe Pricing*, AMAZON, <https://aws.amazon.com/transcribe/pricing> [<https://perma.cc/Y3TG-8H5F>] (last visited Nov. 24, 2019). Amazon Transcribe allows developers to add speech-to-text capabilities to their applications. *Id.* Transcribing speech into text aids the deaf population in accessing applications. BUREAU OF INTERNET ACCESSIBILITY, *supra* note 145.

148. See *Amazon Transcribe Pricing*, *supra* note 147. Amazon Transcribe, for example, charges based on seconds of audio transcribed each month. *Id.* Amazon Transcribe costs \$0.006 to transcribe six seconds of a video available on social media. *Id.*

especially when considered in light of the benefits that follow increased accessibility.¹⁴⁹ Therefore, ASR technologies are readily achievable for the purposes of WAT.

Under WAT, the readily achievable exception also applies to websites that are public accommodations. Consider an individual who operates her own website to promote handmade items. If the individual is subject to the expenses of ADA compliance, she may decide not to sell her items on the internet altogether. As a result, the costs of making an inaccessible website accessible outweighs the benefits, and therefore, she would not be required to comply with the ADA.¹⁵⁰

Litigants have challenged the validity of the readily achievable exception; however, the exception stands.¹⁵¹ Defendants argued that “readily achievable” is unconstitutionally vague in violation of the Due Process Clause.¹⁵² In *Pinnock*, the court cites *Grayned v. City of Rockford* where the Supreme Court held that “we can never expect mathematical certainty from our language.”¹⁵³ Relying on the Court’s holding, the *Pinnock* court held that “readily achievable” is not unconstitutionally vague in violation of substantive due process.¹⁵⁴ Further, the court quotes EEOC regulations, stating that a more specific standard would contravene the goals of the ADA.¹⁵⁵ Thus, the readily achievable exception stands to date. Because physical structures are subject to the readily achievable exception, websites are subject to it as well.

149. *The Business Case for Digital Accessibility*, W3C, <https://www.w3.org/WAI/business-case> [<https://perma.cc/EHG9-X5WV>] (last visited Nov. 24, 2019). Web accessibility increases the reach of a websites market. In 2011, National Public Radio (NPR) created transcripts for recorded content to make that content accessible to the deaf population. As a result, NPR search traffic increased by 6.86%. *Id.*

150. *See* Nondiscrimination on the Basis of Disability in Air Travel: Accessibility of Web Sites and Automated Kiosks at U.S. Airports, 78 Fed. Reg. 67,882, 67,891 (Nov. 12, 2013) (codified at 49 C.F.R. pt. 27), <https://www.govinfo.gov/content/pkg/FR-2013-11-12/pdf/2013-26749.pdf> (finding that the costs of making infrequently visited websites accessible would outweigh the benefits to the disabled).

151. *Pinnock v. Int’l House of Pancake Franchisee*, 844 F. Supp. 575, 581–82 (1993).

152. *Id.* at 579–80 (where the defendant argued that the ADA is unconstitutional because terms, such as “readily achievable,” do not specify the action necessary to conform with the law). The Ninth Circuit followed *Pinnock*’s approach regarding “readily achievable.” *See also* *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898, 909 (9th Cir. 2019) (holding that the ADA did not violate due process by failing to provide specific instructions for accessibility); *Botosan v. Paul McNally Realty*, 216 F.3d 827, 836 (9th Cir. 2000) (following *Pinnock*, “readily achievable” is not unconstitutionally vague).

153. 844 F. Supp. at 581; *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) (holding that a statute “marked by flexibility and reasonable breadth rather than meticulous specificity” does not violate due process) (internal quotations omitted).

154. *Pinnock*, 844 F. Supp. at 581.

155. *Id.* at 582.

1. *Advantages*

There are several advantages to WAT. Congress intended for the Act to have a broad meaning.¹⁵⁶ Under the current approaches, individuals with disabilities must visit a physical place to obtain goods and services that nondisabled individuals may acquire on the internet.¹⁵⁷ Accordingly, individuals with disabilities are unable to enjoy the ease and convenience that comes from the online market.¹⁵⁸ Congress prohibited this kind of disparate treatment when enacting the ADA.¹⁵⁹ With the ever-increasing dependence on the internet to purchase goods and services, subjecting websites to ADA compliance helps abolish the discrimination faced by individuals with disabilities.

Second, WAT leaves room for future technological development. Confining ADA accessibility to only those websites associated with the C.F.R.'s list of public accommodations leaves very little room for future advancement.¹⁶⁰ For example, adhering to the character of the list would not allow for the inclusion of Uber.¹⁶¹ “A website almost certainly could not qualify as ‘. . . a station used for specified public transportation’”¹⁶² If Uber cannot qualify as a public accommodation under “a station used for specified public transportation,” it cannot qualify under any other enumerated public accommodation.¹⁶³ As a result, individuals with disabilities cannot utilize Uber’s services.¹⁶⁴ However, under the new test, Uber is subject to ADA accessibility requirements because a physical place could provide its services.¹⁶⁵

Lastly, WAT’s reliance on “readily achievable” provides guidance to website owners in determining website accessibility.¹⁶⁶ As mentioned previously, physical structures must comply with concrete standards and regulations for accessibility.¹⁶⁷ Similar standards do not exist for websites. Absent Congressional action to develop such standards, the “readily achievable” prong of WAT provides guidance and notice to website owners seeking compliance with ADA.

156. Kessler, *supra* note 29, at 993.

157. *See id.* at 994–95.

158. *Id.* at 1028–29.

159. *See* 42 U.S.C. § 12101(b)(1)–(4).

160. 42 U.S.C. § 12181(7)(A)–(L).

161. *See id.* § 12181(7)(G).

162. *Id.*; Kessler, *supra* note 29, at 1025.

163. 42 U.S.C. § 12181(7)(G).

164. *See id.*

165. *See generally* UBER, <https://accessibility.uber.com/uber-app-accessibility-certification> [<https://perma.cc/783P-2CRD>] (last updated Jan. 9, 2019). Uber does make use of accessibility features in its downloadable application. *Id.*

166. *See* Kessler, *supra* note 29, at 996.

167. *Parker v. Metro Life Ins. Co.*, 121 F.3d 1006, 1011 (6th Cir. 1997).

2. Disadvantages

There are several disadvantages to WAT as well. First, the test departs from the plain language of the ADA.¹⁶⁸ As stated above, the list of public accommodations refers only to physical places, indicating that Congress confined public accommodations to physical places.¹⁶⁹ Under *Reno*, websites are not physical places and thus, are incompatible with the other places listed as public accommodations.¹⁷⁰ While Congress did intend for a broad construction of the list, the use of WAT allows for the inclusion of a large number of websites.¹⁷¹ As a result, the new test essentially adds a whole new category of public accommodations; namely cyberspace.

Second, the test may yield results outside of the scope of the ADA. Because the ADA is entirely silent regarding websites, it was not meant to include them.¹⁷² Given internet usage in the 1990s, Congress arguably may have intended for the ADA to apply even if it did not explicitly list websites among its provisions.¹⁷³ However, DOJ considered amending the ADA to include websites for a number of years but chose not to, implying that the ADA currently does not adequately address websites.¹⁷⁴

Lastly, the language of the ADA mirrors that of the Civil Rights Act (CRA) of 1964.¹⁷⁵ The CRA applies only to physical places.¹⁷⁶ Congress knew when enacting the ADA that its language limited the ADA to physical places.¹⁷⁷ The list of public accommodations in the ADA is almost identical to that in the CRA.¹⁷⁸ Arguably, Congress knew that it was excluding non-physical places when drafting the ADA because it had drafted a similar list already that applied only to physical places. Under these circumstances, a broad interpretation of the ADA may be viewed unfavorably by courts attempting to apply the specific provision of the ADA. While the aforementioned disadvantages are real challenges to WAT, the advantages outweigh

168. 42 U.S.C. § 12181(7)(A)–(L).

169. *Id.*

170. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 851 (1997).

171. *See* Kessler, *supra* note 29, at 1025–26.

172. *See* 42 U.S.C. § 12101(a)(1) (1990).

173. Kessler, *supra* note 29, at 1013–14.

174. *Vu*, *supra* note 20.

175. Michael O. Finnigan, Jr., et al., *Accommodating Cyberspace: Application of the Americans with Disabilities Act to the Internet*, 75 CINN. L. REV. 1795, 1821 (2007) (discussing a court's holding that an online chat room was not a physical place and therefore not a public accommodation under the Civil Rights Act).

176. *Id.*

177. *Id.* at 1807–08.

178. *Compare id.* at 1807–08, 1821–22, *with* 42 U.S.C. § 12181(7)(A)–(L).

the disadvantages. Absent congressional action, WAT is a better alternative to the current approaches because it is flexible, balances the interests of the disabled populations against businesses, and provides more guidance, through the readily achievable standard, than any approach currently used.

CONCLUSION

For decades courts have grappled with applying the ADA to websites. The DOJ considered the application of the ADA to websites; however, it failed to exact any standards for the application of the ADA to websites. Thus, courts split on the issue: some courts allow for all websites to constitute places of public accommodation and others require a nexus between the good or service provided by a website and a physical place.¹⁷⁹

The lack of uniformity amongst the courts creates confusion over whether websites must comply with the ADA and what compliance means. A different approach to this issue is WAT: (1) does the website provide a good or service that is, or could be, provided by a physical place, and (2) is compliance readily achievable. While WAT has its advantages and disadvantages, it is more consistent with the congressional intent of the ADA than either approach currently taken by the courts.

179. *Compare* Carparts Distrib. Ctr., Inc. v. Auto Wholesaler's Ass'n of New England, 37 F.3d 12, 20 (1st Cir. 1994), *with* Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1010 (1997).