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Lazar, Jonathan

Ferleger, David

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**A RECONCEPTUALIZATION OF WEBSITE  
ACCESSIBILITY UNDER THE ADA:  
RESOLVING THE INTER-CIRCUIT CONFLICT  
POST-PANDEMIC**

Jonathan Lazar\* and David Ferleger♦

*The federal circuit courts of appeals are in conflict over whether Title III of the Americans with Disabilities Act requires public accommodations' websites to be accessible to people with disabilities. Some courts consider websites themselves to be a covered "place of public accommodation." Others conclude that websites are not covered at all. The predominant view is that a website must be accessible if it has a "nexus" to a physical public location. However, the "nexus" requirement has been problematic from the start and its weaknesses have been particularly exposed during the COVID-19 pandemic. The pandemic exposes a deep mismatch between the "nexus" requirement and how businesses approach their work. In this article, we present a novel reconceptualization of the website accessibility question which resolves the inter-circuit conflict and allows abandonment of the already unworkable nexus requirement.*

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\* Jonathan Lazar, PhD, LL.M., is a professor in the College of Information Studies (iSchool) at the University of Maryland. Professor Lazar has authored or edited 14 books on human-computer interaction, accessibility, and disability rights, as well as 190 peer-reviewed publications. At the University of Maryland iSchool, Dr. Lazar is director of the Trace Research and Development Center, the nation's oldest research center on technology and disability, is a faculty member in the Human-Computer Interaction Lab (HCIL), and teaches courses on human-computer interaction, user-centered design, accessibility, and legal research methods. <jlazar@umd.edu>

♦ David Ferleger, J.D., has a national law and consulting practice, concentrating in U.S. Supreme Court and other appellate work. He has served as a judicial adjunct in a number of disability rights cases, including as special master, court monitor and technical advisor. Mr. Ferleger is a founding member and a board member of the Academy of Court Appointed Masters (ACAM), and recipient of its 2019 *Civil Justice* Award. He has taught at the New York University Law School and the University of Pennsylvania Law School. He has authored book chapters, law review articles and other works on disability rights and other topics. His books include the *Handbook for Expert Witnesses*, and *The Future of Disability Law*. Mr. Ferleger is a Fellow of the American Association on Intellectual and Developmental Disabilities. <david@ferleger.com>

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## I. EFFECTS OF COVID-19 ON WEBSITE USE

Public websites are relatively recent entities; they did not exist in 1990 when the Americans with Disabilities Act was adopted. Tim Berners-Lee wrote a proposal for the idea of the World Wide Web in March 1989, and a second proposal in November 1990.<sup>1</sup> The first web server was up and running at the end of 1990, and the first web server in the United States was setup in December 1991.<sup>2</sup> The first web browsers for PC and Macintosh environments (including “Mosaic”) were released in 1993<sup>3</sup>, and the Acceptable Use Policy of the Internet, which prohibited commercial use of the Internet, was re-interpreted to allow commerce.<sup>4</sup> While the exact timing of first sale of an item on a web site is unclear, there is general consensus that it occurred in 1994.<sup>5</sup> Based on the timeline, it is clear that there was no public awareness of the Web as a relevant concern in the development and passage of the Americans with Disabilities Act, which was signed into law on July 26, 1990, before the first web server was even up and running.<sup>6</sup>

During the COVID-19 pandemic, it became apparent to consumers and businesses alike that websites are essential to their interactions. Web sites are critical to participation in communities, delivery of education, social contacts, religious engagement, and even acquiring the basic supplies for survival. Some stores, restaurants, businesses, and organizations kept their physical locations closed for customers for large periods of time during the pandemic, and switched to mail delivery, curbside pickup, drive-through, home delivery, or digital delivery of goods or services. Other businesses (such as grocery stores) were declared “essential businesses” and allowed to remain

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<sup>1</sup> *A short history of the web*, CERN, <https://home.cern/science/computing/birth-web/short-history-web> (last visited March 15, 2022).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Robert Cailliau, *A Little History of the World Wide Web*, W3C (1995) (revised Aug. 01, 2021), <https://www.w3.org/History.html>.

<sup>5</sup> Maris Fessenden, *What Was the First Thing Sold on the Internet?*, SMITHSONIAN MAG. (Nov. 30, 2015), <https://www.smithsonianmag.com/smart-news/what-was-first-thing-sold-internet-180957414/> (It could have been either a CD, computer equipment, or there’s still the rumor that it was a pizza, although evidence seems to refute that claim.).

<sup>6</sup> To place the ADA in the context of technology development, it is also important to note that the best-known screen reader, JAWS, utilized by Blind users, was first released in 1989, and likely also had not yet been a concern for those involved in the development and passage of the ADA.

open in limited capacity.<sup>7</sup> Public health rules differed by jurisdiction and so whether a business was defined as an essential business differed depending on location and timing.

Many organizations rapidly moved to add more functionality to their websites to allow for these new methods of ordering and receiving products or services. In the United States, the National Bureau of Economic Research estimated that 61.7% of businesses increased their online presence due to the pandemic.<sup>8</sup> Specifically, “52.5% of businesses responded to the crisis by providing online services, 35.1% expanded digital payments, 25.7% used delivery services, and 24.4% used curbside pickup.”<sup>9</sup>

An accessible website is one that is flexible enough to work with various assistive technologies and differing approaches for input and output. This includes people who are Blind or low vision who may utilize screen readers or refreshable braille displays, people who are Deaf or hard of hearing who may require captioning on videos, and people who have motor impairments that limit their use of pointing devices, among others.<sup>10</sup> To be accessible, a website would be built (or modified) to conform with the Web Content Accessibility Guidelines (WCAG), an international technical standard that has been developed by the Web Accessibility Initiative at the World Wide Web Consortium, using an open process with feedback from all stakeholders.<sup>11</sup> It is important to note that making a website accessible

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<sup>7</sup> Patrick McGeehan & Matthew Haag, *These Stores Are ‘Essential’ in the Pandemic. Not Everyone Agrees*, N.Y. TIMES (last updated Apr. 14, 2020), <https://www.nytimes.com/2020/03/27/nyregion/coronavirus-essential-workers.html>.

<sup>8</sup> Georgij Alekseev et al., *The Effects of COVID-19 on U.S. Small Businesses: Evidence from Owners, Managers, and Employees* (Nat’l Bureau of Econ. Rsch., Working Paper No. 27833, 2020), [https://www.nber.org/system/files/working\\_papers/w27833/w27833.pdf](https://www.nber.org/system/files/working_papers/w27833/w27833.pdf).

<sup>9</sup> *Id.*

<sup>10</sup> JONATHAN LAZAR ET AL., ENSURING DIGITAL ACCESSIBILITY THROUGH PROCESS AND POLICY 2 (1st ed., 2015). *See also* Benjamin S. Briggs & Cynthia Sass, *Websites and Mobile Applications: Do They Comply with Title III of the Americans with Disabilities Act?*, 90 FLA. BAR J. 40, 40 (2016) (impact on technology use of how vision, hearing, mental, and other disabilities); Christopher Mullen, *Places of Public Accommodation: Americans with Disabilities and the Battle for Internet Accessibility*, 11 DREXEL L. REV. 745, 748–51 (2019) (“56.7 million people in the United States registered as having a disability”).

<sup>11</sup> W3C, *Web Content Accessibility Guidelines (WCAG) 2.1* (Andrew Kirkpatrick et al. eds., June 5, 2018), <https://www.w3.org/TR/WCAG21/>.

also provides increased usability for people without disabilities,<sup>12</sup> and allows content to be rendered properly across a broader range of devices and platforms.<sup>13</sup> Captioning provides a great example, since it is legally required because it assists people who are Deaf or hard of hearing, and it also benefits a much broader population of people who utilize captioning to help understand information, including people located in quiet places where they cannot use speakers or noisy places where they cannot hear sound well, people with learning disabilities, and people learning English for the first time.

Unfortunately, in the rapid shift to stay afloat during the pandemic, many of the new websites, new functionalities on existing websites, and smartphone apps were built in a way that is inaccessible for people with disabilities.<sup>14</sup> Therefore, not only were the websites and apps which were the primary (or only) method for accessing goods or services inaccessible, but in-person accommodations were often not feasible.<sup>15</sup> In the past, if a website was not accessible, a company or an organization would frequently offer an accommodation—such as having the person enter into a store to have a staff member assist or using an alternate method such as calling on the phone or, in some cases, substituting email for personal encounters, even though those accommodations rarely provided an equal experience.<sup>16</sup> A recent decision from a district court in *Robles v. Domino's Pizza*, noted that the plaintiff, a Blind man, waited over 45 minutes, on two different occasions, to order a pizza on the phone, since the website and app were not accessible to him. The court noted that “no person who has ever waited on hold with customer service—or ever been hungry for a pizza—would find this to be an acceptable substitute for ordering from a website.”<sup>17</sup>

People with disabilities in many cases are more likely to have

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<sup>12</sup> Sven Schmutz et al., *Implementing Recommendations From Web Accessibility Guidelines: Would They Also Provide Benefits to Nondisabled Users*, 58 HUM. FACTORS 611–629 (2016).

<sup>13</sup> *Id.* at 620.

<sup>14</sup> Jonathan Lazar, *Managing Digital Accessibility at Universities During the COVID Pandemic*, 21 UNIVERSAL ACCESS INFO. SOC'Y 749, 749 (2021).

<sup>15</sup> In many cases, businesses were not allowed to open in-person if they were not deemed essential. And for people with some types of disabilities, social distancing was impossible, either because of mobility challenges or in the case of Blind individuals, they might not be aware how close they were standing to other people.

<sup>16</sup> JONATHAN LAZAR ET AL., *supra* note 10, at 41–58.

<sup>17</sup> *Robles v. Domino's Pizza*, No. CV 16-6599 JGB (EX), 2021 WL 2945562, at \*8 (C.D. Cal. June 23, 2021).

underlying health complications that place them at a higher risk for suffering from serious illness if they contract COVID-19.<sup>18</sup> They may have a heightened need to minimize or avoid physical contact with others and, concomitantly, may increasingly rely on electronic communication and on websites. In addition, some people with disabilities may have challenges with some of the suggested precautions, such as Blind people who may not be able to accurately assess social distancing, or Deaf people who may find it problematic to cover their faces and communicate properly using ASL. During the COVID-19 pandemic, people with disabilities wanted to avoid public places and obtain equal access to the same content, services, and commerce opportunities. Yet, due to inaccessible websites and apps, customers were often denied access to the goods and services of public accommodations.

An analysis of twitter posts by people with disabilities during the pandemic highlighted three key concerns at the intersection of accessibility and technology: (1) the allocation of product delivery services, (2) the transition to remote education, and (3) the dissemination of public health information.<sup>19</sup> In many ways, public attention primarily focused on the accessibility of government websites providing COVID-19 related data,<sup>20</sup> non-governmental organizations providing COVID-19 data,<sup>21</sup> or educational institutions<sup>22</sup> (primary, secondary, and post-secondary) providing accessible online instruction. All of those are important. However, the legal framework for federal, state, and local government websites is different from the framework for stores, businesses, and other public accommodations.

During the COVID-19 pandemic, many businesses and organizations limited in-person interactions and moved more of their

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<sup>18</sup> *People with Disabilities*, U.S. CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-disabilities.html>, (last visited Mar. 15, 2022).

<sup>19</sup> Cole Gleason et al., *Disability and the COVID-19 Pandemic: Using Twitter to Understand Accessibility During Rapid Societal Transition*, PROC. 22ND INT'L ACM SIGACCESS CONF. ON COMPUTS. & ACCESSIBILITY 1, 1 (2020).

<sup>20</sup> Alexa F. Siu et al., *COVID-19 highlights the issues facing blind and visually impaired people in accessing data on the web*, PROC. 18TH INT'L WEB FOR ALL CONF. 1, 4 (2021).

<sup>21</sup> Elana Fernández-Díaz, et al., *Exploring WHO Communication during the COVID 19 Pandemic through the WHO Website Based on W3C Guidelines: Accessible for All?*, 17 INT'L J. ENV'T RSCH. PUB. HEALTH 5663 (2020).

<sup>22</sup> Shanna Russ & Foad Hamidi, *Online learning accessibility during the COVID-19 pandemic*, PROC. 18TH INT'L WEB FOR ALL CONF. 1-7 (2021).

operations, sales, and services online, or made them available through curbside pickup or similar means. Many of these new or expanded online websites and apps were inaccessible for people with disabilities.

As discussed in detail below,<sup>23</sup> over the years since the adoption of the Americans with Disabilities Act, various federal courts of appeals have developed diverging approaches to the question of whether or how the ADA applies to website accessibility. In some circuits, there is a legal requirement for a website to be accessible under Title III of the Americans with Disabilities Act (covering public accommodations) only if there is a “nexus” between the website and the physical public location. In other circuits, the ADA is held not to apply to websites at all, or to apply fully to websites. The middle ground “nexus” approach has emerged in recent years as predominant. However, in addition to other problems with “nexus,” the COVID-19 pandemic shows a deep mismatch between the “nexus” requirement and the reality of life and how businesses are now approaching their work and operations. In this article, we argue that the lessons of the COVID-19 pandemic teach that the nexus requirement is a rule that is no longer rational, logical, workable, or within the intent of the ADA.

## II. THE ADA MANDATES WEBSITE ACCESSIBILITY

We start by advancing a novel proposition here which is absent from the current caselaw on website accessibility. The proposition is that we acknowledge that the ADA statute and its regulations support the conclusion that *websites are an accommodation which permit individuals with disabilities to enjoy and participate, and to receive the benefits of places of public accommodation.*<sup>24</sup> Thus, websites need not be considered as the public accommodation itself. Websites—considered as an ADA accommodation—must be accessible to people with disabilities. This conceptualization distinguishes our argument from the now decades-old debate on whether websites are, or are not,

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<sup>23</sup> See *infra* pp. 76-78.

<sup>24</sup> The awkwardness of the use of the word “accommodation” in multiple meanings is unavoidable due to the statute’s text. There are “places of public accommodation” which are defined in the twelve categories we identify, discussed *infra* p. 72. Those places are obligated to provide “accommodations” to people with disabilities; in this second context, accommodations are various techniques, means and mechanisms to end discrimination and to enhance the participation and inclusion of people with disabilities, and to ensure equal benefit from the place of public accommodation. Thus, “accommodation” in the first instance is a “place,” and, in the second instance, is a “mechanism” for entrée or participation in the benefits of the place.



themselves “places of public accommodation.”<sup>25</sup> As we make this novel argument, we also accept and maintain that websites themselves may also be considered a “place of public accommodation” under the ADA. In addition, as discussed below, this approach resolves the inter-circuit conflict on the legal basis for website accessibility. Resolving this conflict would have an immense real-world impact.<sup>26</sup>

The Americans with Disabilities Act is intended to provide “a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities” and to set forth “clear, strong, consistent, enforceable standards.”<sup>27</sup> Congress recognized that people with disabilities face persistent discrimination “in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.”<sup>28</sup> Among other things, Congress found that “the Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.”<sup>29</sup> The ADA’s provisions also support the nation’s economy. Congress found it an appropriate bulwark against “billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.”<sup>30</sup>

Title III of the ADA prohibits discrimination against persons with disabilities by places of public accommodation and services

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<sup>25</sup> See *infra* pp. 76–78 on inter-circuit conflicts on the issue.

<sup>26</sup> See Lauren Stuy, *No Regulations and Inconsistent Standards: How Website Accessibility Lawsuits Under Title III Unduly Burden Private Businesses*, 69 CASE W. RESV. L. REV. 1079, 1079–1080 (2019) (“And while many people take the Internet for granted, as many as 26.5 million Americans with visual or auditory disabilities face difficulties accessing the websites of private businesses.”); Christina T. Haleas, Note, *Don’t Ask Me What to Do, Just Let Me Sue You: Why We Need Clear Guidelines for Website Accessibility Under Title III of The Americans with Disabilities Act*, U. ILL. J.L. TECH. & POL’Y 465, 471 (2019) (“Courts disagree as to how, and even whether, Title III applies to websites, which is a big issue, considering that there are approximately 1.3 billion people in the world living with visual impairment.”).

<sup>27</sup> 42 U.S.C. § 12101(b)(1), (b)(2). Decades before the ADA, Professor tenBroek eloquently advocated for attention to the national challenges addressed in the ADA. Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CAL. L. REV. 841, 843, 847–48, (1966) (urging disability integration as “the policy of the nation,” and suggesting that people with disabilities have a right “to live in the world” with the same access as others).

<sup>28</sup> 42 U.S.C. § 12101(a)(3).

<sup>29</sup> *Id.* at § 12101(a)(7).

<sup>30</sup> *Id.* at § 12101(a)(8).

operated by private entities, including retail establishments.<sup>31</sup> Title III defines twelve categories of public accommodations: 1) Places of lodging, 2) Food and drink establishments, 3) Places of exhibition or entertainment, 4) Places of public gathering, 5) Sales or rental establishments, 6) Service establishments, 7) Public transportation terminals, depots or stations, 8) Places of public display or collection, 9) Places of recreation, 10) Places of education, 11) Social service center establishments, and 12) Place of lodging.<sup>32</sup> It is important to note that nowhere within the ADA statute or regulations is there an exception for pandemic or other form of emergency.

The “[g]eneral rule” is that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”<sup>33</sup> Title III also includes both general and specific prohibitions. The general prohibition against discrimination, which is applicable to this article, is that it is discriminatory to grant or deny disabled persons “the opportunity . . . to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity” because of their disability.<sup>34</sup> The general provisions of Title III also require a public accommodation to offer “[g]oods, services, facilities, privileges, advantages, and accommodations . . . in the most integrated setting appropriate to the needs of the individual.”<sup>35</sup>

The law obligates each public accommodation to make changes in business as usual to address the needs of people with disabilities.<sup>36</sup> Discrimination thus includes such things as “a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals

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<sup>31</sup> *Id.* at §§ 12181–89 (The ADA identifies twelve categories of “places of public accommodation.”), 42 U.S.C. § 12181(7).

<sup>32</sup> *Id.* at § 12181(7).

<sup>33</sup> *Id.* at § 12182(a).

<sup>34</sup> 42 U.S.C. § 12182(b)(1)(A)(i).

<sup>35</sup> *Id.* at § 12182(b)(1)(B).

<sup>36</sup> *Id.* at § 12182(b)(2).

with disabilities”<sup>37</sup> and “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.”<sup>38</sup> Entities which violate the law face legal sanctions, including possible injunctive orders requiring compliance.<sup>39</sup>

For public accommodations, Title III of the Americans with Disabilities Act is the mandate.<sup>40</sup> Web sites are a portal to, and a service of, public accommodations. Web sites play a pivotal role in fulfilling the independence and equality principles of the ADA for people with disabilities. They constitute a 24/7 means for large-scale commerce, services, entertainment and communication. When its website is inaccessible, the public accommodation itself is inaccessible.

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<sup>37</sup> *Id.* at § 12182(b)(2)(A)(ii). The implementing regulation restates the statute:

A public accommodation shall make reasonable modifications in policies, practices, or procedures, when the modifications are necessary to afford goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the public accommodation can demonstrate that making the modifications would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations. 28 C.F.R. § 36.302(a).

<sup>38</sup> 42 U.S.C. § 12182(b)(2)(A)(iii) (These prohibitions do not apply when an action would “fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.”).

<sup>39</sup> Remedies for violation of Title III include injunctive relief and awards for attorneys’ fees. *Id.* at § 12188(a)(2) (injunctive relief); § 12205 (attorneys’ fees). Compensatory damages may not be awarded. *See* Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377, 378 (2000) (noting that the legislative compromise resulting in ADA Title III resulted in limiting remedies to injunctive relief only, and not monetary damages such as compensatory damages). Injunctive relief can be awarded “to any person who is being subjected to discrimination on the basis of disability in violation” of Title III. 42 U.S.C. § 12188(a)(1), (2).

<sup>40</sup> For federal websites, the relevant statute is Section 508 of the Rehabilitation Act, which requires the accessibility of federal websites, among other technologies. 36 C.F.R. § 1194.1 (2021). For state and local websites, Title II of the Americans with Disabilities Act (state and local government), as well as Section 504 of the Rehabilitation Act (which covers recipients of Federal funding), are the legal framework which require accessibility of websites. The “nexus” analysis in this article, while perhaps most relevant to Title III public accommodations, is also pertinent to website accessibility under Section 508 and Title II.

A. *Websites Must Be Accessible as Places of Public Accommodation*

We conclude that the ADA statute and its regulations, summarized generally above, strongly support the existence of a legal requirement for websites' accessibility. The statute itself provides that support in at least four respects:

1. Title III does not limit what aspects of a place of public accommodation must be accessible.<sup>41</sup> A website is a "service, privilege, advantage, or accommodation" of the entity.
2. Title III explains that discrimination includes any "denial of the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation or a place of public accommodation."<sup>42</sup> When everyone else can utilize the internet, and people with disabilities cannot, that denies participation in the benefits of the website.
3. Title III also defines discrimination to include "affording" people with disabilities with services, advantages, and the like, which are "not equal to that afforded to other individuals."<sup>43</sup>
4. Title III recognizes that public accommodations may have in place discriminatory operations. Thus, Title III requires public accommodations "to make reasonable modifications in policies, practices or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, . . ."<sup>44</sup>

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<sup>41</sup> "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a); 28 C.F.R. § 36.202(b).

<sup>42</sup> 42 U.S.C. § 12182 (b)(1)(A)(i); 28 C.F.R. § 36.202(a).

<sup>43</sup> 42 U.S.C. § 12182(b)(1)(A)(ii); 28 C.F.R. § 36.202(b).

<sup>44</sup> 42 U.S.C. § 12182(b)(2)(A)(ii); 28 CFR § 36.302(a).

Neither the ADA statute nor the ADA regulations specifically mention website accessibility. However, as early as 1996, the DOJ opined that the ADA does cover websites<sup>45</sup>, and courts have stated as early as 2006 that the ADA does cover websites.<sup>46</sup> A full rationale for coverage of websites in the “effective communications” requirement of the ADA is provided by the DOJ in its formal Statement of Interest in *New v. Lucky Brand Dungarees Store, Inc.*, where the DOJ stated that even if an accessibility standard has not been defined for a specific technology, the ADA requirements under Title III still apply, as it would be impossible for the ADA to predict in advance any possible technology that could be utilized by a public accommodation.<sup>47</sup> Until there are new regulations related to digital technology under the ADA, state and local governments as well as public accommodations, are encouraged to utilize the Web Content Accessibility Guidelines (WCAG) (nearly every settlement agreement and consent decree utilizes it) but are allowed to use other approaches. While the DOJ did start a rulemaking process to define specific requirements for web accessibility in 2010, that rulemaking process was abandoned in 2017.<sup>48</sup>

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<sup>45</sup> Deval Patrick, *Letter from Assistant Attorney General for Civil Rights Deval Patrick to Sen. Tom Harkin*, U.S. DEP’T OF JUST. (Sept. 9, 1996), <https://www.justice.gov/crt/foia/file/666366/download>.

<sup>46</sup> *Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 953 (N.D. Cal. 2006).

<sup>47</sup> U. S. DEP’T OF JUST., *Statement of Interest in the New v. Lucky Brand Jeans*, (Apr. 10, 2014), at 13 n.11, [https://www.ada.gov/briefs/lucky\\_brand%20\\_soi.docx](https://www.ada.gov/briefs/lucky_brand%20_soi.docx).

<sup>48</sup> Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions, 82 Fed. Reg. 60932 (proposed Dec. 26, 2017).

The absence of regulatory guidance has understandably drawn attention. See generally Daniel Sorger, *Writing the Access Code: Enforcing Commercial Web Accessibility Without Regulations Under Title III of the Americans with Disabilities Act*, 59 B.C. L. REV. 1121 (2018); Youlan Xiu, *What Does Web Accessibility Look Like Under the ADA?: The Need for Regulatory Guidance in an E-Commerce World*, 89 GEO. WASH. L. REV. 400 (2021); Josephine Meyer, *Accessible Websites and Mobile Applications Under the ADA: The Lack of Legal Guidelines and What This Means for Businesses and Their Customers*, 44 SEATTLE U. L. REV. 14 (2020).

Our view is that websites *qua* websites must be accessible under the ADA is not fully shared by all federal courts.<sup>49</sup> The federal circuit courts of appeals take several approaches to the extent to which websites, when considered as places of public accommodation, are covered by the ADA. While the precise distinctions among the cases' formulations are sometimes unclear, this table maps the terrain:

### Nexus Approach

#### Second Circuit

*Pallozzi v. Allstate Life Insurance Co.*, 198 F.3d 28 (2d Cir. 1999), opinion amended on denial of reh'g, 204 F.3d 392 (2d Cir. 2000) (Title III applies to insurance underwriting policies); *Leonard F. v. Israel Disc. Bank*, 199 F.3d 99 (2d Cir. 1999) (Title III may not apply to insurance policy if it has “no nexus” to physical office); *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381 (E.D.N.Y. 2017) (nexus);

#### Third Circuit

*Menkowitz v. Pottstown Mem'l Med. Ctr.*, 154 F.3d 113 (3d Cir. 1998) (accepts nexus principle in Sixth Circuit's *Parker* case, *infra*); *Peoples v. Discover Fin. Servs.*, 387 F. App'x 179 (3d Cir. 2010) (public accommodation must be physical place); *Ford v. Schering-Plough*, 145 F.3d 601 (3d Cir. 1998) (public accommodation must be a place; here, no nexus is present); *Laufer v. Aark Hosp. Holding, LLC*, No. 20-5648 (RBK/AMD), 2021 U.S. Dist. LEXIS 244129 (D.N.J. Dec. 21, 2021) (public

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<sup>49</sup> The circuit split among the federal courts of appeals revolves around whether there is a required nexus between a physical location and a website for website accessibility to be required under the ADA. Jonathan Lazar, *Due Process and Primary Jurisdiction Doctrine: A Threat to Accessibility Research and Practice?*, PROC. 20TH INT'L ACM SIGACCESS CONF. ON COMPUTS. & ACCESSIBILITY 404, 404 (Oct. 2018). See table on inter-circuit split *infra* p. 72.

accommodation must be a place, but here website has nexus);

### **Sixth Circuit**

*Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010-11 (6th Cir. 1997) (public accommodation must be physical place; here, insurance plan has no nexus to the place); *Stoutenborough v. Nat'l Football League*, 59 F.3d 580 (6th Cir. 1995) (Title III is limited to a physical space);

### **Ninth Circuit**

*Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000); *Blair v. Bank of Am., NA*, 573 Fed. Appx. 665, 2014 WL 2069287 (9th Cir. 2014) (unpublished disposition) (Weyer nexus requirement is still Ninth Circuit law); *Brown v. BPS Direct, LLC*, No. LA CV14-04622 JAK (JEMx), 2014 U.S. Dist. LEXIS 197419 (C.D. Cal. Oct. 6, 2014);

### **Eleventh Circuit**

*Haynes v. Dunkin' Donuts, LLC*, 741 F. App'x 752 (11th Cir. 2018) (nexus); *see also Gil v. Winn-Dixie Stores, Inc.*, 993 F.3d 1266 (11th Cir. 2021) (websites are not a place of public accommodation and are not covered by ADA; rejects nexus approach), vacated and appeal dismissed by 2021 U.S. App. LEXIS 38489 (Dec. 28, 2021).

## **Physical location not required**

### **First Circuit**

*Carparts Distribution Ctr. v. Auto. Wholesaler's Ass'n*, 37 F.3d 12 (1st Cir. 1994) (ADA does not require public accommodations to have a physical structure); *Nat'l Ass'n of the Deaf v. Harvard Univ.*, 377 F. Supp. 3d 49 (D. Mass. 2019) (discusses circuit split);

**Seventh Circuit**

*Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999) (no need for physical place); *Morgan v. Joint Admin. Bd.*, 268 F.3d 456 (7th Cir. 2001) (same).

**Physical Location Required****Fourth Circuit**

*Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, 541 (E.D. Va. 2003), *aff'd*, No. 03-1770, 2004 WL 602711 (4th Cir. Mar. 24, 2004) (public accommodations limited to actual, physical places); *Carroll v. FedFinancial Fed. Credit Union*, 324 F. Supp. 3d 658 (E.D. Va. 2018) (Title III cannot extend beyond actual physical facilities);

**Fifth Circuit**

*Magee v. Coca-Cola Refreshments USA, Inc.*, 833 F.3d 530 (5th Cir. 2016) (physical place required; vending machines in a building are not public accommodations).

We believe that, as we show in the next section, that these divergent approaches may be reconciled if websites are found to be accessible simply as an accommodation. If that approach is adopted, there will be no need for analysis of the meaning of “nexus” in Title III access litigation.

B. *A Reconceptualization: Websites Must Be Accessible as an Accommodation*

Since *Nat'l Fed'n of the Blind v. Target Corp.* in 2006,<sup>50</sup> many courts have interpreted Title III of the ADA to include website accessibility for people with disabilities. Whether or not websites themselves are an ADA place of public accommodation, they certainly may, and should, be considered an accommodation provided by public

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<sup>50</sup> 452 F. Supp. 2d at 956 (granting motion to dismiss to the extent that the website offered information and services unconnected to the retailer's stores but denying motion to the extent that it was alleged that the inaccessibility of the retailer's website impeded the full and equal enjoyment of goods and services offered in the retailer's stores).



accommodations to enable people with disabilities to have, in the words of the statute, “the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.”<sup>51</sup> The reasoning in the four numbered points in the previous section applies to this approach as well.

In further support of consideration of websites as an accommodation, we turn to another statutory provision. Frequently, the “auxiliary aids and services” requirement,<sup>52</sup> which is further articulated in the “effective communication” requirement<sup>53</sup> in the regulation, is cited as the authority for the requirement of website accessibility. The opinion in *Target* discusses but does not rely on the auxiliary aids and services requirement.<sup>54</sup>

That regulation provides:

A public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities.<sup>55</sup>

The effective communication requirement is a powerful support for web accessibility, especially because it specifically contemplates the development of new technologies to facilitate participation and inclusion of people with disabilities. The requirement also opens the way for considering websites as an accommodation to be provided for under the ADA.

It is now well established that various communication mechanisms, including new technology, constitute effective auxiliary communication.<sup>56</sup> For our purposes, since websites were insignificant

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<sup>51</sup> 42 U.S.C. § 12182(a); 28 CFR § 36.202(b).

<sup>52</sup> 42 U.S.C. § 12182.

<sup>53</sup> 28 C.F.R. § 36.303(c)(1).

<sup>54</sup> 452 F. Supp. 2d at 956.

<sup>55</sup> 28 C.F.R. § 36.303(c)(1).

<sup>56</sup> See, e.g., Vishnu Nair et al., *A Hybrid Indoor Positioning System for the Blind and Visually Impaired Using Bluetooth and Google Tango*, 6 J. ON TECH. & PERS. WITH DISABILITIES 62, 63 (2018) (describing the use of vibrotactile devices to provide additional information to a user about their surroundings); Hang Wu et al., *Efficient Indoor Localization Based on Geomagnetism*, 15 ACM TRANSACTIONS ON SENSOR NETWORKS 1–3 (2019), (proposing a tool for indoor localization that utilizes magnetic fields); Seyed Ali Cheraghi, *Beacon-Based Wayfinding for People with Disabilities*, (2019) (Ph.D. dissertation, Wichita State University) (designing a wayfinding system that allows visually impaired people to interact with Bluetooth-based beacons

when the ADA was adopted, they are “new technology.” The ADA requires “effective communication.” A public accommodation can choose among various alternatives as long as the result is effective communication.<sup>57</sup> What constitutes “effective communication” is a fact-intensive determination.<sup>58</sup> However, it is clear that “effective” means more than simply enabling basic information transfer:

For an effective-communication claim brought under the ADA and RA, we do not require a plaintiff to show actual deficient treatment or to recount exactly what the plaintiff did not understand. Nor is it a sufficient defense for a defendant merely to show that a plaintiff could participate in the most basic elements of a doctor-patient exchange. Rather, the relevant inquiry is whether the hospitals' failure to offer an appropriate auxiliary aid impaired the patient's ability to exchange medically relevant information with hospital staff.<sup>59</sup>

“The purpose of the effective communication rules is to ensure that the person with a vision, hearing, or speech disability can communicate with, receive information from, and convey information to, the covered entity.”<sup>60</sup> The effective communication regulation

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for navigation); Yeo-Jang Chang & Tsen-Yung Wang, *Comparing Picture and Video Prompting in Autonomous Indoor Wayfinding for Individuals with Cognitive Impairments*, 14 PERS. & UBIQUITOUS COMPUTING 737, 738 (2010), (proposing a personal guidance system based on Bluetooth for individuals with cognitive impairments); Seyed Ali Cheraghi et al., *GuideBeacon: Beacon-Based Indoor Wayfinding for the Blind, Visually Impaired, and Disoriented*, IEEE INT'L CONF. ON PERVASIVE COMPUTING & COMM'NS 121, 121 (2017), (noting how beacon-based wayfinding can be used “for navigation in large indoor spaces independently and effectively”).

<sup>57</sup> 28 C.F.R. § 36.303(c).

<sup>58</sup> See e.g., *Silva v. Baptist Health S. Fla., Inc.*, 856 F.3d 824, 836 (11th Cir. 2017); *Vargas v. Quest Diagnostics Clinical Lab'ys, Inc.*, No. 19-8108, 2021 WL 5989961, at \*3, \*5 (C.D. Cal. Oct. 15, 2021).

<sup>59</sup> *Silva*, 856 F.3d at 829.

<sup>60</sup> *Effective Communication*, U.S. DEPT. OF JUSTICE (Jan. 2014), <https://www.ada.gov/effective-comm.htm>. The rules apply to communicating with the person who is receiving the covered entity's goods or services as well as with that person's parent, spouse, or companion. *Id.*

provides a map to its requirements, using examples which illustrate its breadth and depth. The regulation lists four non-exclusive “examples” of “auxiliary aids and services.”<sup>61</sup> The first examples are those which mainly benefit individuals who are Deaf or hard of hearing; the second examples list aids or services which mainly benefit individuals who are Blind or have low vision including “accessible electronic and information technology; or other effective methods of making visually delivered materials available.”<sup>62</sup> The third and fourth examples are expandable catch-alls: “Acquisition or modification of equipment or devices” and “[o]ther similar services and actions.”<sup>63</sup>

These catch-alls have substance, as the Department of Justice emphasizes in its regulatory commentary. The auxiliary aids or services provision applies “to a wide range of services and devices for ensuring effective communication.”<sup>64</sup> The Department of Justice noted in Appendix C that the rule “requires that appropriate auxiliary aids and services be furnished to ensure that communication with persons with disabilities is as effective as communication with others.” The Department refrained from providing “an exhaustive list” of examples because that “would omit new [auxiliary] devices that will become available with emerging technology.”<sup>65</sup>

The inter-circuit conflict on website accessibility<sup>66</sup> disappears with our reconceptualization. All of those decisions, however, seek to ask and answer the question “are businesses’ websites a ‘place of public accommodation’ under the ADA?” We believe, however, that the law might most felicitously move forward, the better when the question is “are businesses’ websites an *accommodation* of the business under the ADA?” Necessarily, an accommodation must be accessible. The answer to that question is yes.

Pre-COVID-19, the nexus approach dominated. The circuit split among the federal courts of appeals has revolved around whether a website has a nexus to a physical location.<sup>67</sup> We believe that there is no longer a need for that debate. Our suggestion that websites be considered an ADA accommodation, rather than an adjunct to a public

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<sup>61</sup> 28 C.F.R. § 36.303(b).

<sup>62</sup> *Id.* at § 36.303(b)(1), (2).

<sup>63</sup> *Id.* at § 36.303(b)(3), (4).

<sup>64</sup> *Id.* at Pt. 36, App. C (analyzing § 36.303).

<sup>65</sup> *Id.* (The Department’s analysis emphasizes the need for effective communication: “[u]se of the most advanced technology is not required so long as effective communication is ensured.”).

<sup>66</sup> *See supra* pp. 76-78.

<sup>67</sup> Jonathan Lazar, *Due Process and Primary Jurisdiction Doctrine: A Threat to Accessibility Research and Practice?*, PROC. 20TH INT’L ACM SIGACCESS CONF. ON COMPUTS. & ACCESSIBILITY 404, 404 (2018).

accommodation, is also consistent with Title III caselaw which considers websites to be a “service” of a public accommodation.<sup>68</sup>

### III. THE NEXUS REQUIREMENT SHOULD BE ABANDONED

We move now to 1) describe the nexus requirement, 2) interpret the nexus requirement within the context of the COVID-19 pandemic, and 3) argue that, in addition to our reconceptualization of the status of websites under Title III, the COVID-19 pandemic makes the nexus requirement an approach that is no longer rational, logical, workable, or within the intent of the ADA.<sup>69</sup>

The nexus requirement considered whether or how a website has a sufficient connection (nexus) to an indisputable place of public accommodation under the ADA. For the purposes of this section of this article, we take the “nexus” requirement as we find it in the caselaw. Therefore, in this section, we do not reiterate our suggestion that business websites may be considered an accommodation for people with disabilities, which accommodation is provided by the place of public accommodation.

#### A. *The Nexus Requirement for Website Accessibility under Title III*

In one of the earliest cases on website accessibility in 2002, *Access Now, Inc. v. Southwest Airlines*, the court found that a website was not covered by Title III of the ADA, stating that “Having failed to establish a nexus between southwest.com and a physical, concrete place of public accommodation, Plaintiffs have failed to state a claim

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<sup>68</sup> See e.g., *Carroll v. FedFinancial Fed. Credit Union*, 324 F. Supp. 3d 658, 665 (E.D. Va. 2018). To limit the ADA to discrimination in the provision of services occurring on or at the physical premises of a public accommodation would contradict this plain language of the statute. See also *Gorecki v. Hobby Lobby Stores, Inc.*, 2017 U.S. Dist. LEXIS 109123, 2017 WL 2957736, at \*3 (C.D. Cal. June 15, 2017) (“Title III applies to the services of a place of public accommodation, not services *in* a place of public accommodation.”); *Nat’l Fed’n of the Blind*, 452 F. Supp. at 953–54 (noting that the purpose of the statute is to bar actions or omissions which impair a disabled person’s “full enjoyment” of the services or goods of a covered accommodation).

<sup>69</sup> It is important to note that many other forms of discrimination that took place against people with disabilities during the COVID-19 pandemic (such as limiting the ability to vote absentee in an accessible manner, or limiting access to education), are outside of the scope of this article.

upon which relief can be granted under Title III of the ADA”<sup>70</sup> In this case, the court addressed the concept of a nexus requirement under the ADA as presented by plaintiffs, but stated: “because the Internet website, southwest.com, does not exist in any particular geographical location, Plaintiffs are unable to demonstrate that Southwest’s website impedes their access to a specific, physical, concrete space such as a particular airline ticket counter or travel agency.”<sup>71</sup>

The notion of examining a nexus between a physical location and the broader services of a physical location is rooted in a number of previous non-website cases—for example, *Access Now, Inc. v. Southwest Airlines Co.*,<sup>72</sup> *Rendon v. Valleycrest Prods.*,<sup>73</sup> and *Carparts Distribution Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New England, Inc.*<sup>74</sup> In *Rendon*, the Eleventh Circuit found that an inaccessible telephone selection process for contestants on a TV show filtered out many potential contestants with disabilities, calling it a discriminatory procedure which limited access to the TV show, a place of public accommodation:

A reading of the plain and unambiguous statutory language at issue reveals that the definition of discrimination provided in Title III covers both tangible barriers, that is, physical and architectural barriers that would

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<sup>70</sup> *Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312, 1321 (S.D. Fla. 2002). About the same time, in a 2003 law review article, Moberly advocated for using the nexus concept under the ADA to interpret coverage for websites: “[u]nder the nexus approach, the ADA should apply only to websites that have a connection, or nexus, to a physical place of public accommodation.” Richard E. Moberly, *The Americans with Disabilities Act in Cyberspace: Applying the Nexus Approach to Private Internet Websites*, 55 MERCER L. REV. 963, 966 (2004) (He further argued, “[t]he ADA, however, should not apply generally to the rest of the Internet because remaining websites do not have a connection with a physical place of public accommodation.”).

<sup>71</sup> *Access Now, Inc.*, 227 F. Supp. 2d at 1321. Superseding *Access Now*, the U.S. Department of Transportation later issued regulations requiring accessibility for airline websites. See *Nondiscrimination on the Basis of Disability in Air Travel: Accessibility of Web Sites and Automated Kiosks at U.S. Airports*, 14 C.F.R. §§ 382, 399. (Nov. 12, 2013) <https://www.regulations.gov/document?D=DOT-OST-2011-0177-0111>.

<sup>72</sup> 227 F. Supp. 2d at 1317–1321.

<sup>73</sup> *Rendon v. Valleycrest Productions, Ltd.*, 294 F.3d 1279 (11th Cir. 2002).

<sup>74</sup> 37 F.3d 12 (1st Cir. 1994).

prevent a disabled person from entering an accommodation's facilities and accessing its goods, services and privileges, see 42 U.S.C. § 12182(b)(2)(A)(iv), and intangible barriers, such as eligibility requirements and screening rules or discriminatory policies and procedures that restrict a disabled person's ability to enjoy the defendant entity's goods, services and privileges, see 42 U.S.C. § 12182(b)(2)(A)(i)-(ii).<sup>75</sup> There is nothing in the text of the statute to suggest that discrimination via an imposition of screening or eligibility requirements must occur on site to offend the ADA... Defendants urge us to hold, in effect, that so long as discrimination occurs off site, it does not offend Title III. We do not believe this is a tenable reading of Title III.<sup>75</sup>

In *Carparts*, the court ruled that public accommodations under Title III of the ADA are not just limited to physical structures, saying:

Neither Title III nor its implementing regulations make any mention of physical boundaries or physical entry. Many goods and services are sold over the telephone or by mail with customers never physically entering the premises of a commercial entity to purchase the goods or services. To exclude this broad category of businesses from the reach of Title III and limit the application of Title III to physical structures which persons must enter to obtain goods and services would run afoul of the purposes of the ADA and would severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges and advantages,

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<sup>75</sup> 294 F.3d at 1283–1285.

available indiscriminately to other members of the general public.<sup>76</sup>

While the First Circuit in *Carparts* described the concept of a nexus, it never actually used the word “nexus” in its decision. Similarly, the Eleventh Circuit's decision in *Rendon* did not actually use the word nexus, except in a footnote.<sup>77</sup>

B. *The Nexus Requirement During the Covid-19 Pandemic*

We believe that the changes in how business operated during the COVID-19 pandemic, and will operate during the likely post-pandemic period, mean that the nexus requirement is a rule that is no longer rational, logical, workable, or within the intent of the ADA. We argue that continuing to utilize the nexus approach leads to inconsistent results, new agencies (such as public health agencies) being given jurisdiction over web accessibility without a change in statute or regulation, and in enabling businesses to avoid web accessibility requirements by simply changing their business model. Weaknesses in the nexus test have often been identified.<sup>78</sup>

Business as usual changed radically during the pandemic. During the pandemic, some businesses remained open while offering other options (including new options such as curbside pickup) while other businesses were no longer open for customers to visit, but again, offered curbside pickup or delivery. Web sites and apps became a basic tool for survival both for the businesses and the consumers; orders for

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<sup>76</sup> 37 F.3d at 20.

<sup>77</sup> 294 F.3d at 1285 n.8 (explaining that other cases “can be read to require a nexus between the challenged service and the premises of the public accommodation”). That nexus is surely present here.

<sup>78</sup> See 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, 115 (2017) (“[T]he nexus test falls short for many reasons, the most critical being the subjectivity of the test, which has led to a circuit split.”); 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, 995 (2008) (“[T]he ‘nexus test’ . . . confuses the issue”); Johanna Smith & John Inazu, *Virtual Access: A New Framework for Disability and Human Flourishing in an Online World*, 21 WIS. L. REV. 719, 721–722 (2021) (discussing cases which developed and rejected the nexus test); 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, 134 (2009) (identifying problematic aspects of the nexus test).

delivery and pickup were required to be placed on a website. Inaccessibility of a website or app resulted in discrimination against people with disabilities who were unable to visit the store or to receive the at-home delivery available to non-disabled individuals who could enter the business. People with disabilities were thus required discriminatorily to assume a higher risk than the general population.<sup>79</sup>

It is impossible to accurately track the differences between businesses that (1) switched to strictly virtual format, (2) increased their virtual presence online but offered in-person shopping, (3) were operating in a hybrid way where they were sometimes open for in-person visits and other times were not, (4) were temporarily shutdown, and (5) permanently shutdown (exited). There is no historical data about businesses that “switch format.” Curbside pickup, pre-pandemic, was not a distribution method utilized by a majority of businesses. Yet there is no doubt that businesses increased the use of online methods for offering their goods and services. In the United States, the National Bureau of Economic Research estimated that 61.7% of businesses increased their online presence due to the pandemic.<sup>80</sup> Specifically, “52.5% of businesses responded to the crisis by providing online services, 35.1% expanded digital payments, 25.7% used delivery services, and 24.4% used curbside pickup.”<sup>81</sup> These percentages were much higher in the United States than elsewhere in the world, as worldwide, the World Bank reports that 22% of businesses increased their digital presence, and 8% of businesses created an initial digital presence.<sup>82</sup> It is expected that the change in consumer behavior and increased preference for online shopping and delivery, rather than in person, will last beyond the pandemic.<sup>83</sup>

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<sup>79</sup> Ironically, pre-pandemic, it used to be that people with disabilities faced discrimination where there were online-only pricing specials, and if the website was inaccessible, the person with a disability was not able to obtain the online price and was forced to pay the higher in-person price. Jonathan Lazar et al., *Potential Pricing Discrimination Due to Inaccessible Web Sites*, PROC. INTERACT 2011, 108, 108–114 (2011).

<sup>80</sup> Georgij Alekseev et al., *supra* note 8, at 2.

<sup>81</sup> *Id.*

<sup>82</sup> Marie Christine Apedo-Amah et al., *Unmasking the Impact of COVID-19 on Businesses, Firm Level Evidence from Across the World*, (World Bank Group, Working Paper No. 9434, 2020),

<https://openknowledge.worldbank.org/bitstream/handle/10986/34626/Unmasking-the-Impact-of-COVID-19-on-Businesses-Firm-Level-Evidence-from-Across-the-World.pdf?sequence=5>.

<sup>83</sup> Seema Mehta et al., *The New Consumer Behaviour Paradigm amid COVID-19: Permanent or Transient?*, 22 J. HEALTH MGMT. 291, 295 (2020).



C. *The Pandemic Exposed Shortcomings in the Nexus Approach*

The nexus approach is a failure because a) it produces inconsistent results, b) it improperly assigns Title III coverage decisions to non-legal agencies, c) it shifts many businesses out of Title III coverage.

1. Inconsistent Results

One of the core tenets of the law is that it must be consistent and predictable. According to the nexus approach, website accessibility is required only if an inaccessible website would serve as a barrier to the physical location. Yet in a given week or month—due to lockdowns, shutdowns, and COVID-19 case numbers—a physical location might sometimes be open and at other times might not be open. Public health authorities may have declared a lockdown, or a governor may have changed the list of what types of businesses are considered “essential.”

Under the nexus approach, there is no requirement for web accessibility if there is no open in-use physical location. Businesses would thus flip back and forth between ADA coverage under the nexus theory (because the inaccessible website is a barrier to the public accommodation), and then not qualifying under the nexus theory (because there is no place of public accommodation). For instance, restaurants which were open for dine-in business clearly counted as public accommodation and would be required to have an accessible website on Monday. But when, on Wednesday of the same week, due to public health restrictions, the restaurant turned into a “dark kitchen,” preparing meals for delivery but not allowing the public in, suddenly the restaurant no longer fit under the nexus requirement since it wasn’t offering a public accommodation. Yet two weeks later, allowed to open for in-person dining again due to lower case counts, the restaurant suddenly qualifies again under the nexus theory. Further, for a restaurant that offered only curbside take-out, would the parking lot be considered enough of a physical place to trigger the nexus requirement?

2. Non-legal Agencies Empowered to Make Title III Determinations

The law presumes authority for making legal determinations and interpreting the law rests with the legal system. For example, the Department of Justice is responsible for the Americans with Disabilities Act. For other disability rights laws, there are other authorities, such as the U.S. Department of Transportation for airline

web accessibility and the U.S. Department of Education for technology in schools. However, because the outcome of the nexus analysis depends on whether there is a physical location and whether the website serves as a barrier to that physical location, public health authorities and elected/appointed political figures are, in effect, deciding whether a website must be accessible when they mandate whether and how businesses remain open.<sup>84</sup>

Under the nexus theory, if a business was open and welcomed customers, the nexus requirement would apply, and if a business was not open to the public (even if it still provided goods and services), the nexus requirement would not apply. Thus, authority to determine website accessibility requirements became vested in the pertinent governmental authority, typically the state or county department of public health. Nowhere in the Americans with Disabilities Act are public health departments given any jurisdiction over any aspect of ADA enforcement or decision-making, but during a pandemic, the nexus requirement inadvertently leads to public health departments or elected/appointed politicians having indirect jurisdiction over web accessibility.

### 3. Post-pandemic Shifting of Many Businesses Out of Legal Coverage

Pre-pandemic, there were many types of businesses that always, or almost always, offered in-person services, because customers had not developed acceptance of business models which were strictly virtual and/or delivery-based. Simply put, in many industries, not having a physical presence was not a feasible option. For instance, while pre-pandemic businesses had already worked out how to sell clothing and shoes online, most consumers were not yet on board with purchasing furniture without experiencing the furniture in

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<sup>84</sup> During the pandemic, some businesses were deemed “essential businesses” and were allowed to remain open. However, the definition of “essential businesses” differed from jurisdiction to jurisdiction and was the subject of much political pressure. In most states, the governor defines which businesses are considered “essential” and may remain open (some mayors have similar power). Some states utilized existing Federal guidance from the Department of Homeland Security, some states created their own definitions of “essential businesses,” and some states had no guidance. *COVID-19: Essential Workers in the States*, NAT’L COUNCIL STATE LEGISLATURES (Jan. 11, 2021),

<https://www.ncsl.org/research/labor-and-employment/covid-19-essential-workers-in-the-states.aspx>.

person,<sup>85</sup> in part because unlike clothing and shoes, it's very hard for a consumer to return furniture.<sup>86</sup> During the pandemic, however, as many more businesses moved to no longer offer a physical location that a consumer could visit, customer preferences and expectations changed, and many of these new shopping habits are expected to stay, post-pandemic.<sup>87</sup> Yet by changing business models to avoid a physical location, many businesses in nexus circuits no longer fall under the nexus requirement, because there is no longer a nexus between a physical location and the website. This may have the effect of moving a large percentage of businesses from the “legally required to be accessible” category to “not legally required to be accessible.” There is no ADA “right” for businesses to opt-out of compliance simply by changing their business model through dropping their physical location. Yet that is a result of maintaining the nexus approach.

Concerts or plays provide an interesting example. During the COVID-19 pandemic, concerts or plays which are normally in person, were held online. When held in person, if in a nexus circuit, the website for the concert or play must be accessible. Yet when the concert is fully online and there is no physical location, the requirement for web accessibility in a nexus circuit is removed as there is no physical location that would be a public accommodation. For people with disabilities, a virtual concert might provide an obvious advantage over a physical one. Yet when the concert moves from being a physical concert or play (where there might be physical accommodations needed), to a virtual concert or play (which theoretically would be more accessible), the nexus requirement for website accessibility disappears. Would concerts and plays choose to remain in an online format so that they avoid the web accessibility requirements in nexus circuits?

As previously mentioned, the DOJ explained in a statement of interest in the *New v. Lucky Brand Dungarees Store, Inc.* case, that it would be impossible for the ADA to predict in advance any possible technology that could be utilized by a public accommodation. Similarly, it seems rational that a business should not be able to

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<sup>85</sup> Less than 15% of furniture sales pre-pandemic were online. Laura Wood, *Global Furniture Market to Reach \$616.7 Billion by 2026—Online Sales Continue to Gain Traction*, YAHOO RSCH. & MKTS. (Oct. 15, 2021), <https://www.yahoo.com/now/global-furniture-market-reach-616-095300519.html>.

<sup>86</sup> See Jiamei Bai et al., *Solving the paradox of growth and profitability in e-commerce*, MCKINSEY & CO. (Dec. 30, 2021), <https://www.mckinsey.com/industries/retail/our-insights/solving-the-paradox-of-growth-and-profitability-in-e-commerce>.

<sup>87</sup> Seema Mehta et al., *supra* note 83, at 298.

discriminate by switching to a business model which was not yet imagined at the creation of the ADA, thereby bypassing legal requirements and legitimizing discrimination. This switch may provide a financial advantage for the public accommodation, but the switch may deny accessibility to an individual with a disability located in a nexus circuit, as the nexus between the website and the physical location disappears.

D. *The Reconceptualization Renders Nexus Unnecessary and Resolves the Inter-circuit Conflict*

The pandemic has complicated the business landscape. How much physical in-person contact will the public accommodations want to provide? How much physical in-person contact will individual consumers want, or be able to, participate in? The format of the transaction (in-person or virtual) that occurs between a public accommodation and a consumer, post-pandemic, is a complex soup of financial, logistical, public health, and psychological considerations. The current nexus approach for web accessibility does not begin to reflect the reality that public accommodations and consumers face post-pandemic.

The major dislocations in business-consumer interactions precipitated by the COVID-19 pandemic, combined with the internet-powered evolution in business already in motion, lead us to conclude that the nexus approach is no longer rational, logical or workable.

#### IV. CONCLUSION

Title III of the Americans with Disabilities Act requires that public accommodations' websites be accessible to people with disabilities. As some federal circuit courts of appeals have held, the accessibility obligation arises directly from the statute and its regulations. The predominant approach among the courts of appeals is that accessibility must be provided if there is a "nexus" between the website and a physical public location, but some circuits have wholly rejected any Title III accessibility requirement.

The "nexus" requirement has been problematic from the start, and it has accentuated the conflict among the circuits; prior critiques of nexus have not identified mechanisms to resolve the inter-circuit conflict.<sup>88</sup> The weaknesses of the nexus approach have been particularly exposed during the COVID-19 pandemic. The pandemic exposes a deep mismatch between the "nexus" requirement and how

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<sup>88</sup> See generally *supra* text accompanying note 78.

businesses approach their work.<sup>89</sup> The nexus approach is neither workable nor logical.

In this article, we present a novel reconceptualization of the website accessibility issue which resolves the inter-circuit conflict and allows abandonment of the already unworkable nexus requirement. Until now, the courts in conflict have analyzed the question before them as “Are websites accessible directly under the ADA, or only in relation to the physical place of a public accommodation?” The reconceptualization is to consider websites as an accommodation under the ADA, which enables people with disabilities to participate in, and benefit from, what is offered by public accommodations. Accommodations are necessarily accessible. This novel approach permits abandonment of the already unworkable nexus approach and resolves the inter-circuit conflict.

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<sup>89</sup> The effects of the pandemic on website accessibility have been noted in a commentary, but the author of that commentary does not suggest a means to eliminate the inter-circuit conflict, or detail how deficiencies in the nexus construct can effectively be addressed. Randy Pavlicko, *The Future of the Americans with Disabilities Act: Website Accessibility Litigation After Covid-19*, 69 CLEV. ST. L. REV. 953, 966 (2021).