The ADA and Small Business:

Website Compliance Amid a Plethora of Uncertainty

*by Rob Smith**

"I also want to say a special word to our friends in the business community… I know there have been concerns that the ADA may be vague or costly, or may lead endlessly to litigation. But I want to reassure you right now that my administration and the United States Congress have carefully crafted this Act."**

"I see small business as the backbone of the American economy."***

INTRODUCTION

Thirty years ago, bipartisan majorities in the Senate and House of Representatives passed the Americans with Disabilities Act ("ADA" or "Act"). President George H.W. Bush soon thereafter signed the legislation, providing historic protections for those living with disabilities. At the time, business groups like the National Federation of Independent Business and the Chamber of Commerce expressed reservations about the ADA's effect on small businesses.[1] In an attempt to ease these concerns, the President specifically addressed the business community's reservations upon signing the bill.

What nobody could envision at the time of this historic legislation, was the impact of the impending internet boom on business sales, combined with the application of the ADA to non-physical structures and goods. The result of the unforeseen interplay between emerging technology and the ADA has been uncertainty in the courts, obscurity from the Department of Justice ("Department" or "DOJ") on a compliance standard, and a catch-22 choice for small business owners:

1) Do they forego competition and advertising in the online market due to high compliance costs;
2) Do they continue in this market and ignore the increasing risk of litigation and the accompanying costs; or
3) Do they pay the compliance costs for website improvements, which may not be required?

This paper discusses the uncertainty over the ADA's application to websites, the lack of a definitive standard for compliance (assuming applicability), and the impact this has on small business owners. Part I discusses the text of the ADA, while Part II reviews the Department of Justice's interpretation of the Act pertaining to websites and whether it provides any clarity for small businesses. Part III then summarizes recent litigation and court decisions regarding website noncompliance with the ADA. Part IV provides an overview of congressional attempts to remedy this uncertainty, while Part V analyzes what this uncertainty means for small businesses, and how they should navigate the confusing legal landscape.

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**Presidential Statement on Signing the Americans with Disabilities Act (July 26, 1990), https://www.ada.gov/ghw_bush_ada_remarks.html (George H.W. Bush).
***Stephen Labaton, *THE 1992 CAMPAIGN: The Republicans; Bush Courts Small Businesses by Offering Loans*, N.Y. Times (Sept. 5, 1992) (quoting George H.W. Bush), https://www.nytimes.com/1992/09/05/us/the-1992-campaign-the-republicans-bush-courts-small-businesses-by-offering-loans.html.
[1] CONGRESSIONAL DIGEST, SHOULD THE SENATE APPROVE THE AMERICANS WITH DISABILITIES ACT OF 1989? 208 (1989); Susan Mandel, *Disabling the GOP*, 42 NAT'L REV. 23-24 (1990).

I. THE ADA'S TEXT

The ADA is a long and complex statute, leading to decades of judicial precedent, prompting the question of where to begin an analysis of the statute's requirements. Because "we're all textualists now,"[2] any analysis of the ADA's applicability to websites begins with the text of the statute.[3] Congress made multiple relevant findings regarding discrimination against those with disabilities, which it expressed in the ADA:

> (1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; . . . ;
> (2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
> (3) discrimination against individuals with disabilities persists in such critical areas as . . . public accommodations, . . . communication, . . .
> (5) individuals with disabilities continually encounter various forms of discrimination, including . . . the discriminatory effects of . . . communication barriers . . .
> (7) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, ...[4]

The main original purpose of the Act was "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities[.]"[5] Later in the Act, § 12182(a) prohibits discrimination by a place of public accommodation:

> "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 by any person who owns, leases (or leases to), or operates a place *of* public accommodation."[6]

Section 12182(b)(2)(A) expands on the general prohibition against discrimination with some specific prohibitions:

> (ii) 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 with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations;
> (iii) 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, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden;
> (iv) a failure to remove architectural barriers, and communication barriers that are structural in nature . . . .[7]

Finally, the Act defines "[p]ublic accommodation" as an operation affecting commerce and is:

> (A) "an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;
> (B) a restaurant, bar, or other establishment serving food or drink;
> (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition entertainment;

[2] Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg.
[3] *See e.g.,* Little Sisters of the Poor v. Pennsylvania, 140 S. Ct. 2367, 2380 (2020) (mentioning that when construing a statute, "[o]ur analysis begins . . . with the text."); A. Scalia & B. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 56 (2012) ("The words of a governing text are of paramount concern[.]").
[4] 42 U.S.C. § 12101(a).
[5] 42 U.S.C. § 12101(b)(1).
[6] 42 U.S.C. § 12182(a) (emphasis added).
[7] 42 U.S.C. § 12182(b)(2)(A)(ii-iv).

(D) an auditorium, convention center, lecture hall, or other place of public gathering;
(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
(G) a terminal, depot, or other station used for specified public transportation;
(H) a museum, library, gallery, or other place of public display or collection;
(I) a park, zoo, amusement park, or other place of recreation;
(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation."[8]

Consistent with the technological circumstances of the time period in which it passed, the ADA does not include the terms "internet" or "website." However, given the broadness of its language — "communication," "communication barriers," "full participation," and "equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations" — it is not hard to see how some would apply the Act broadly to these mediums.

II. THE EXECUTIVE BRANCH: DOJ CLARIFIES, OR DOES IT?

The ADA originally vested in the Attorney General the power to issue regulations interpreting, implementing, and enforcing the Act's mandate.[9] With this authority, the Department of Justice has long "affirmed the application of title III to Web sites [sic] of public accommodations."[10] In its first interpretation of the ADA's applicability to websites, the Department asserted that "[c]overed entities under the ADA are required to provide effective communication, regardless" of the media used and that "entities that use the Internet for communications regarding their programs, goods, or services must . . . offer those communications through accessible means as well."[11]

As the internet grew in popularity during the early 2000's, the Department began getting involved in ADA litigation over access to internet services. In a Fifth Circuit case involving a business offering only online services, the Department filed an amicus arguing the ADA applied to the online-only business.[12] The brief took the position that "services . . . of [that] place of public accommodation" in § 12182(a) included those services "'of' a place of public accommodation, not the services 'at' or 'in' a place public accommodation."[13] This, the Department argued, demonstrated clear statutory meaning and congressional intent to not limit the ADA's prohibition to offerings at brick-and-mortar public accommodations.[14]

Just a few years later the Department again filed an amicus arguing for broad ADA application, this time before the Eleventh Circuit. The case involved a game show utilizing automated telephone quizzes to narrow the pool of applicants. Plaintiffs challenged the practice as violating the ADA's prohibition on discrimination given its requirement to utilize the telephone keypad in the quizzes, which excluded individuals with certain disabilities from participating. The Department argued the telephone screenings were a "service" offered by a "public accommodation," which had the effect of excluding disabled individuals.[15] Once again, the Department took the position that the ADA was not just applicable to services at the place of public accommodation, but instead applied to all services and offerings of the public accommodation, whether on- or off-site.[16]

[8] 42 U.S.C. § 12181(7).
[9] *See* 42 U.S.C. § 12186(b); 42 U.S.C. § 12188(b).
[10] Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460, 43464 (July 26, 2010).
[11] Letter to Deval L. Patrick, Assistant Att'y Gen., Civil Rights Div., Dep't of Justice, to Tom Harkin, U.S. Sen. (Sept. 9, 1996) (on file with the Department of Justice).
[12] *See* Brief for the United States as Amicus Curiae Supporting Appellant, *Hooks v. OKBridge*, Inc., 232 F.3d 208 (5th Cir. 2000) (No. 99-50891).
[13] *Id.* at 9.
[14] *See id.* at 11-16.
[15] *See* Brief for the United States as Amicus Curiae Supporting Appellant, p. 10-12, *Rendon v. Valleycrest Productions, Inc.,* 294 F.3d 1279 (11th Cir. 2002) (No. 01-11197).
[16] *See id.* at 14-20.

One of the Department's most thorough explanations of its position came in its 2010 Advance Notice of Proposed Rulemaking ("ANPRM" or "Notice") to "establish requirements for making the goods, services, facilities, privileges, accommodations, or advantages offered by public accommodations via the Internet, specifically at sites on the World Wide Web (Web), accessible to individuals with disabilities."[17] After recognizing the increased role of the Internet in the daily life of the ordinary American, as well as the increasing commercial presence on that forum, the Notice postulated "[t]he ADA's promise to provide an equal opportunity for individuals with disabilities to participate in and benefit from all aspects of American civic and economic life will be achieved . . . only if it is clear . . . that [] Web sites must be accessible."[18] Some of the most common barriers to web access listed in the Notice for those with disabilities were the lack of captions in audio or video content, unmodifiable font size or color contrast, the presence of timed-response actions, the lack of navigational headings and links, and pictures without text description.[19] In the Department's view, removing these web barriers was "neither difficult nor especially costly."[20]

Transitioning to the statutory argument for website inclusion in the ADA's prohibition on discrimination, the Department renewed its early 2000s' amicus arguments. Dissecting the prohibition in § 12182(a), the Department stated "[t]he plain language of th[is] statutory provision[] applies to discrimination in offering the goods and services *'of'* a place of public accommodation . . . , rather than being limited to those goods and services provided *'at'* or *'in'* a place of public accommodation[.]"[21] At its core, the Department's statutory argument that the ADA "mandate for 'full and equal enjoyment' requires nondiscrimination by a place of public accommodation in the offering of *all* its goods and services, including those offered via Web sites[,]" rests on a distinction between prepositions.[22] Ironically, before requesting public comment on the Notice, the Notice itself recognized that "voluntary compliance has proved inadequate in providing Web site accessibility to individuals with disabilities," and "inconsistent court decisions, differing standards for determining Web accessibility, and repeated calls for Department action," have all contributed to "remaining uncertainty regarding the applicability of the ADA to Web sites of entities covered by title III."[23] In the request for public comments, the Notice recognized that voluntary guidelines set forth by the Web Content Accessibility Guidelines ("WCAG") vary significantly, and opted for comments on the median standard.[24]

Unfortunately, the entire 2010 ANPRM and its analysis of website compliance with the ADA was all for naught. After "not publish[ing] any rulemaking document regarding title III Web accessibility" in the aftermath of the 2010 ANPRM, the Department issued a notice withdrawing the 2010 ANPRM.[25] The withdrawal notice provided no clarity for ADA website compliance, instead just promising to evaluate whether promulgating specific standards was necessary.

In the past few years alone, members of Congress on both sides of the political aisle have asked the Department to provide further clarity regarding ADA website compliance.[26] In response to a letter by over 100 members of Congress, the DOJ reaffirmed its longstanding ADA website compliance position. Assistant Attorney General Stephen Boyd wrote that "the ADA applies to public accommodations' websites[,]" which is "consistent with the ADA's title III requirement that the goods, services, privileges, or activities provided by places of public accommodation be equally accessible to people with disabilities."[27] Also continuing its longstanding trend, the DOJ offered the following charlotte's web of guidance:

1) "[T]he absence of a specific regulation does not serve as a basis for noncompliance";
2) "[P]ublic accommodations have flexibility in how to comply" with the ADA; and
3) "[N]oncompliance with a voluntary technical standard for website accessibility does not necessarily indicate noncompliance with the ADA."

[17] Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460 (July 26, 2010).
[18] *Id.* at 43461-62.
[19] *Id.* at 43462.
[20] *Id.*
[21] *Id.* at 43463 (emphasis added).
[22] *Id.*
[23] *Id.* at 43464.
[24] *Id.* at 43465 ("Should the Department adopt the WCAG 2.0's 'Level AA Success Criteria' as its standard for Web site accessibility[?]").
[25] Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions, 82 Fed. Reg. 60932 (Dec. 26, 2017).
[26] *See* Letter from the U.S. House of Reps. to the Hon. Jeff Sessions, Att'y Gen., U.S. Dep't of Justice (June 20, 2018), https://www.adatitleiii.com/wp-content/uploads/sites/121/2018/06/ADA-Final-003.pdf (signed by over 100 members of the U.S. House); Letter from Sens. Grassley, Rounds, Tillis, Crapo, Cornyn, and Ernst to the Hon. Jeff Sessions, Att'y Gen., U.S. Dep't of Justice (Sep. 4, 2018), https://www.judiciary.senate.gov/imo/media/doc/2018-10-04%20Grassley,%20Rounds,%20Tillis,%20Crapo,%20Cornyn,%20Ernst%20to%20Justice%20Dept.%20-%20ADA%20Website%20Accessibility.pdf
[27] Letter from Stephen E. Boyd, Assistant Att'y Gen., U.S. Dep't of Justice, to Ted Budd, U.S. House of Reps. (Sep. 25, 2018) (hereinafter "Boyd House Letter"), https://images.cutimes.com/contrib/content/uploads/documents/413/152136/adaletter.pdf (responding to House letter); *see also* Letter from Stephen E. Boyd, Assistant Att'y Gen., U.S. Dep't of Justice, to Charles E. Grassley, U.S. Senate (Oct. 11, 2018), https://www.grassley.senate.gov/imo/media/doc/2018-10-11%20DOJ%20to%20Grassley%20-%20ADA%20Website%20Accessibility.pdf (providing no more clarity than House letter).

Noticeably absent from the letter was the inverse of number 3, as a number 4 — compliance with a widely accepted voluntary standard is a good faith defense to ADA noncompliance suits. This would have provided clarity and protection to small businesses, while also ensuring people with disabilities have "full and equal" enjoyment to public accommodations' websites. Seven members of the Senate pointed out this omission just last year in a letter stating that the Department's position does not "foreclose the possibility that *compliance* with a voluntary standard might not necessarily be viewed as compliance with the ADA."[28] As it stands, the DOJ's most recent letter leaves small businesses with this unfollowable mandate:

"Comply! But we won't tell you how to comply and what compliance means. If you try to comply, and it is later deemed not enough, too bad."[29]

III. THE JUDICIARY AND THE ADA

Given the ADA's absence of clear textual guidance on its applicability to the internet, the internet's rise as a commercial forum, and the DOJ's lack of guidance, courts have been asked to weigh in. The number of website accessibility lawsuits drastically increased — by almost three-fold — from 2017 to 2018 and continue to number in the thousands annually.[30] Unsurprisingly, these courts have often issued conflicting and unclear opinions.

Generally, courts agree that the "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation" language in the ADA applies to business websites. However, they are split on whether the website itself may be a "public accommodation" or whether the website must have some nexus relationship to a physical business location, which is the "public accommodation" under the ADA.

The First and Seventh Circuit Courts of Appeals, as well as a district court in the Second Circuit, have held that there need not be any physical business location for emerging technology such as websites to qualify as places of public accommodation. The First Circuit has said that the inclusion of "travel service" and "shoe repair service" in 42 U.S.C. § 12181(7)(F) demonstrate Congress did not mean to limit "public accommodations" to physical buildings, since these services can occur without those spaces.[31] It went on to say excluding businesses without physical buildings from Title III's reach would "run afoul of the purposes of the ADA and severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods[] [and] services" available to the general public.[32] Similarly, the Seventh Circuit flatly rejected the argument that "public accommodation" is limited to physical places. In doing so, the court proclaimed "[t]he site of the sale is irrelevant to Congress's goal of granting the disabled equal access to sellers of goods and services."[33] Analogizing selling an insurance policy to a disabled person over the internet to selling a piece of furniture to a disabled person in a store, the court held there was no distinction under Title III.[34] After review of the ADA's text, application of the canons of construction, and review of previous precedents and legislative history, a Vermont federal district court also concluded that excluding the internet from the reach of "public accommodations" would "defeat the purpose" of the ADA and Congress's intent for the Act.[35]

Meanwhile, other courts have taken a narrower approach to the ADA's website applicability. The Third, Sixth, and Ninth Circuit Courts of Appeals have adopted a "nexus" theory, which requires non-physical business offerings to have a significantly close connection to the physical place of business.

[28] *See* Letter from Sens. Grassley, Tillis, Crapo, Cornyn, Ernst, Blackburn, and Rounds to William P. Barr, Att'y Gen., U.S. Dep't of Justice (July 30, 2019), https://www.grassley.senate.gov/imo/media/doc/2019-07-30%20Grassley%20et%20al%20to%20DOJ%20-%20ADA%20Website%20Accessibility.pdf.

[29] *See also* John D. McMickle, *After DOJ Letter on Website Compliance, the ADA Guessing Game Continues*, WASHINGTON LEGAL FOUND. (Nov. 13, 2019), https://www.wlf.org/wp-content/uploads/2019/11/11132019McMickle_WLFLegalPulse.pdf (describing the DOJ stance's effect as "[t]he business community has to guess how to ensure a website complies with the ADA, and hope it guessed correctly[,]" "untenable" and "a dereliction").

[30] Kristina M. Launey & Minh N. Vu, *The Curve Has Flattened for Website Accessibility Lawsuits*, SEYFARTH SHAW LLP (Apr. 29, 2020), https://www.adatitleiii.com/2020/04/the-curve-has-flattened-for-federal-website-accessibility-lawsuits/ (graphing the increase in ADA lawsuits that could be identified through a diligent search).

[31] Carparts Distribution Ctr. v. Auto. Wholesaler's Ass'n, 37 F.3d 12, 19 (1st Cir. 1994).

[32] *Id.* at 26-27.

[33] Morgan v. Joint Admin. Bd., 268 F.3d 456, 459 (7th Cir. 2001).

[34] *Id.*; *see also* Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 560 (7th Cir. 1999).

[35] Nat'l Fed'n of the Blind v. Scribd Inc., 97 F. Supp. 3d 565, 575-76 (D. Vt. 2015); *see also* Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28, 32 (2d Cir. 1999) ("[T]he statute was meant to guarantee [disabled individuals] more than mere physical access.").

In the Sixth Circuit case, the court sitting en banc reviewed whether different employee disability insurance benefits based on mental versus physical disabilities violated Title III of the ADA. Citing to previous precedent, the court held that "a public accommodation is a physical place" and there was no "nexus" between the good (the insurance policy) and the physical office of the insurer because the employee obtained the insurance through their employer. In response to the dissent, the court was clear to note that its decision simply meant: "Title III covers only physical places. We have expressed no opinion as to whether a plaintiff must physically enter a public accommodation to bring suit under Title III as opposed to merely accessing, by some other means, a service or good provided by a public accommodation."[36] The majority disagreed with the First Circuit's reading of "travel service" and "shoe repair service" to mean something other than a physical building, concluding that application of the noscitur a sociis canon of construction rendered "[t]he clear connotation of the words" to mean a "public accommodation is a physical place."[37]

The relevant Third Circuit case was also about employee disability insurance benefits. In rejecting the argument that the different policy benefits based on mental or physical disabilities was a Title III violation, the court noted that there was no "nexus" between the policy benefits from Plaintiff's employment and the physical insurance office. Unlike the courts discussed above, the Third Circuit held the "plain meaning" of Title III's "public accommodation" to be a physical place. It did so based on most places expressed in Title III being physical places, the canons of construction requiring interpretation of those other ambiguous words in a similar manner, and an analogy to the interpretation of "public accommodation" in Title II of the 1964 Civil Rights Act. The court held that the receiving of benefits through the plaintiff's employer meant there was no "connection" to the physical accommodation as required under Title III, because it "is all of the services which the public accommodation offers, not all services which the lessor of the public accommodation offers[,] which fall within the scope of Title III."[38]

In a similar case, the Ninth Circuit adopted the "nexus" theory, concluding proper interpretation of Title III "suggests that some connection between the good or service complained of and an actual physical place is required."[39] It held Title III to only mean that any goods and services provided by a place must be available without discrimination, but a place need not offer different goods and services.[40]

In an early 2000's case, while not explicitly adopting the "nexus" theory, the Eleventh Circuit concluded that Title III covers both tangible barriers like physical building restrictions, and intangible barriers like screening rules or eligibility requirements, to enjoy the goods or services of a public accommodation. It held as completely unpersuasive the argument that the ADA only covers on-site discrimination.[41]

However, more recently, both the Ninth and Eleventh Circuits, and district courts, have directly addressed the ADA's applicability to business websites.

One of the first cases about business website obligations under the ADA was *Gil v. Winn-Dixie Stores, Inc.*, a 2017 opinion from the United States District Court for the Southern District of Florida.[42] Contrary to previous cases, this case presented the question of whether "Winn-Dixie's website . . . is a public accommodation in and of itself."[43] The facts of the case are rather straightforward — Gil, a blind man, tried to access the Winn-Dixie website to refill prescriptions, but was unable because of its inaccessibility.[44] In addition to refilling prescriptions, the Winn-Dixie website allowed customers to access digital coupons and find store locations.[45] After reviewing the split between courts adopting the physical structures requirement for a place of public accommodation and those adopting the "nexus" theory, the court passed on whether the website itself was a public accommodation, because the facts indicated at the very least the "website [was] heavily integrated with Winn-Dixie's physical store locations and operat[ed] as a gateway to the physical store locations."[46] It further held the ability to refill prescriptions online, access digital coupons, and find store locations were "services, privileges, [and] advantages" offered by Winn-Dixie's physical stores.[47]

[36] Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1011 n.3 (6th Cir. 1997).
[37] *Id.* at 1014.
[38] Ford v. Schering-Plough Corp., 145 F.3d 601, 612-13 (3d Cir. 1998).
[39] Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114 (9th Cir. 2000).
[40] *Id.* at 1115.
[41] *Rendon*, 294 F.3d at 1283-84.
[42] Gil v. Winn-Dixie Stores, Inc., 257 F. Supp. 3d 1340 (S.D. Fla. 2017).
[43] *Id.* at 1342.
[44] *Id.* at 1344.
[45] *Id.*
[46] *Id.* at 1349.
[47] *Id.; see also* 42 U.S.C. § 12182(a).

The Ninth Circuit reaffirmed its earlier adoption of the "nexus" theory, extending it to business websites under the ADA. In *Robles v. Domino's Pizza*, the plaintiff alleged Domino's violated Title III because he, as a blind man, was unable to order pizza online due to the website not having software for the visually impaired.[48] The court held Domino's' restaurants were places of public accommodation under the ADA, and under DOJ guidance interpreting the ADA, public accommodations must "provide auxiliary aids and services to make visual materials available," including websites and mobile apps.[49] Notably, the court called the "nexus between Domino's website and app and physical restaurants" critical to its holding.[50] The nexus here was that the website and app "facilitate[d] access to the goods and services" of Domino's physical locations.[51] While Domino's argued the lack of clarity on its obligations under the ADA raised due process concerns, the court rejected this argument due to DOJ consistently interpreting websites to be covered under the ADA, even if it has not made compliance standards clear. Domino's appealed to the Supreme Court, presenting one of the best and only opportunities for the Court to clarify business obligations under the ADA, but the Court denied certiorari.[52]

In a similar case involving a blind plaintiff alleging discrimination under the ADA, the Eleventh Circuit held Dunkin Donuts' website was a service facilitating the use of the places of public accommodation (its physical shops).[53] Because the ADA prohibits discrimination in the goods and services offered by a place of public accommodation, the court concluded the plaintiff had a plausible claim under the ADA for discrimination due to the lack of website accessibility.[54]

Just recently in April of 2021, the Eleventh Circuit again addressed the issue of website accessibility under the ADA. Reviewing the district court's decision in *Gil v. Winn-Dixie Stores, Inc.*, the panel, over a strong dissent, vacated the district court decision and held the lack of website accessibility to Mr. Gil did not suffice as a "barrier to [] access" under the ADA.[55] In reviewing whether the website itself was a place of public accommodation, the panel concluded it was not based on all statutorily expressed places of public accommodation being "tangible, physical places."[56] The court then repudiated the argument that it had adopted a "nexus" theory in earlier cases — requiring merely a nexus between the service and physical public accommodation — stating this was nowhere to be found in precedent or the statute.[57] Finally, it held that Winn-Dixie committed no Title III violation and Gil was able to "enjoy fully and equally 'the goods, services, facilities, privileges, advantages, or accommodations of' Winn-Dixie's physical stores[.]"[58] The determining factor in the panel's decision was that the website did not provide the sole access point for any service offered by the store, i.e., whatever Mr. Gil could not do on the website, he was still able to do in the store itself.[59]

IV. CONGRESSIONAL INACTION

While Congress could amend the ADA to provide clarity and protect small businesses from ADA compliance lawsuits, it has failed to do so. In 2017, Representative Ted Poe (R-TX) introduced the ADA Education and Reform Act (H.R. 620), which attracted more than 100 cosponsors from members of both parties. H.R. 620 would have amended the ADA to require a written notice of violation to public accommodations not in compliance, and a 60-day cure period to allow for compliance before an injured party may bring a civil suit.[60] H.R. 620 passed the House but stalled in the Senate.

Just this past October, Representatives Ted Budd (R-NC) and Lou Correa (D-CA) introduced the Online Accessibility Act ("OAA"). This act would amend the ADA to add a Title VI, providing three consequential updates to the ADA.[61]

[48] Robles v. Domino's Pizza, 913 F.3d 898, 902-03 (9th Cir. 2019).
[49] *Id.* at 905.
[50] *Id.*
[51] *Id.* at 905-06.
[52] 140 S. Ct. 122 (2019).
[53] Haynes v. Dunkin' Donuts, Ltd. Liab. Co., 741 F. App'x 752, 754 (11th Cir. 2018).
[54] *Id.*
[55] Gil v. Winn-Dixie Stores, Inc. , 993 F.3d 1266, 1284 (11th Cir. 2021).
[56] *Id.* at 1277.
[57] *Id.* at 1281.
[58] *Id.* at 1284.
[59] *See id.* at 1277-84. The panel distinguished its previous precedent, *Rendon*, 294 F.3d 1279, based on the phone messaging system in that case providing the "sole access point" for the game show. *Gil*, 993 F.3d at 1279-80. Similarly, the panel concluded the Ninth Circuit decision in *Robles*, 913 F.3d 898, was inapposite due to *Robles'* adoption of the "nexus" standard and the lack of any direct sales through the website, as was the case with Domino's Pizza in *Robles*. *See Gil*, 993 F.3d at 1281-84.
[60] ADA Education and Reform Act of 2017, H.R. 620, 115th Cong. (2d Sess. 2018).
[61] Online Accessibility Act of 2020, H.R. 8478, 116th Cong. (2d Sess. 2020).

First, the OAA would impose a general rule prohibiting those with disabilities from being "excluded from participation in" or "denied the full and equal benefits of the services of a consumer facing website or mobile application[.]"[62] Second, it would set forth a standard for website compliance — substantial compliance with the WCAG 2.0 A or AA level guidelines or alternative equivalent.[63] Finally, the OAA would impose a notice requirement and cure period before an individual can file a complaint with the DOJ or bring a civil action for the noncompliant website or mobile app.[64] While the OAA would resolve major problems leading to ADA website compliance litigation — ADA applicability to websites, the standard for compliance, and notice of responsibility to business owners — history suggests the bill's fate is dim.

V. THE REALITY FOR SMALL BUSINESS

Small businesses face a conundrum on how to bring their websites into compliance with the ADA. Whether it be the courts or DOJ, one thing is consistently clear — Title III, in some way, applies to business websites.[65] Businesses are better served to ignore the legal technicalities of whether their websites themselves are public accommodations, or a "nexus" must exist between the website and the physical location. Any small business utilizing a website to make sales, promote products, offer location information, offer discounts, or even advertise, may wish to give serious consideration to updating its website so that those with disabilities have "equality of opportunity, [and] full participation" "in the full and equal enjoyment of the goods, services, facilities, privileges, [or] advantages" of the website.[66] This ensures that websites are "equally accessible to people with disabilities."[67]

What does this look like in practice? The Department has not officially adopted any of the WCAG level guidelines and has even suggested that one can comply with the ADA without complying with those guidelines.[68] But informally, the Department and Congress have recognized the WCAG 2.0 AA guidelines as a potential standard.[69] Until official guidance comes, small businesses may wish to consider using the 2.0 AA guidelines as the bare minimum for website compliance. The four principles of 2.0 AA compliance are that the website is perceivable, operable, understandable, and robust.[70] Some examples of required modifications under the 2.0 AA guidelines include captions for all live media, audio description for prerecorded videos, a text to images contrast ratio of 4.5:1, the ability to resize text, and the website including descriptive headings and labels.

There are multiple consulting companies and services that will review business websites for ADA compliance. This does impose an additional cost on small businesses, but the cost is likely to be far less than any damages from a future lawsuit based on lack of ADA compliance. While the number of federal lawsuits alleging lack of ADA website compliance leveled off in 2019, there were still on average 188 filed per month.[71] In addition, other contextual indications suggest a rise in the risk of liability on the horizon. While federal courts continue to struggle with Title III's applicability to business websites, state courts in the same geographical regions are reading the ADA quite broadly — a bad sign for small business owners.[72] In a state like California, without proactively addressing the risk, small business owner liability rests with the jurisdictional preferences of plaintiffs and payday-seeking attorneys. Finally, the Biden Administration took office in January 2021, which suggests aggressive DOJ enforcement of noncompliant websites, as was the case under the Obama Administration.[73]

[62] *Id.* at § 601(a).
[63] *Id.* at § 601(b).
[64] *Id.* at § 602(b).
[65] *See* Patrick, *supra* note 11; Boyd House Letter, *supra* note 27; *supra* Part II, III.
[66] 42 U.S.C. § 12101(a); 42 U.S.C. § 12182(a).
[67] *See* Boyd House Letter, *supra* note 27.
[68] *See* Boyd House Letter, *supra* note 27.
[69] *See* H.R. 8478; Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460.
[70] More detailed provisions of the 2.0AA guidelines can be found at https://www.w3.org/WAI/WCAG21/quickref/?versions=2.0#non-text-content. Note that to meet level AA, one must satisfy all the requirements of level A as well.
[71] Kristina M. Launey & Minh N. Vu, *The Curve Has Flattened for Federal Website Accessibility Lawsuits*, SEYFARTH SHAW LLP (Apr. 29, 2020), https://www.adatitleiii.com/2020/04/the-curve-has-flattened-for-federal-website-accessibility-lawsuits/.
[72] *See* Minh N. Vu, *A Second California State Court Judge Says the ADA Covers Online-Only Businesses*, SEYFARTH SHAW LLP (Aug. 27, 2020), https://www.adatitleiii.com/2020/08/a-second-california-state-court-judge-says-the-ada-covers-online-only-businesses/ (discussing California state courts holding that Title III goes so far as to cover online-only businesses).
[73] *See* Minh N. Vu & Kristina M. Launey, *How Will DOJ Enforce Title III of the ADA in a Biden Administration?*, SEYFARTH SHAW LLP (Nov. 17, 2020), https://www.adatitleiii.com/2020/11/how-will-doj-enforce-title-iii-of-the-ada-in-a-biden-administration/.

CONCLUSION

Contrary to President Bush's signing statement, the ADA has led to a constant stream of litigation.[74] Whether this litigation is due to the vagueness of the ADA, judges stretching its words beyond their natural meaning, or application of the Act to never-intended nor foreseen technologies, is irrelevant to small businesses today. All that matters is the "backbone of the American economy" is needlessly at risk for significant liability.[75] Knowing this risk exists, each branch of the federal government has had the opportunity to clarify the ADA's applicability to websites. Yet each has punted on the issue, offering no conclusive guidance. While the government punts, small businesses are left to navigate this uncertain arena with little more than a directive to "comply."

To reduce the risk of legal liability from lack of compliance with the ADA, small businesses may wish to consider at the very least proactively updating their websites to be WCAG level 2.0 AA compliant. While the DOJ and Congress have not officially mandated this level of compliance, this appears to be the most likely mandatory standard should one be created.[76] Eventually, a required standard for website accessibility will arise. In the meantime, by proactively conforming their websites, small businesses will incur a minor immediate cost but avoid the costly risk of litigation and federal government enforcement, including fines and requirements to conform to the guidelines anyway.

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[74] *See* Presidential Statement on Signing the Americans with Disabilities Act (July 26, 1990), https://www.ada.gov/ghw_bush_ada_remarks.html (George H.W. Bush).

[75] Stephen Labaton, *THE 1992 CAMPAIGN: The Republicans; Bush Courts Small Businesses by Offering Loans,* N.Y. Times (Sept. 5, 1992) (quoting George H.W. Bush), https://www.nytimes.com/1992/09/05/us/the-1992-campaign-the-republicans-bush-courts-small-businesses-by-offering-loans.html.

[76] *See* H.R. 8478; Andrews v. Blick Art Materials, LLC, 286 F. Supp. 3d 365, 370 (E.D.N.Y. 2017) (requiring "the Websites [be in] substantial conformance with the Web Content Accessibility Guidelines (WCAG) 2.0 Level AA, which are hereby determined by the *court* to be an appropriate standard to judge whether Defendant is in compliance with any accessibility requirements of the ADA[.]"); Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460; *see also* Panerese et al. v. Shiekh Shoes, LLC, 19-CV-4061(JMA)(AYS), 2020 WL 7041083, at *1-2 (E.D.N.Y. Dec. 1, 2020) (granting injunctive relief and requiring the defendant to conform their business site with the WCAG 2.0 guidelines); Guglielmo v. Alpha Indus. of Virginia, Inc. , No. 1:20-cv-05917-VEC, 2020 WL 7022563, at *3 (S.D.N.Y. Nov. 30, 2020) (describing terms of stipulated consent decree including compliance with WCAG 2.0 AA guidelines); Young v. Drury University, No. 20-cv-05718 (RA), 2020 WL 6939678, at *3 (S.D.N.Y. Nov. 25, 2020) (same); Cruz v. Soha Designs, Inc., No. 20-cv-04578 (OTW), 2020 WL 6690680, at *2-3 (S.D.N.Y. Nov. 13, 2020) (same); Calcano v. SuperMe, LLC, No. 2:20-cv-6440 (LTS/SN), 2020 WL 6484977, at *3 (S.D.N.Y. Nov. 3, 2020) (same); Cruz v. Wigwam Mills, Inc, No. 1:20-cv-05142-MKV, 2020 WL 6445109, at *2 (S.D.N.Y. Nov. 2, 2020) (same).