

**INCORPORATING TOOLS AND TECHNICAL
GUIDELINES INTO THE WEB
ACCESSIBILITY LEGAL FRAMEWORK FOR
ADA TITLE III PUBLIC ACCOMMODATIONS**

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INTRODUCTION.....	305
I. AUTOMATED TOOLS AND GUIDELINES FOR WEB ACCESSIBILITY.....	308
A. GUIDELINES	310
B. AUTOMATED TOOLS.....	312
II. EXISTING LEGAL FRAMEWORK FOR WEB ACCESSIBILITY.....	314
A. STATUTES	314
B. REGULATIONS	317
C. CASE LAW.....	320
1. NEXUS.....	320
2. REMEDIES	325
III. THE PREVALANCE OF “DRIVE-BY” LAWSUITS	327
IV. AN IMPROVED LEGAL FRAMEWORK.....	331
A. PROPOSED ENHANCEMENT TO THE EXISTING LEGAL FRAMEWORK	332
CONCLUSION	341

INTRODUCTION

Websites act as a crucial link in the systems that enable us to find information, connect to service providers, and meet our work, education, health, and entertainment needs. As websites have become more central to our lives—more acutely since the onset of the COVID-19 pandemic—the web is garnering increased attention. An accessible website is one that is equally usable by people with disabilities who rely on alternate forms of input or output, such as screen readers, alternate keyboards, captioning,

voice recognition, and alternate pointing devices or no pointing devices.¹ Estimates from the Centers for Disease Control (CDC) indicate that approximately 26% of adults in the U.S., or sixty-one million people, have a disability.² Designing websites so that they can be utilized by the greatest number of possible users is a combination of good design and following existing standards. In fact, making a website more accessible is also likely to make it more usable for people without disabilities.³ However, despite the availability of design/evaluation tools, many websites and online digital content are inaccessible for people with disabilities—a February 2021 automated analysis detected accessibility errors in 97.4% of the top one million website homepages.⁴

Web accessibility has been an issue for the twenty-five years since the original Department of Justice (DOJ) announcement in 1996 that websites of public accommodations were required to be accessible.⁵ Since the Americans with Disabilities Act (ADA) became a statute before the advent of the web, websites are not mentioned in the original statute. The twelve categories of public accommodations listed in Title III of the ADA include places of lodging, food and drink establishments, places of exhibition or entertainment, and places of public gathering—all physical locations.⁶ However, this fact has not prevented disabled plaintiffs from asserting their right to accessible websites. Lawsuits related to the topic of web accessibility have been an issue for at least fifteen years since *National Federation of the Blind v. Target Corp.*,⁷ and they have become a focal point over

1. For definition and discussion of accessible technology in general, see JONATHAN LAZAR ET AL., ENSURING DIGITAL ACCESSIBILITY THROUGH PROCESS AND POLICY 2 (1st ed. 2015).

2. *Disability Impacts All of Us*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 16, 2020), <https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html>.

3. See generally Sven Schmutz et al., *Implementing Recommendations from Web Accessibility Guidelines: Would They Also Provide Benefits to Nondisabled Users*, 58 HUM. FACTORS 611 (2016) (concluding that “that implementing accessibility guidelines can provide several benefits for nondisabled users.”).

4. *The WebAIM Million*, WEBAIM (Apr. 30, 2021), <https://webaim.org/projects/million/>.

5. See Letter from Deval L. Patrick, Assistant Att’y Gen. Civ. Rights Div., to Tom Harkin, Sen., U.S. DEP’T OF JUST. (Sept. 9, 1996), <https://www.justice.gov/crt/foia/file/666366/download>.

6. See 42 U.S.C. § 12181(7).

7. See, e.g., *Nat’l Fed’n of Blind v. Target Corp.*, 452 F. Supp. 2d 496 (N.D. Cal.

the past five years as the number of lawsuits has increased dramatically.⁸

This Article argues that the weakness of the existing legal framework for web accessibility for public accommodations is that it does not acknowledge the existence of automated tools and guidelines. These automated tools and guidelines are necessary for defining and validating accessibility, and without them, there is an environment of confusion that encourages web accessibility lawsuits. Furthermore, other areas of federal law, such as those requiring accessibility for federal government websites or airline websites, already incorporate tools and guidelines into their regulatory framework, which demonstrates the feasibility of incorporation.⁹ In addition, this Article also proposes several enhancements to the legal framework for public accommodations that acknowledge and incorporate existing tools and guidelines.

Technical experts may be knowledgeable about the Web Content Accessibility Guidelines (WCAG).¹⁰ However, for most other stakeholders involved in litigation, both the tools and guidelines for accessibility such as WCAG are confusing and hard to apply—and they are rarely even mentioned in the legal framework. Apart from lawyers, very few stakeholders have a clear understanding of what the law requires, and outside of technical experts, very few stakeholders know whether their websites are accessible.

This Article postulates that the confusion occurring in web accessibility lawsuits is due to the legal side not recognizing the technical side, as evidenced by statutes and regulations that do not even mention tools and guidelines. Similarly, the tools and guidelines often do not acknowledge the legal side, but that is outside of the scope of this Article. The current legal framework for web accessibility does not offer enough clarity to protect the rights of people with disabilities. This Article offers potential enhancements to the legal framework with the goal of protecting

2006).

8. See Kristina M. Launey & Minh N. Vu, *Federal Website Accessibility Lawsuits Increased in 2021 Despite Mid-Year Pandemic Lull*, SEYFARTH: ADA TITLE III (Mar. 21, 2021), <https://www.adatitleiii.com/2022/03/federal-website-accessibility-lawsuits-increased-in-2021-despite-mid-year-pandemic-lull/#more-3988>.

9. See discussion *infra* Part II.A.

10. *WCAG 2 Overview*, W3C: WEB ACCESSIBILITY INITIATIVE (Apr. 29, 2021), <https://www.w3.org/WAI/standards-guidelines/wcag/> (discussing the general WCAG 2 guidelines).

the rights of people with disabilities to equal access to information and digital content. Additionally, a clearer, improved framework will benefit companies that want to better understand their legal requirements and avoid lawsuits.

I. AUTOMATED TOOLS AND GUIDELINES FOR WEB ACCESSIBILITY

Disabilities can present many barriers to accessing internet content: people who have no vision cannot see text and other visual content, people with limited reach and dexterity may not be able to reliably touch a screen or click with a mouse, people who cannot hear will miss dialog and sounds in videos, and so on. People in specific disability groups often share common accessibility barriers, but there may be some idiosyncrasies. Web accessibility guidelines are compilations of web access barriers (and potential solutions) across disability groups. These accessibility guidelines can be used in the evaluation of websites for accessibility. The best-known and most widely accepted guidelines for web accessibility are the Web Content Accessibility Guidelines.¹¹ While incorporating the WCAG into a development process should ensure an accessible website, that is sometimes not the case. There are three standard evaluation methods used to determine if a website is accessible: usability testing involving users with disabilities, manual expert reviews (also known as inspections), and automated accessibility testing.¹² Web accessibility guidelines such as WCAG are frequently used in the latter two evaluation methods.¹³

Usability testing involves people with disabilities working through tasks on the website to identify the barriers that they encounter.¹⁴ Such testing does not rely on web accessibility guidelines and often does not find accessibility barriers that do

11. See generally *WCAG 2 Overview*, W3C: WEB ACCESSIBILITY INITIATIVE (Mar. 18, 2022), <https://www.w3.org/WAI/standards-guidelines/wcag/> (discussing the general WCAG 2 guidelines).

12. See generally Julio Abascal et al., *Tools for Web Accessibility Evaluation*, in *WEB ACCESSIBILITY: A FOUNDATION FOR RESEARCH* 479, 480-82 (Yeliz Yesilada & Simon Harper eds., 2019).

13. *Id.* at 479, 481.

14. See Sheryl Burgstahler et al., *Software Accessibility, Usability Testing and Individuals with Disabilities*, 10 *INFO. TECH. & DISABILITIES E-J.*, no. 2, 2004 (discussing usability in terms of the user's experience and in terms of the "testing and feedback process employed by designers and engineers wherein actual users are observed as they interact with specific feature(s) of a product.").

not relate to the user's own disability.¹⁵ Expert inspections (programs such as the U.S. federal government's Trusted Tester program¹⁶ provide certification) can find accessibility barriers and are good at determining compliance with accessibility guidelines, but they require access to experts and are too labor intensive to scale for an organization that may have hundreds or even thousands of pages that would need to be inspected.¹⁷ In their inspections, experts might use manual or semi-automated tools to check for accessibility problems and conformance to guidelines.¹⁸ Combining usability testing involving people with disabilities and expert inspections is the ideal method. However, both involve humans, so scalability is limited.¹⁹ Furthermore, the levels of expertise of the "experts" in an expert review can lead to inconsistent results.²⁰ With larger websites, non-automated lay users or experts use some form of sampling technique: either evaluating the most frequently visited pages, a random sampling of pages, or sampling pages that use different page templates.²¹ Automated tools for accessibility testing measure compliance against accessibility guidelines but cannot find accessibility barriers outside of the guidelines that have been implemented.²² Such tools are often presented as a scalable method for accountability since they can potentially check all the web pages on a website.²³ However, the reports that current tools generate are often confusing, misleading, and do not provide guidance in

15. LAZAR ET AL., *supra* note 1, at 147.

16. The Trusted Tester program "provides a code-inspection based test approach for determining web content conformance to the Section 508 standards." *Section 508 Trusted Tester Conformance Test Process Version 5*, U.S. DEP'T OF HOMELAND SEC. (Jan. 31, 2022), <https://www.dhs.gov/trusted-tester>.

17. LAZAR ET AL., *supra* note 1, at 143.

18. Abdullah Alsaeedi, *Comparing Web Accessibility Evaluation Tools and Evaluating the Accessibility of Webpages: Proposed Frameworks*, 11 INFO. 40 § 3.1 (2020).

19. LAZAR ET AL., *supra* note 1, at 143.

20. *See generally* Giorgio Brajnik et al., *The Expertise Effect on Web Accessibility Evaluation Methods*, 26 HUM.-COMPUT. INTERACTION 246, 256-74 (2011).

21. *See* Matthew King et al., *Managing usability for people with disabilities in a large web presence*, 44 IBM Sys. J. 519, 520 (2005); *see generally* Giorgio Brajnik et al., *Effects of sampling methods on web accessibility evaluations*, in 9TH INTERNATIONAL ACM SIGACCESS CONFERENCE ON COMPUTERS AND ACCESSIBILITY 59, 60-61 (2007).

22. Abascal et al., *supra* note 12, at 481.

23. *See* King et al., *supra* note 21, at 520; *see generally* Brajnik et al., *supra* note 21, at 60-61.

assessing legal compliance.²⁴

A. GUIDELINES

The Web Content Accessibility Guidelines are the most well-accepted and well-known technical standards for accessibility in the world.²⁵ WCAG originated in the mid-1990s as the Trace Center Unified Web Site Accessibility Guidelines, which formed the foundation for WCAG 1.0, which was approved by the Web Accessibility Initiative of the World Wide Web Consortium (W3C) in 1999.²⁶ WCAG 2.0 is significantly different in structure and content from WCAG 1.0 and was finalized in 2008.²⁷ WCAG 2.1 was released in June 2018 and extends WCAG 2.0 with seventeen additional success criteria.²⁸ In total, WCAG has been in use, with W3C approval, for over twenty years.

Large technology companies such as Microsoft, IBM, Google, and Apple were involved in the development of the WCAG standards, and an open, public process was used to allow all stakeholders to participate.²⁹ There was wide support from consumers, industry, and researchers when the guidelines were

24. See Hayfa Y. Aabuaddous et al., *Web Accessibility Challenges*, 7 INT'L. J. COMPUT. SCI. & APPLICATIONS, no. 10, 2016, at 176.

25. See Loïc Martínez & Michael Pluke, *Mandate M 376: New Software Accessibility Requirements*, 27 PROCEDIA COMPUT. SCI. 271, 272 (2014); Carli Spina, *WCAG 2.1 and the Current State of Web Accessibility in Libraries*, 2 WEAVE J. OF LIBR. USER EXPERIENCE, no. 2, 2019.

26. See Shadi Abou-Zahra & Judy Brewer, *Standards, Guidelines, and Trends*, in WEB ACCESSIBILITY: A FOUNDATION FOR RESEARCH 225, 231 (Yeliz Yesilada & Simon Harper eds., 2019); Elizabeth Ellcessor, *Bridging Disability Divides*, 12 INFO., COMM'N & SOC'Y 289, 298 (2010); Jonathan Lazar, *Web Accessibility Policy and Law*, in WEB ACCESSIBILITY: A FOUNDATION FOR RESEARCH 247, 253 (Yeliz Yesilada & Simon Harper eds., 2019).

27. See generally Loretta Guarino Reid & Andi Sno-Weaver, *WCAG 2.0: a web accessibility standard for the evolving web*, in INTERNATIONAL CROSS DISCIPLINARY CONFERENCE ON WEB ACCESSIBILITY: BEIJING 2008, 109 (Yeliz Yesilada gen. chair, 2008) (comparing WCAG 1.0 and WCAG 2.0).

28. Shawn Lawton Henry, *What's New in WCAG 2.1*, W3C: WEB ACCESSIBILITY INITIATIVE (Aug. 13, 2020), <https://www.w3.org/WAI/standards-guidelines/wcag/new-in-21/>.

29. See W3C (2008, press release) W3C Web Standard Defines Accessibility for Next Generation Web (Dec. 2008), [https://www.w3.org/2008/12/wcag20-pressrelease](https://www.w3.org/2008/12/wcag20-pressrelease;); Accessibility Guidelines Working Group - Participants, W3C: Web Accessibility Initiative, <https://www.w3.org/groups/wg/ag/participants> (last visited Jan. 11, 2022); W3C Process Document, W3C: Web Accessibility Initiative (Nov. 2, 2021), <https://www.w3.org/2021/Process-20211102/>.

finalized.³⁰ In many ways, the W3C process of allowing all stakeholders to comment is similar to the U.S. federal regulatory development process, albeit without any specific legal requirements to it.

The WCAG 2.x series documents are organized by the four principles of “POUR,” which require that web content must be “Perceivable, Operable, Understandable, and Robust” for all.³¹ Under each of these principles are a series of informative guidelines, each of which encompass one or more normative success criteria.³² Conformance to WCAG is evaluated according to the success criteria levels (Level A, AA, and AAA), where each subsequent level has more accessibility features.³³ WCAG 2.x success criteria are technology-agnostic, in that they lay out what must be true of the web content and access to it, but not how it must be done in a specific format or technology (such as HTML or PDF).³⁴ The W3C publishes a large set of informative documents on how to understand and apply WCAG success criteria to different technologies.³⁵

Success criteria in WCAG are meant to be testable, with technical details included so that conformance can be ascertained through a combination of human and automated means.³⁶ However, these guidelines can be difficult to understand for people who do not have the technical expertise. A W3C working group has recognized this difficulty and is working on what is currently called the W3C Accessibility Guidelines 3—three drafts were published 2021.³⁷ In these drafts, the editors were interested in public feedback on an approach in which guidelines

30. See W3C (2008, press release) *W3C Web Standard Defines Accessibility for Next Generation Web* (Dec. 2008), <https://www.w3.org/2008/12/wcag20-pressrelease>; *W3C Process Document*, W3C: WEB ACCESSIBILITY INITIATIVE (Nov. 2, 2021), <https://www.w3.org/2021/Process-20211102/#Consensus>.

31. See Spina, *supra* note 25.

32. See *WCAG 2 Overview*, *supra* note 11.

33. See *5.2.1 Conformance Level*, W3C (June 5, 2018), <https://www.w3.org/TR/WCAG21#cc1>.

34. See *W3C Accessibility Guidelines – Abstract*, W3C (June 5, 2018), <https://www.w3.org/TR/WCAG21#abstract-0>.

35. See Accessibility Guidelines Working Grp., *Techniques for WCAG 2.1*, W3C: WEB ACCESSIBILITY INITIATIVE (Mar. 9, 2022), <https://www.w3.org/WAI/WCAG21/Techniques/>.

36. See *id.*

37. W3C, *W3C Accessibility Guidelines (WCAG) 3.0 Publication History*, <https://www.w3.org/standards/history/wcag-3.0> (last visited Apr. 24, 2022).

were simplified, and conformance tests were listed separately.³⁸ It is not yet known whether this new simplified-and-separated approach to the guidelines will be successful in making them easier to understand while still being useful for different stakeholders, such as website developers, decision makers, and those who check for conformance. WCAG allows for significant flexibility in how organizations meet its accessibility success criteria, and governments around the world accept WCAG as the gold standard for making web content (and related technologies) accessible.³⁹

B. AUTOMATED TOOLS

There are two general types of automated tools for web accessibility: tools for evaluation and tools for remediation. Evaluation tools have been available since the mid-1990s⁴⁰ and check web content for non-conformance against guidelines and common patterns of inaccessibility.⁴¹ Web accessibility tools may give guidance or suggestions, or may be integrated in development workflows to fix some accessibility issues.⁴² Web accessibility remediation tools began to add machine learning and other artificial intelligence methods in the mid-2010s.⁴³ However, the currently available automated web accessibility evaluation tools are still limited in ability and scope. They are designed primarily for programmers or web developers interested in the coding level, not for website managers interested in the overall organizational level of accessibility or for those who are trying to

38. See Jeanne Spellman et al., *W3C Accessibility Guidelines (WCAG) 3.0: W3C First Public Working Draft*, W3C (Dec. 7, 2021), <https://www.w3.org/TR/2021/DNOTE-wcag-3.0-explainer-20211207/>.

39. See Spina, *supra* note 25.

40. See *Early Favorite Accessibility Tools & Checkers: A Trip Down Memory Lane*, DEQUE SYSTEMS (Nov. 16, 2016), <https://www.deque.com/blog/deques-favorite-early-accessibility-tools/>.

41. Abascal et al., *supra* note 12, at 481.

42. See *id.* at 486-87.

43. See generally Shadi Abou-Zahr et al., *Artificial Intelligence (AI) for Web Accessibility: Is Conformance Evaluation a Way Forward?*, in WEB4ALL 2018: 15TH INTERNATIONAL WEB FOR ALL CONFERENCE 2, 4 (2018), <https://www.w4a.info/2018/> (choose "Download Communication Papers"; then select "38") (discussing AI for web accessibility today including current limitations and potential applications); Aisha Counts, *COVID-19 kickstarted a war over web accessibility* (Dec. 8, 2021), <https://www.protocol.com/digital-accessibility-web-covid> (discussing the impact of the COVID-19 pandemic on increasing web accessibility).

assess legal compliance.⁴⁴ Most evaluation tools are based on the WCAG 2.0 (or WCAG 2.1) and cover only a subset of its guidelines.⁴⁵ Human understanding and context are needed to successfully analyze some aspects of WCAG conformance, but most evaluation tools cover the technological low-hanging fruit with the success criteria that are easy to implement.⁴⁶ In addition, tools often flag items that could be potential problems that need to be manually checked by evaluators who are familiar with accessibility.⁴⁷ Effectively interpreting detailed reports from automated evaluation tools requires technical knowledge of both web development and accessibility,⁴⁸ so the technical nature of such reports do not help website managers really understand what the barriers are and whether their site is accessible. There are frequently many false positives that need to be manually checked⁴⁹—and that inflated number may be intimidating to people unfamiliar with using the tools. Different tools have different strengths and weaknesses, but novices may assume that the results they get are completely accurate. This may lead users of the tools to incorrectly believe that their website is beyond repair, leading to “negative effects and . . . undesirable consequences.”⁵⁰ This might also empower litigants who want to scare potential defendants with data showing that their website is in violation of accessibility requirements.

Many popular accessibility remediation tools today are in a category of tools known as accessibility overlays.⁵¹ Accessibility overlays are software layers that act on top of the underlying page code.⁵² The person visiting the website interacts with the

44. See generally Jonathan Lazar et al., *Investigating the Potential of a Dashboard for Monitoring U.S. Federal Website Accessibility*, in PROCEEDINGS OF THE 50TH ANNUAL HAWAII INTERNATIONAL CONFERENCE ON SYSTEM SCIENCES 2428 (2017); LAZAR ET AL., *supra* note 1, at 139, 161.

45. See Abascal et al., *supra* note 12, at 484.

46. See *id.* at 483-84.

47. See *id.*

48. See Hayfa Y. Abuaddou et al., *Web Accessibility Challenges*, 7 INT’L J.R OF ADVANCED COMPUT. SCI. & APPLICATIONS, no. 10, 2016, at 171, 176.

49. See Markel Vigo et al., *Benchmarking Web Accessibility Evaluation Tools: Measuring the Harm of Sole Reliance on Automated Tests*, in W4A 2013: 10TH INTERNATIONAL DISCIPLINARY CONFERENCE ON WEB ACCESSIBILITY § 4.3 (2013).

50. See *id.*

51. See Hugh Grant, *A Simple Guide to Web Accessibility Overlays*, TECHBULLION (Feb. 11, 2022), <https://techbullion.com/a-simple-guide-to-web-accessibility-overlays/>.

52. See Brad Henry, *Accessibility Overlays in Digital Content*, TPGI (May 13, 2020), <https://www.tpgi.com/accessibility-overlays-in-digital-content/>.

overlay software, which can change the presentation, structure, content, and behavior of the underlying page to potentially better fit a user with disabilities.⁵³ The currently available web accessibility overlays may only remediate a subset of accessibility problems.⁵⁴ There is also some controversy in the web accessibility community about the claims made by companies that sell accessibility overlays.⁵⁵ However, the controversy and limitations of current-generation overlays are beyond the scope of this paper.

II. EXISTING LEGAL FRAMEWORK FOR WEB ACCESSIBILITY

Typically, there are four primary sources of legal rules: constitutions,⁵⁶ statutes, regulations (federal or state, where applicable), and case law. This Article will examine these sources to understand the legal framework for web accessibility for public accommodations.

A. STATUTES

The Americans with Disabilities Act is split up into three main parts: Title I (employment), Title II (state and local government), and Title III (public accommodations).⁵⁷ There are currently twelve categories of public accommodations as defined in the ADA:

(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;

53. Symposium, *Overlays Panel at the 2020 ICT Accessibility Testing Symposium* 2-3 (2020), <https://www.ictaccessibilitytesting.org/wp-content/uploads/2021/04/Overlays-Transcript.pdf> (transcript).

54. *See id.* at 16.

55. *See Overlay Fact Sheet*, OVERLAY FACT SHEET, <https://overlayfactsheet.com/> (last visited Jan. 11, 2022).

56. The U.S. Constitution does not mention web accessibility (or more broadly, disability), and there currently are no U.S. state constitutions that mention web accessibility. While federal disability rights laws may have their roots in the U.S. Constitution, that is a topic beyond the scope of this paper, and currently, constitutions are not sources for legal rules related to web accessibility.

57. The lesser-known Title IV relates to telecommunications and Title V is miscellaneous. *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. § 12101).

- (B) a restaurant, bar, or other establishment serving food or drink;
- (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
- (D) an auditorium, convention center, lecture hall, or other place of public gathering;
- (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
- (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
- (G) a terminal, depot, or other station used for specified public transportation;
- (H) a museum, library, gallery, or other place of public display or collection;
- (I) a park, zoo, amusement park, or other place of recreation;
- (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
- (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
- (L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.⁵⁸

It is important to note that all twelve categories of public accommodation are physical places. Websites are not, as of yet, mentioned in the statute. Not surprisingly, then, case law has therefore become the primary source of legal rules in the area of web accessibility for public accommodations.⁵⁹ However, although the ADA does not mention web accessibility requirements for public accommodations, there are several other

58. 42 U.S.C. § 12181(7).

59. See Jonathan Lazar, *Due Process and Primary Jurisdiction Doctrine: A Threat to Accessibility Research and Practice?*, 20TH INTERNATIONAL ACM SIGACCESS CONFERENCE ON COMPUTERS AND ACCESSIBILITY 404, 404-05 (2018).

federal statutes that relate to the accessibility of websites.⁶⁰

There are very disparate statutory requirements for government websites and for the broader set of organizations known as “public accommodations.”⁶¹ For example, websites for the federal government are required to be accessible under Section 508 of the Rehabilitation Act, and the required technical standard under the updated Section 508 regulation is provided by the Web Content Accessibility Guidelines 2 (WCAG 2).⁶² The revised Section 508 standards apply the WCAG 2 level AA criteria⁶³ to all electronic content, whether on the web or not.⁶⁴ However, while WCAG is mentioned in the Section 508 regulations, there is no mention of automated inspection tools.

Another federal statute, the Air Carrier Access Act, prohibits discrimination against people with disabilities in air transportation,⁶⁵ and its implementing regulations mention the WCAG 2 level AA guidelines.⁶⁶ However, it also does not discuss automated testing tools, and it covers only airline websites, not the broader category of public accommodations.⁶⁷ For the Air Carrier Access Act, the enforcement remedies are orders to compel issued by the Secretary of Transportation and occasionally civil fines for the air carrier.⁶⁸

At a high level, Section 255 of the Telecommunications Act requires that “[a] provider of telecommunications service shall ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable.”⁶⁹ Section 255 of the

60. See Christopher Mullen, Note, *Places of Public Accommodation: Americans with Disabilities and the Battle for Internet Accessibility*, 11 DREXEL L. REV. 745, 754 (2019).

61. LAZAR ET AL., *supra* note 1, at 88-95.

62. 82 Fed. Reg. 5790-91.

63. WCAG has three levels: level A is the minimum level, AA is a necessity for a workable website (it also includes level A), and AAA is the most difficult to implement. See LAZAR ET AL., *supra* note 1, at 64.

64. *Applicability and Conformance Requirements*, GSA: SECTION508.GOV (2018), <https://www.section508.gov/develop/applicability-conformance/>.

65. Air Carrier Access Act of 1986, Pub. L. No. 99-435, § 2, 100 Stat. 1080 (1986).

66. *Part 382 – Nondiscrimination on the Basis of Disability in Air Travel*, NAT'L ARCHIVES (Sept. 23, 2021), <https://www.ecfr.gov/current/title-14/chapter-II/subchapter-D/part-382>.

67. See *id.*

68. See 14 C.F.R. § 383.2(a).

69. 47 U.S.C. § 255.

Telecommunications Act of 1996⁷⁰ applies to all technology (not only the web), and it does not refer to the WCAG guidelines.⁷¹ However, Section 255 does defer to the U.S. Access Board for defining the terms “accessible to” and “usable by.”⁷² The U.S. Access Board, in turn, uses WCAG in its implementing regulations for Section 255.⁷³ The only Section 255 remedy is that of the Federal Communications Commission (FCC) deciding to issue an order based on its formal complaint process.⁷⁴

Many states also have statutes requiring the state government to have accessible websites.⁷⁵ For example, Arizona has a statute adopting the accessibility standards of Section 508 of the Rehabilitation Act for any electronic or information technology to which state funds are directed.⁷⁶ In California, the law states that anything conducted, operated, administered, or funded by the state must provide equal access.⁷⁷ Other states, such as Maryland, tie accessibility directly to the procurement process.⁷⁸ Yet for the much larger number of websites for ADA-defined public accommodations, there are no statutes or regulations that specifically mention website accessibility.⁷⁹

B. REGULATIONS

Although the DOJ started a regulatory process in 2010 to define specific regulations for web accessibility for public accommodations under Title III of the ADA, that rulemaking did not progress and was withdrawn in 2017.⁸⁰ So, like the statute

70. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 255, 110 Stat. 56.

71. *See id.*

72. *See id.*

73. 82 Fed. Reg. 5790-91.

74. *Id.*

75. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 18-131 to -132; ARK. CODE ANN. §§ 25-26-203; COLO. REV. STAT. ANN. § 24-85-103; FLA. STAT. ANN. § 282.60; IDAHO CODE ANN. § 67-6702(6)(e), 6708(9)(k); IND. CODE ANN. § 4-13.1-3-1; KY. REV. STAT. ANN. § 61.982; LA. STAT. ANN. § 39:302; MD. CODE ANN., State Fin. & Proc. § 3A-311; MINN. STAT. ANN. § 16E.03(9); MO. ANN. STAT. § 191.863; MONT. CODE ANN. § 18-5-603; NEB. REV. STAT. § 73-205; OKLA. STAT. ANN. tit. 62, § 34.28; VA. CODE ANN. § 2.2-3500; W. VA. CODE ANN. § 18-10N-3.

76. *See* ARIZ. REV. STAT. ANN. §§ 18-131 to -132.

77. CAL. GOV'T CODE § 11135(d)(2).

78. *See, e.g.*, MD. CODE ANN., STATE FIN. & PROC. § 3A-311.

79. *See* Lauren Stuy, *No Regulations and Inconsistent Standards: How Website Accessibility Lawsuits under Title III Unduly Burden Private Businesses*, 69 CASE W. RES. L. REV. 1079, 1081 (2019).

80. Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four

itself, existing formal administrative rules interpreting the ADA, while containing general language applicable to websites, do not specifically mention websites. However, administrative regulations have nonetheless been a source of legal rules related to the ADA's application to web accessibility.

ADA regulations state that public accommodations are bound by a duty to provide "effective communications" to people with disabilities. This duty is defined in 28 C.F.R. § 36.303(a), which states:

A public accommodation shall take those steps that 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 public accommodation can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden, i.e., significant difficulty or expense.⁸¹

Another section of that regulation, 28 C.F.R. § 36.303(c)(1), further discusses effective communication: "A public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities. This includes an obligation to provide effective communication to companions who are individuals with disabilities."⁸²

The DOJ has stated since 1996 that websites of public accommodations are covered under this "effective communications" requirement (in both the statute and the regulations) of Title III of the ADA.⁸³ For instance, it did so in

Previously Announced Rulemaking Actions, 82 Fed. Reg. 60932 (Dec. 26, 2017), <https://www.federalregister.gov/documents/2017/12/26/2017-27510/nondiscrimination-on-the-basis-of-disability-notice-of-withdrawal-of-four-previously-announced> (notice of "withdrawal of four previously announced Advance Notices of Proposed Rulemaking (ANPRMs), pertaining to title II and title III of the Americans with Disabilities Act (ADA), for further review.").

81. 28 C.F.R. § 36.303(a).

82. *Id.* at § 36.303(c)(1).

83. Letter from Deval Patrick, Assistant Att'y Gen., C.R. Div., to the Hon. Tom Harkin, U.S. Sen. (Sept. 9, 1996), <https://www.justice.gov/crt/foia/file/666366/download>.

the 1996 initial letter from Assistant Attorney General for Civil Rights Deval Patrick to Senator Tom Harkin⁸⁴ and the 2014 DOJ Statement of Interest in *New v. Lucky Brand Dungarees Store, Inc.*, explaining the application of the “effective communications” requirement to websites.⁸⁵ The DOJ’s reasoning was that even when an accessibility standard has not yet been defined for a particular technology, the general ADA requirements of equal access, specifically “effective communications” under Title III (Public Accommodations), still apply because the ADA cannot predict in advance every potential technology that could be used in a public accommodation.⁸⁶ Along similar lines, the Statement of Interest noted that “[t]he fact that POS [point of sale] devices are not specifically addressed in the current title III regulation and the ADA Standards does not change Lucky Brand’s obligations under the ADA to ensure effective communication with individuals with disabilities.”⁸⁷ Later, the DOJ noted in its Statement that Title III of the ADA requires that public accommodations provide “appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities.”⁸⁸ So, in general, the DOJ points people to the ADA Title III regulations that relate to effective communication.⁸⁹ However, this administrative rule was not created through a formal rulemaking procedure, which is more open to stakeholder involvement.⁹⁰

As relates to administrative law, there are three levels of deference that courts give: *Chevron*, *Auer*, and *Skidmore* deference.⁹¹ *Auer* deference would apply when agencies are interpreting their own interpretations of the ADA as promulgated through regulations⁹²—as was the case with the 1996 letter and

84. *Id.*

85. Statement of Interest of the United States at 6-7, *New v. Lucky Brand Dungarees Stores, Inc.*, 51 F. Supp. 3d 1284 (2014) (No. 14-20574), https://www.ada.gov/briefs/lucky_brand%20_soi.docx; *see also* *New v. Lucky Brand Dungarees Stores, Inc.*, 51 F. Supp. 3d 1284 (S.D. Fla. 2014).

86. Statement of Interest of the United States at 7-8, *New*, 51 F. Supp. 3d 1284.

87. *Id.* at 9 (citing 42 U.S.C. § 12182(b)(2)(A)(iii); 28 C.F.R. § 36.303).

88. 28 C.F.R. § 36.303(c); 42 U.S.C. § 12182(b)(2)(A)(iii).

89. *See* Statement of Interest of the United States at 9, *New*, 51 F. Supp. 3d 1284; *see also* 42 U.S.C. § 12182(b)(2)(A)(iii); 28 C.F.R. § 36.303.

90. *See generally* 5 U.S.C. §§ 551-59.

91. *See* *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Auer v. Robbins*, 519 U.S. 452 (1997); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

92. *See* Daniel J. Sheffner, CONG. RSCH. SERV., LSB10279, HAS JUDICIAL

2014 Statement discussed above. Indeed, courts have often given significant deference to the DOJ in interpreting the regulations that they have promulgated under Title II and Title III of the ADA.⁹³ However, while the formal regulations for broad, effective communications under Title III are clear, the application of those regulations to websites appears in agency interpretation, which can be hard to understand—both in terms of their content and legal authority—for those who primarily work on developing and maintaining websites.⁹⁴

C. CASE LAW

As is common when the other sources of legal rules are not clear, case law has filled the gap of providing guidance in the area of web accessibility. However, in many ways, this has resulted in additional confusion and more lawsuits. Since websites are not mentioned in the ADA statute or regulations, the DOJ (as mentioned in the last section) has interpreted websites as falling under the “effective communication” clauses of the ADA. However, instead of focusing on the meaning of “effective communication,” courts have mainly analyzed the relationship between the website and the definition of “public accommodation.” This focus has resulted in the development (or appropriation from previous ADA case law) of the “nexus” theory⁹⁵ for analyzing whether a website is a public accommodation under the ADA. If and when ADA coverage is established, this naturally leads to the question of remedy, which involves tools and guidelines for web accessibility. The next two sections will discuss the nexus analysis and questions related to remedies.

1. NEXUS

A core requirement of Title III of the ADA 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

DEFERENCE TO AGENCY REGULATORY INTERPRETATIONS REACHED ITS FINAL AUER? 1 (2019), <https://sgp.fas.org/crs/misc/LSB10279.pdf>.

93. See, e.g., *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898, 906-07 (9th Cir. 2019).

94. See generally *Stuy*, *supra* note 79.

95. See *infra* Part II.C.1.

operates a place of public accommodation.”⁹⁶ However, there may be limits to the coverage that Title III provides. Specifically, there is currently a circuit split regarding the requirement for a sufficient nexus between a physical public accommodation and its website in order to subject the latter to coverage by ADA.

The nexus theory of interpreting the ADA pre-dates web accessibility, which may explain some of the challenges in clearly applying the nexus theory to websites.⁹⁷ The nexus theory, as applied to websites, requires that there must be a nexus between the website and the physical location of a public accommodation (which is clearly covered by the ADA), so, for example, “the inaccessibility of Target.com impedes the full and equal enjoyment of goods and services offered in Target stores . . .”⁹⁸ Before the web, the nexus rule was discussed in cases such as *Weyer v. Twentieth Century Fox Film Corp.*,⁹⁹ *Parker v. Metropolitan Life Ins. Co.*,¹⁰⁰ and *Ford v. Schering-Plough Corp.*¹⁰¹ As applied to websites, and as first articulated in *National Federation of the Blind v. Target*, the nexus theory requires that an inaccessible website be a barrier to accessing the physical accommodation itself for the ADA to apply.¹⁰²

Currently, the Third, Sixth, and Ninth Circuits maintain a nexus requirement.¹⁰³ Thus, a website is only required to be accessible if the website is an extension of a physical accommodation such that barriers on the website are barriers to the physical accommodation.¹⁰⁴ In the Ninth Circuit district court case *National Federation of the Blind v. Target*, the inaccessible website was a barrier to accessing the physical Target store, or, as the court found, the “inaccessibility of Target.com impedes the full and equal enjoyment of goods and services offered in Target

96. 42 U.S.C. § 12182.

97. Deeva V. Shah, *Web Accessibility for Impaired Users: Applying Physical Solutions to Digital Problems*, 38 HASTINGS COMM. & ENT L.J. 215, 227 (2016).

98. *Nat'l Fed'n of the Blind*, 452 F. Supp. 2d at 956.

99. *See Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000).

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

101. *See Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612-13 (3d Cir. 1998).

102. *See Nat'l Fed'n of the Blind*, 452 F. Supp. 2d at 952.

103. *See Lazar, supra* note 59, at 404.

104. *See id.*

stores.”¹⁰⁵ Therefore, ADA coverage applied to the website that was the subject of the plaintiff’s claim.¹⁰⁶

In contrast, courts in the First, Second, and Seventh Circuits have held that a consumer website, by itself, counts as a public accommodation.¹⁰⁷ As an example, according to a district court in the First Circuit, the Netflix website is covered under the ADA, even though Netflix has no physical store.¹⁰⁸ It is important to note that this circuit split on the nexus issue already existed before the legal question on web accessibility. In *National Federation of the Blind v. Scribd*,¹⁰⁹ another case about web accessibility, the district court cited *Carparts Distribution Center, Inc. v. Automotive Wholesaler’s Association of New England*, noting that in *Carparts*, “the First Circuit explained that public accommodations are not limited to physical structures,”¹¹⁰ and further noting that “[i]t would be ‘absurd’ to conclude people who enter an office to purchase a service are protected by the ADA but people who purchase the same service over the telephone or by mail are not.”¹¹¹ The Seventh Circuit similarly noted, in *Morgan v. Joint Administration Building*, that “[a]n insurance company can no more refuse to sell a policy to a disabled person over the Internet than a furniture store can refuse to sell furniture to a disabled person who enters the store.”¹¹² Similarly, “The Second Circuit Court of Appeals [has] emphasized that it is the sale of goods and services to the public, rather than how and where that sale is executed, that is crucial when determining if the protections of the ADA are applicable.”¹¹³

The Eleventh Circuit Court of Appeals had been considered

105. See *Nat’l Fed’n of the Blind*, 452 F. Supp. at 956.

106. See *id.*

107. See, e.g., *Nat’l Ass’n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 202 (D. Mass. 2012); *Nat’l Fed’n of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565, 575-76 (D. Vt. 2015); *Morgan v. Joint Admin. Bd.*, 268 F.3d 456, 459 (7th Cir. 2001). For further discussion of the circuit split, see Stuy, *supra* note 79, at 1086-89; Lazar, *supra* note 59, at 404.

108. See *Nat’l Ass’n of the Deaf*, 869 F. Supp. 2d 196.

109. *Nat’l Fed’n of the Blind*, 97 F. Supp. 3d 565.

110. See *id.* at 570 (citing *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New Eng.*, 37 F.3d 12, 19 (1st Cir. 1994)).

111. *Id.*

112. *Morgan*, 268 F.3d at 459 (citations omitted).

113. *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 392 (E.D.N.Y. 2017) (citing *Palozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 33 (2d Cir. 1999), *opinion amended on denial of reh’g*, 204 F.3d 392 (2d Cir. 2000)).

to be a nexus circuit, with rules similar to those of the Ninth Circuit.¹¹⁴ However, the 2021 Eleventh Circuit ruling in *Gil v. Winn-Dixie* created confusion, as the court indicated that people misunderstood its previous ruling in *Rendon v. Valleycrest Productions*.¹¹⁵ *Rendon* is a 20-year-old non-web precedent about ADA Title III, which addressed phone access for contestants trying out for the television show “Who Wants to be a Millionaire?”¹¹⁶ In *Gil v. Winn-Dixie*, the Eleventh Circuit indicated that the *Rendon* case did not actually endorse or adopt a nexus standard.¹¹⁷ This recent ruling seemed to add a new legal standard for web accessibility which applies only in the Eleventh Circuit:

Accordingly, we hold that Winn-Dixie’s website does not constitute an “intangible barrier” to Gil’s ability to access and enjoy fully “the goods, services, facilities, privileges, advantages or accommodations of” a place of public accommodation (here, a physical Winn-Dixie store). Consequently, Gil’s ability to access the website does not violate Title III of the ADA in this way.¹¹⁸

At the moment, the “intangible barrier” standard in the Eleventh Circuit is unique: “Winn-Dixie’s limited use website, although inaccessible by individuals who are visually disabled, does not function as an intangible barrier to an individual with a visual disability accessing the goods, services, privileges, or advantages of Winn-Dixie’s physical stores”¹¹⁹ The “intangible barrier” standard does not exist in any other circuit, and, as of January 2022, this case is no longer good law and the

114. See *Haynes v. Dunkin’ Donuts LLC*, 741 F. App’x 752, 753 (11th Cir. 2018); see also *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340, 1348-49 (S.D. Fla. 2017) (stating that “where a website is wholly unconnected to a physical location, courts within the Eleventh Circuit have held that the website is not covered by the ADA,” however the question of whether a website is a public accommodation was not at issue in this case).

115. See *Gil v. Winn-Dixie Stores, Inc.*, 993 F.3d 1266, 1281 (11th Cir. 2021) (citing *Rendon v. Valleycrest Prods.*, 294 F.3d 1279 (11th Cir. 2002)) (“Gil erroneously assumes in his arguments that *Rendon* established a ‘nexus’ standard But we did not adopt or otherwise endorse a ‘nexus’ standard in *Rendon*. Indeed, the only mention of a ‘nexus’ in *Rendon* is a footnote acknowledging that certain precedent from other circuits . . .”).

116. See *Rendon*, 294 F.3d 1279.

117. See *Gil*, 993 F.3d at 1281.

118. *Id.* at 1280.

119. See *id.* at 1279.

standard does not exist in the Eleventh Circuit, either.¹²⁰ Gil, the plaintiff in the case, requested an en banc rehearing in the Eleventh Circuit on April 15, 2021.¹²¹ Then on December 28, 2021, the Eleventh Circuit granted the en banc rehearing but noted that the appeal was rendered moot, stating, “we vacate our opinion and the underlying judgment, dismiss the appeal, and remand for the district court to dismiss the case as moot.”¹²²

The nexus requirement for web accessibility present in some circuits is an example of the connection and accompanying confusion between the technical and the legal communities. There is confusion not only because of the existing circuit split on whether a nexus is required, but also because there is not a clear legal test for whether a nexus between a website and a physical location exists. “By alleging that (1) Defendant’s website gives individuals ‘the opportunity to place an order through the website for free pickup’ at Defendant’s physical stores, and that (2) Plaintiff was prevented from using that portion of the website because it was not compatible with SRS and inaccessible to him as an individual with blindness, Plaintiff pled facts sufficient to plausibly state a claim under the nexus theory.”¹²³ But how much of a nexus must be present? How would you document the nexus? The confusion due to the unclear standards and circuit split on the nexus issue would merit scholarly attention even without the dramatic increase in “drive-by” lawsuits (discussed in Part III), but these lawsuits take advantage of the existing situation and highlight the need for work in this area. A clear definition of what constitutes a nexus for a website would be helpful.

As mentioned earlier, there are multiple interpretations of statutes and regulations coming out of the DOJ, providing that websites of public accommodations are covered under Title III of the ADA.¹²⁴ Yet, courts have not uniformly ruled the same way.¹²⁵

120. See *Gil v. Winn-Dixie Stores, Inc.*, 21 F.4d 775, 776 (11th Cir. 2021) (per curiam).

121. See *id.*

122. See *id.*

123. *Haynes v. Kohl’s Dep’t Stores, Inc.*, 391 F. Supp. 3d 1128, 1135 (S.D. Fla. 2018).

124. See *supra* Part II.C.

125. Ryan C. Brunner, *Websites as Facilities Under ADA Title III*, 15 DUKE L. & TECH. REV. 171, 174-75 (2017); see also Youlan Xiu, Note, *What Does Web Accessibility Look like under the ADA?: The Need for Regulatory Guidance in an E-*

2. REMEDIES

While the nexus issue is often in the limelight, there is another legal issue that less frequently gets attention: the appropriate remedy for violations. Under Title III of the ADA, private lawsuits can request injunctive relief but not damages.¹²⁶ Attorney fees can also be provided in private lawsuits.¹²⁷ Only lawsuits filed in court by the DOJ—not by private citizens—can request damages in the form of civil penalties.¹²⁸

Thus, injunctive relief is the most widely available remedy. However, under the current legal framework, it is unclear what the injunctive relief should be when websites are inaccessible. From a strictly technological point of view (or, put another way, if you asked a computer scientist this question instead of a lawyer), if one wants a website to be accessible, the best guide is the Web Content Accessibility Guidelines, first issued as an international standard in 1999¹²⁹ and included in other federal laws,¹³⁰ as well as most legal settlements.¹³¹

There is currently no legal specification for the web accessibility technical standards that should be used. This lack of specification was a key legal question in *Robles v. Dominos Pizza*.¹³² Robles, a blind individual, sued Domino's Pizza because its website and mobile app were not accessible.¹³³ Domino's claimed that Robles could not request compliance with a specific technical standard, such as WCAG, because no standard is cited

Commerce World, 89 GEO. WASH. L. REV. 412, 400-428 (2021) (discussing the circuit split relevant to the nexus issue); Carly Schiff, Note, *Cracking the Code: Implementing Internet Accessibility Through the Americans with Disabilities Act*, 37 CARDOZO L. REV. 2315, 2344-46 (2015) (proposing elimination of the nexus requirement in favor of content classifications).

126. See 28 C.F.R. § 36.501.

127. *Id.* at § 36.505.

128. See *id.* at § 36.503-504.

129. See *Web Content Accessibility Guidelines 1.0*, W3C (May 5, 1999), <https://www.w3.org/TR/WAI-WEBCONTENT/>.

130. See 36 C.F.R. § 1194.1; *Part 382 – Nondiscrimination on the Basis of Disability in Air Travel*, NAT'L ARCHIVES (Sept. 23, 2021), <https://www.ecfr.gov/current/title-14/chapter-II/subchapter-D/part-382>.

131. See generally LAZAR ET AL., *supra* note 1, at 62-65.

132. See *Robles v. Dominos Pizza LLC*, No. CV 16-06599 SJO (SPx), 2017 WL 1330216, at *3 (C.D. Cal. Mar. 20, 2017), *rev'd and remanded sub nom.*, *Robles v. Domino's Pizza, LLC*, 913 F.3d 898 (9th Cir. 2019).

133. *Id.* at *1.

in the regulations or the statute.¹³⁴ Siding with Domino's, the court reasoned that requiring compliance with a specific standard would violate Domino's due process rights.¹³⁵ Thus, the district court granted a motion to dismiss.¹³⁶ As Jonathan Lazar mentioned in *Due Process and Primary Jurisdiction Doctrine: A Threat to Accessibility Research and Practice?*, *Robles* was dismissed at the district court "because the plaintiff asked for the WCAG. Not only will the relief of the WCAG not be offered, but having a plaintiff simply asking for WCAG, will lead to the plaintiff losing the case."¹³⁷ There is even some evidence that in cases filed right after *Robles*, there was a hesitation to ask for WCAG.¹³⁸

Fortunately, the district court's ruling did not stand. The Ninth Circuit reversed and remanded, noting that use of the WCAG is a question of remedy, not of liability.¹³⁹ As the court explained:

Robles merely argues—and we agree—that the district court can order compliance with WCAG 2.0 as an equitable remedy if, after discovery, the website and app fail to satisfy the ADA. At this stage, Robles only seeks to impose liability on Domino's for failing to comply with § 12182 of the ADA, not for the failure to comply with a regulation or guideline of which Domino's has not received fair notice.¹⁴⁰

In response, Domino's filed a writ of certiorari to the U.S. Supreme Court, which declined to hear the case.¹⁴¹ Finally, in June 2021, following remand, the district court granted summary judgement to plaintiff Robles on the cause of action related to the accessibility of the Domino's website, ordering Domino's Pizza "to bring its website into compliance with the WCAG 2.0 guidelines."¹⁴²

134. *Id.* at *2.

135. *Id.*

136. *Id.* at *1.

137. See Lazar, *supra* note 59, at 405 (emphasis in original).

138. *Id.*

139. See *Robles*, 913 F.3d at 907.

140. *Id.*

141. See *Domino's Pizza, LLC v. Robles*, 140 S. Ct. 122 (2019) (Mem.).

142. *Robles v. Domino's Pizza LLC*, No. CV 16-6599 JGB (Ex), 2021 WL 2945562, at *10 (C.D. Cal. June 23, 2021). After the June 23, 2021 summary judgment for Robles on the website, a trial was going to occur on the issue of the mobile app accessibility, but the parties came to a settlement. Seyfarth Shaw LLP, *Robles v.*

Currently, no circuit has claimed that the WCAG are required for public accommodations, even though WCAG are the only internationally accepted guidelines for web content accessibility.¹⁴³ Indeed, there are still many open questions in the legal framework and some confusion as to whether and how WCAG should be brought up in an initial filing. This is because none of the statutes, regulations, or administrative guidance for public accommodations under Title III of the ADA specifically mention WCAG. The question still remains open: can/should a plaintiff ask for WCAG as a potential remedy and does the current legal framework lead to a clear understanding of the topic, or confusion and a potential increase in the number of lawsuits?

III. THE PREVALANCE OF “DRIVE-BY” LAWSUITS

In the years since the holding that websites can be public accommodations in *National Federation of the Blind v. Target*,¹⁴⁴ there have been thousands of lawsuits related to web accessibility. One law firm, Seyfarth Shaw, documented over 2,200 web accessibility lawsuits in federal court under ADA Title III per year in 2018 and 2019¹⁴⁵ and over 2,500 filings in 2020.¹⁴⁶ According to research from UsableNet, the number of ADA related lawsuits has continued to increase significantly over the past several years, and their estimate, at approximately 3,500 cases, was higher than the Seyfarth Shaw figure.¹⁴⁷

Domino’s Settles After Six Years of Litigation (June 10, 2022), <https://www.adatitleiii.com/2022/06/robles-v-dominos-settles-after-six-years-of-litigation/>.

143. See generally *WCAG 2 Overview*, *supra* note 11.

144. See *Nat’l Fed’n of Blind*, 452 F. Supp. 2d 946.

145. Kristina M. Launey & Minh N. Vu, *The Curve Has Flattened for Federal Website Accessibility Lawsuits*, SEYFARTH: ADA TITLE III (Apr. 29, 2020), <https://www.adatitleiii.com/2020/04/the-curve-has-flattened-for-federal-website-accessibility-lawsuits/>.

146. See Kristina M. Launey & Minh N. Vu, *Federal Website Accessibility Lawsuits Increased in 2020 Despite Mid-Year Pandemic Lull*, SEYFARTH: ADA TITLE III (Apr. 28, 2020), <https://www.adatitleiii.com/2021/04/federal-website-accessibility-lawsuits-increased-in-2020-despite-mid-year-pandemic-lull/#more-3988>.

147. See Jason Taylor, A record-breaking year for ADA Digital Accessibility Lawsuits., USABLENET (Dec. 21, 2020, 4:04 PM), <https://blog.usablenet.com/a-record-breaking-year-for-ada-digital-accessibility-lawsuits> (“ADA related cases in 2020 increased 23% over 2019. This includes cases filed in federal court and those filed in California state court under the Unruh Act with a direct reference to violation of the ADA.”).

While many lawsuits for web accessibility are genuine efforts to improve accessibility, some lawsuits are caused by misunderstandings, and unfortunately, some lawsuits are filed to seize opportunities for quick cash without genuine concern for advancing or protecting the rights of disabled persons.¹⁴⁸ Web accessibility has gained increased attention, primarily because of the massive increase in the number of lawsuits filed claiming inaccessible websites for people with disabilities.¹⁴⁹ In some ways, this increase is not surprising and is not necessarily a bad thing: the ADA was written to provide an avenue for enforcement through lawsuits by private individuals.¹⁵⁰ Furthermore, because the statutes and regulations have not been clear about web accessibility, all involved have looked to case law to help interpret the legal requirements.¹⁵¹ However, there has been a crushing growth in drive-by lawsuits, in which 100 or more businesses are sued on the same day by the same plaintiff and the same law firm (also known as “cut-and-paste” lawsuits).¹⁵² As one district court judge noted:

Computers have made a lot of things in life easier. Copy-and-paste litigation is one of them. The pitfalls of such an approach is [sic] evident here where, among other things, Plaintiff’s opposition responds to arguments never made by its opponent . . . and failed to even correctly identify what Defendant sells . . . (referring to Banana Republic as a “food establishment”). Although it features the fruit in its name, Banana Republic does not sell bananas.¹⁵³

Indeed, it is becoming more common for a law firm and a serial plaintiff to sue all entities within a category (e.g., all of the art galleries in New York City) without actually knowing whether their websites are accessible.¹⁵⁴ Since Title III of the ADA does not provide for financial damages as a form of relief, the lawyers

148. See *Ethics in the Digital Accessibility Legal Space: ADA Enforcement Cases or Something Else?*, LAINEY FEINGOLD (Sept. 29, 2020), <https://www.lflegal.com/2019/07/ethics-2/>.

149. See *id.*

150. See 28 C.F.R. § 36.501.

151. See generally LAZAR ET AL., *supra* note 1, at 89-90.

152. See generally *Ethics in the Digital Accessibility Legal Space*, *supra* note 148.

153. *Dominguez v. Banana Republic, LLC*, No. 1:19-CV-10171-GHW, 2020 WL 1950496, at *30 (S.D.N.Y. Apr. 23, 2020).

154. See Elizabeth A. Harris, *Galleries from A to Z sued over websites that the Blind can’t use*, N.Y. TIMES (Feb. 18, 2019), <https://www.nytimes.com/2019/02/18/arts/design/blind-lawsuits-art-galleries.html>.

for serial plaintiffs use this approach, similar to “phishing” online, hoping that they can score a few settlements.¹⁵⁵ Disability rights lawyers, such as the law firm of Lainey Feingold, try to separate their goals from those of these “serial/nuisance/drive-by” lawsuits, noting that the serial lawsuits performed for quick cash settlements do not further the goals of the Americans with Disabilities Act.¹⁵⁶ A built-in assumption in this type of serial lawsuit is that the defendant will not understand web accessibility and will not know whether their website is accessible. Given the lack of knowledge on the part of the defendant, the plaintiff may assume that it is not even necessary to check whether the defendant’s website is accessible because the defendant will have no way to determine if the claim is correct. These serial plaintiffs may be driven by a desire to take advantage of a situation where there is confusion in the law and a lack of usable tools to easily determine whether a website is accessible—not by a desire for improving website accessibility. Furthermore, it is not only that the defendant does not know whether their website is inaccessible; there is also no easy way to determine whether it is accessible within a reasonable time frame.

In a drive-by lawsuit, a plaintiff files a lawsuit providing just enough detail about why a website of a public accommodation (usually a business) is inaccessible to meet the plaintiff’s complaint filing requirement, but not enough to actually assist the defendant in determining what barriers may be present. There are no special pleading standards related to filing a complaint related to web accessibility—just the minimum required under the Federal Rules of Civil Procedure.¹⁵⁷ When the defendant does not know whether or not their website is accessible and the legal framework provides no guidance on tools or evaluation methods for determining whether the website is accessible, the defendants may offer a settlement rather than fixing the website to make it accessible. When there is a settlement, but the website is not made accessible, there are no net societal gains in terms of improved accessibility. These nuisance lawsuits are result of confusion about the law and a lack of information about the actual accessibility of websites. Current statutes, regulations, and automated testing tools leave big gaps

155. *See Ethics in the Digital Accessibility Legal Space, supra* note 148.

156. *See id.*

157. FED. R. CIV. P. 3, 5.

in our knowledge and understanding. For instance, if one is sued for web inaccessibility under Title III of the ADA, two main questions arise: (1) what would be the suggested way to determine if the website is accessible, and (2) if the website is not accessible, what would be the suggested tools or methods to make the website compliant? The current legal framework is silent on both of those questions. The authors of this Article believe that the lack of clarity, in part, is what drives companies that have been sued for web accessibility to settle. While the serial lawsuit problem exists more broadly in Title III of the ADA,¹⁵⁸ the rules for how to make an accessible physical location are clear, unlike those for websites.

The high number of nuisance lawsuits threatens the existing legal framework with repeated, bipartisan attempts to pass legislation to make it procedurally more difficult to file a civil rights claim. Rather than creating appropriate statutes or regulations, a group of 100 U.S. senators and representatives have recently asked the DOJ to eliminate the ability for people with disabilities to sue for web accessibility.¹⁵⁹ When the DOJ refused, noting their longstanding interpretation that the ADA applies to websites,¹⁶⁰ the group put forth a bill to remove the right to sue for web accessibility without first overcoming multiple procedural hurdles.¹⁶¹ This proposed brute force legislative measure, likely a result of the increase in drive-by lawsuits, would severely limit the legal rights of people with disabilities by hindering access to the courts.

158. Hannah Albarazi, *COVID-19's Impact On Businesses Fuels ADA Reform Debate*, LAW360 (Nov. 14, 2021, 8:02 PM) <https://www.law360.com/articles/1439804/covid-19-s-impact-on-businesses-fuels-ada-reform-debate>.

159. See Letter from Ted Budd et al., N.C. Rep., House of Representatives, to Jeff Sessions, U.S. Att'y Gen. (June 20, 2018), <https://www.adatitleiii.com/wp-content/uploads/sites/121/2018/06/ADA-Final-003.pdf> (relying on *Robles v. Dominos Pizza LLC*, No. CV 16-06599 SJO (SPx), 2017 WL 1330216, at *5 (C.D. Cal. Mar. 20, 2017)).

160. See Letter from Stephen E. Boyd, Assistant Atty. Gen., to Ted Budd, N.C. Rep., House of Representatives (Sept. 25, 2018), <https://www.adatitleiii.com/wp-content/uploads/sites/121/2018/10/DOJ-letter-to-congress.pdf>.

161. See Online Accessibility Act, H.R. 1100, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-bill/1100/text>. The current status of this proposed bill as of February 19, 2022, is that it was referred to the Subcommittee on Consumer Protection and Commerce in the House of Representatives. For updated actions on this Act, see Online Accessibility Act, H.R. 1100, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-bill/1100/all-actions?overview=closed#tabs>.

At the same time, on the defendant side, there clearly is a need to limit the number of lawsuits or have better ways to evaluate and respond to the claims related to web accessibility. As we have previously explained, there is currently no guidance in the law on the use of tools and guidelines to assist defendants in proactively or reactively evaluating or remediating their websites for accessibility.¹⁶² Legislators are now sometimes making the argument that the right to sue should be removed,¹⁶³ rather than working to enhance the legal framework with more technical detail on tools and guidelines to avoid lawsuits by proactively increasing accessibility in the first place.

IV. AN IMPROVED LEGAL FRAMEWORK

During the COVID-19 pandemic, the essential nature of websites has become more apparent, as they are critical to systems for service delivery, community participation, and social contact. Often, in the rush to place services online, accessibility has not been considered.¹⁶⁴ Websites that play a key role in filling society's educational, employment, commercial, and entertainment needs need to be accessible. Furthermore, the legal framework needs to provide guidance on the use of tools and guidelines, not only to lawyers, but also to the people involved with actual website creation and maintenance: the designers, developers, and webmasters.¹⁶⁵

The increased media attention to web accessibility is due in large part to a massive increase in the number of lawsuits being filed against organizations under Title III of the Americans with Disabilities Act.¹⁶⁶ The authors postulate that this increase in lawsuits reflects weaknesses in the legal framework, and

162. See *infra* Part II.

163. See Online Accessibility Act, H.R. 1100, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-bill/1100/text>.

164. See generally Jonathan Lazar, *Managing digital accessibility at universities during the COVID-19 pandemic*, UNIVERSAL ACCESS IN THE INFO. SOC. (2021).

165. See Jonathan Lazar et al., *Improving web accessibility: A study of webmaster perceptions*, 20 COMPUTS. IN HUM. BEHAV. 269, 272, 276 (2004).

166. See, e.g., Ann-Marie Alcantara, *Lawsuits Over Digital Accessibility for People With Disabilities Are Rising*, WALL ST. J. (July 15, 2021, 1:10 PM), <https://www.wsj.com/articles/lawsuits-over-digital-accessibility-for-people-with-disabilities-are-rising-11626369056> (“Consumers’ increased use of e-commerce and other digital experiences during the Covid-19 pandemic heightened awareness of accessibility issues, but advocates say many companies still don’t give priority to accessibility when they design new products and features.”).

specifically, the lack of tools and guidelines in the legal framework. This weakness manifests itself in multiple ways. For instance, if sued, defendants are unsure as to what the legal requirements are, and none of the automated web accessibility tools currently available can confidently determine if an organization's websites are legally compliant. An improved legal framework, where organizations can evaluate the merits of any lawsuit and decide how to respond appropriately, using tools and guidelines, may potentially lead to a reduction in drive-by lawsuits, freeing up judicial resources.

A. PROPOSED ENHANCEMENT TO THE EXISTING LEGAL FRAMEWORK

The authors propose the following solutions as potential ways (either separately or in combination) to resolve the challenges with the existing legal framework for web accessibility. These solutions all involve tools and/or guidelines.

1. Legislators can enact new statutes that specifically mention web accessibility and incorporate tools and guidelines.

This is the most obvious solution, and many have already suggested this.¹⁶⁷ An example of this was the Online Accessibility Act (H.R. 8478), which was proposed but failed to pass during the 116th Congress.¹⁶⁸ The Act would have added web accessibility and mobile app accessibility to the ADA by requiring compliance with WCAG.¹⁶⁹ However, it would have first provided the operator of the inaccessible website with a ninety-day notice period in which to remediate the problem. If the problem was not remediated within ninety days, then the plaintiff would have another ninety days in which to file a complaint with the DOJ. A plaintiff would not have the right to file a claim until all administrative remedies through the DOJ had been exhausted.¹⁷⁰

Both pro-business forces and disability advocates want clearer guidance in the form of new statutes.¹⁷¹ However, the

167. See generally Blake E. Reid, *Internet Architecture and Disability*, 95 IND. L.J. 591, 602-04 (2020).

168. See Online Accessibility Act, H.R. 8478, 116th Cong. (2020), <https://www.congress.gov/bill/116th-congress/house-bill/8478>.

169. See *id.* at 2.

170. See *id.* at 5.

171. See generally *The Proposed Online Accessibility Act in US Congress is [STILL]*

biggest stumbling block seems to be that pro-business forces want reduced access to the courts for cases related to web accessibility, whereas disability advocates do not want any reduction in access to the courts.¹⁷² For instance, pro-business forces want to remove the right to use the courts for web accessibility actions, to require a DOJ investigation first,¹⁷³ or to require a waiting period before any lawsuits can be filed.¹⁷⁴

One author suggests that the easiest way to make the fix would be to simply add a thirteenth category of public accommodation: websites.¹⁷⁵ The current ADA has twelve categories of public accommodation, and while those twelve categories were meant to be inclusive, it has become clear that they are not.¹⁷⁶

For any proposed legislation to be useful, it should include specifics related to tools and guidelines. For instance, as previously discussed, legislation would need to state which technical guidelines (or categories of technical guidelines) would meet the legal requirement. Similarly, the legislation would need to address how automated accessibility testing tools can potentially be used to determine legal compliance. For instance, if a defendant can prove that they had previously used either a testing tool or a remediation tool, and that tool showed the defendant's website to be accessible, would that be sufficient to provide a safe harbor of some type? Given that tools and guidelines are necessary for creating and remediating websites for accessibility, the proposed legislation certainly would need to address both of those.

Bad for Digital Inclusion, LAINEY FEINGOLD (Apr. 3, 2021), <https://www.lflegal.com/2020/10/ada-backlash/>.

172. *See generally id.*

173. *See* Letter from Ted Budd et al., N.C. Rep., House of Representatives, to Jeff Sessions, U.S. Att'y Gen. (June 20, 2018), <https://www.adatitleiii.com/wp-content/uploads/sites/121/2018/06/ADA-Final-003.pdf> (relying on *Robles v. Dominos Pizza LLC*, No. CV 16-06599 SJO (SPx), 2017 WL 1330216, at *5 (C.D. Cal. Mar. 20, 2017)).

174. Similar demands for waiting periods have been made under ADA Title III more broadly, such as in Bailey Howard, *Enforcement, Compliance, and Waiting Periods in Litigation under the Americans with Disabilities Act*, 17 FLA. ST. U. BUS. REV. 25, 28 (2018).

175. *See* Mullen, *supra* note 60, at 768.

176. *See id.* at 768-70.

2. Regulations can be issued or revised for clarity to incorporate accepted standards such as the WCAG guidelines and appropriate evaluation/remediation tools.

There seems to be a wide level of agreement that there is a need for updated regulations, although certainly, there may be disagreements about the content of the regulations. Businesses have taken the viewpoint that without clear regulations and guidance on web accessibility, it is unfair to require vague compliance.¹⁷⁷ The DOJ—which has authority to promulgate regulations for public accommodations under the ADA Title III, with the exception of transportation-related provisions which are granted to the Department of Transportation¹⁷⁸—started a regulatory process in 2010 to define specific regulations for web accessibility for Title III Public Accommodations under the ADA.¹⁷⁹ There was initial progress, including a supplemental notice for proposed rulemaking in 2016.¹⁸⁰ However, the rulemaking process did not progress to a Notice of Proposed Rulemaking,¹⁸¹ and the rulemaking process was withdrawn in 2017.¹⁸² There has long been demand for regulations that specifically mention and clarify requirements for web accessibility under the ADA.¹⁸³ On November 5, 2015, fifteen disability rights groups sent a joint letter to President Obama, stating, in part:

As you said on July 26, 2010, these rules are “the most important updates to the ADA since its original enactment in 1991.” We agree, and we believe it is essential that the associated final rule be issued under your administration. Therefore, we urge you to release the NPRM [Notice of

177. *See generally* Stuy, *supra* note 79, at 1097-1103.

178. *See* 42 U.S.C. § 12186.

179. *See* 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).

180. *See* Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities, 81 Fed. Reg. 28658, 28659 (May 9, 2016).

181. Shah, *supra* note 97, at 226.

182. Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions, 82 Fed. Reg. 60932 (Dec. 26, 2017), <https://www.federalregister.gov/documents/2017/12/26/2017-27510/nondiscrimination-on-the-basis-of-disability-notice-of-withdrawal-of-four-previously-announced>

183. *See, e.g.*, Letter from Clark Rachfal et al., Am. Council of the Blind, to Hon. Kristen Clarke, Assistant Atty. Gen. (Feb. 28, 2022), <https://www.acb.org/accessibility-standards-joint-letter-2-28-22>.

Proposed Rulemaking] for Title III of the ADA without further delay and take immediate action to ensure equal internet access for all Americans with disabilities.¹⁸⁴

These demands do not only come from disability advocates. Even technology companies such as Microsoft have sent letters to the White House requesting regulations on web accessibility to help clarify their requirements.¹⁸⁵ On January 14, 2016, a joint letter was sent to President Barack Obama by Microsoft President and Chief Legal Officer Brad Smith, and National Federation of the Blind President Mark Riccobono, including the following text:

Regulations from the Department of Justice (DOJ) are needed to provide companies with clear and meaningful guidelines so they can serve their clients and customers with disabilities. Thus, as you said on July 26, 2010, these rules are “the most important updates to the ADA since its original enactment.” We agree, and urge you to release the NPRM for Title III of the ADA without further delay.¹⁸⁶

As with the previous suggestion of a new statute, this Article’s authors are certainly not the first authors to suggest the need for updated and clarified regulations.¹⁸⁷ Two noteworthy efforts take different approaches: Moroney modifies the standard argument, suggesting that the DOJ use a negotiated rulemaking approach¹⁸⁸ and Weissburg suggests that the Equal Employment Opportunity Commission (EEOC) issue web accessibility regulations under Title I (employment) for employers and employment application websites, which could potentially spur similar action by DOJ under Title III (public accommodations).¹⁸⁹ Given that other federal regulations require conformance with

184. E-mail from American Association of People with Disabilities et al., to Barack Obama, Pres. of the U.S. (Nov. 5, 2015) (on file with authors).

185. See E-mail from Mark A. Riccobono, Pres., Nat’l Fed. of the Blind, and Brad Smith, Pres. & Chief Legal Off., Microsoft, to Barack Obama, Pres. of U.S. (Jan. 14, 2016) (on file with authors).

186. See *id.*

187. See generally Mullen, *supra* note 60, at 768-72.

188. See generally Julie Moroney, Note, *Reviving Negotiated Rulemaking for an Accessible Internet*, 119 MICH. L. REV. 1581 (2021).

189. See generally Harper Weissburg, Note, *Are You There, EEOC? It’s Me. Title I: Using Title I to Improve Web Accessibility under the ADA*, 101 B.U.L. REV. 1917 (2021).

WCAG for airline websites¹⁹⁰ and for federal websites,¹⁹¹ requiring the use of WCAG would be a reasonable approach consistent with existing regulations and would do nothing to diminish the rights of people with disabilities to access the courts.

3. Heightened pleading standards could be adopted that require a standard of evidence prior to filing a case related to web accessibility, therefore reducing the number of frivolous lawsuits.

The current lack of a strict pleading standard for ADA web accessibility cases has created a situation rife with confusion and frivolous suits.¹⁹² The authors would suggest that there be a requirement that the accessibility violations and nexus be pled with reference to specific details, thus eliminating the ability to “copy-and-paste” lawsuits as is currently occurring. Suits filed with several U.S. district courts in California, where the number of ADA cases has significantly increased,¹⁹³ illustrate the need for this reform. Because the state of California has heightened pleading standards for ADA cases, frivolous litigants are now filing their cases in federal court instead of state court.¹⁹⁴ For example, in *Schutz v. Cuddeback*, the Southern District of California criticized this activity as “forum shopping” because the plaintiff was clearly seeking to avoid the heightened pleading standards in California state court.¹⁹⁵ The need for reform was also well-illustrated by the prior example of *Banana Republic*, where the litigants did not even realize that the store chain does not sell bananas.¹⁹⁶ The Online Accessibility Act hinted at this need for heightened pleading standards in Section 603, proposing

190. See 14 C.F.R. § 382.43.

191. See 36 C.F.R. § 1194 App. D.

192. See Joseph A. Seiner, *Pleading Disability*, 51 B.C.L. Rev. 95, 97-98 (2010) (discussing “confusion over the proper pleading standards to apply . . .,” in disability cases).

193. See Minh Vu et al., *ADA Title III Federal Lawsuit Filings Hit An All Time High*, SEYFARTH: ADA TITLE III (Feb. 17, 2022), <https://www.adatitleiii.com/2022/02/ada-title-iii-federal-lawsuit-filings-hit-an-all-time-high/>.

194. See Martin H. Orlick & Stuart K. Tubis, *California’s Central District tries to curb high frequency ADA litigant filings by declining supplemental jurisdiction over state law claims*, ADA COMPLIANCE & DEF. BLOG (Mar. 17, 2021), <https://ada.jmbm.com/californias-central-district-tries-to-curb-high-frequency-ada-litigant-filings-by-declining-supplemental-jurisdiction-over-state-law-claims/>.

195. *Schutz v. Cuddeback*, 262 F. Supp. 3d 1025, 1031 (S.D. Cal. 2017).

196. *Dominguez*, No. 1:19-CV-10171-GHW, 2020 WL 1950496, at *30; see *supra* note 158 and accompanying text.

that “[i]n any action filed under this title, the complaint shall plead with particularity each element of the plaintiff’s claim, including the specific barriers to access a consumer facing website or mobile application.”¹⁹⁷

Heightened pleading standards could require that a complaint filed by a plaintiff include specific references to success criteria in the Web Content Accessibility Guidelines. So, if a web accessibility barrier is claimed, the plaintiff would also need to note specifically where in the WCAG potential solutions are provided. Using this approach would get around the reality that a statute or regulation may not yet require the use of WCAG, so it would not be possible to require a complaint to document how existing barriers would violate WCAG. However, there would not be any reason why potential *solutions* described in WCAG could not be required in a complaint. Similarly, a complaint could be required to document the types of evaluation methods used to determine that there were accessibility barriers: users with disabilities, expert (manual) evaluations, or automated testing tools. While requiring more information related to tools and guidelines would likely not be problematic for plaintiffs with disabilities who want to file individual lawsuits for access, the heightened pleading standards could potentially stop some of the drive-by lawsuits, where the barrier of providing the additional information may stop those who are filing 100 lawsuits a day.

4. Legal certification of tools, individuals, and firms that conduct evaluations or remediations.

The authors suggest legal certification for both tools and firms that assist with both evaluation and remediation of web accessibility. Defendants who are sued often do not know where to turn to determine whether their website is indeed accessible, and therefore, they often settle instead. What if there were pre-vetted tools, or pre-vetted individuals, or pre-vetted firms, who had a certification for evaluating for accessibility—or for remediating? That would provide some guidance on who could be trusted. While such certifications do not exist in a legal sense, there are existing efforts to certify individuals and organizations at a professional level.¹⁹⁸ The proposed certification could be

197. Online Accessibility Act, H.R. 1100, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-bill/1100/text>.

198. See, e.g., *Web Accessibility Specialist*, INTERNATIONAL ASSOCIATION OF ACCESSIBILITY PROFESSIONALS, <https://www.accessibilityassociation.org/s/>

similar to what Underwriters Laboratory (UL)¹⁹⁹ does when they certify the safety of physical products.²⁰⁰ The certifying agency could even be a federal body, such as the U.S. Access Board.²⁰¹ A clear process of certification and validation through audits that have an oversight board would be a much better approach than the current one, in which various companies and individuals claim that they can test and validate websites for compliance. A state example of a guided process is Massachusetts, with its IT Acquisition Access Compliance Program, which outlines the accessibility requirements that must be included in any IT system contract for the state of Massachusetts.²⁰² The earlier mentioned “Trusted Tester” program for the Department of Homeland Security²⁰³ is an example of the type of certification program for individuals that could be expanded to certify individuals as being qualified to evaluate or remediate for web accessibility, since Trusted Tester focuses, not surprisingly, on testing methods. Figure 1 illustrates the authors’ recommendations with a flowchart of how the process of using certified firms, people, or tools might work.

wascertification.

199. Underwriters Laboratories Inc. provides safety standards, testing, and certification for a variety of services and physical products. *See About UL*, UL, <https://www.ul.com/about> (last visited June 10, 2022).

200. *See Certification*, UL, <https://www.ul.com/services/certification> (last visited Mar. 1, 2022).

201. The U.S. Access Board is a federal agency that creates design guidelines and technical standards related to accessibility for people with disabilities. The Access Board has staff, as well as an actual “board” which is comprised of a combination of representatives of federal agencies involved with disability, and members of the public with disabilities. For more information, see *About the U.S. Access Board*, U.S. ACCESS BD., <https://www.access-board.gov/about/> (last visited Apr. 10, 2022).

202. *See IT Acquisition Access Compliance Program*, MASS.GOV, <https://www.mass.gov/guides/it-acquisition-access-compliance-program> (last visited Nov. 19, 2021).

203. LAZAR ET AL., *supra* note 1, at 192-93.

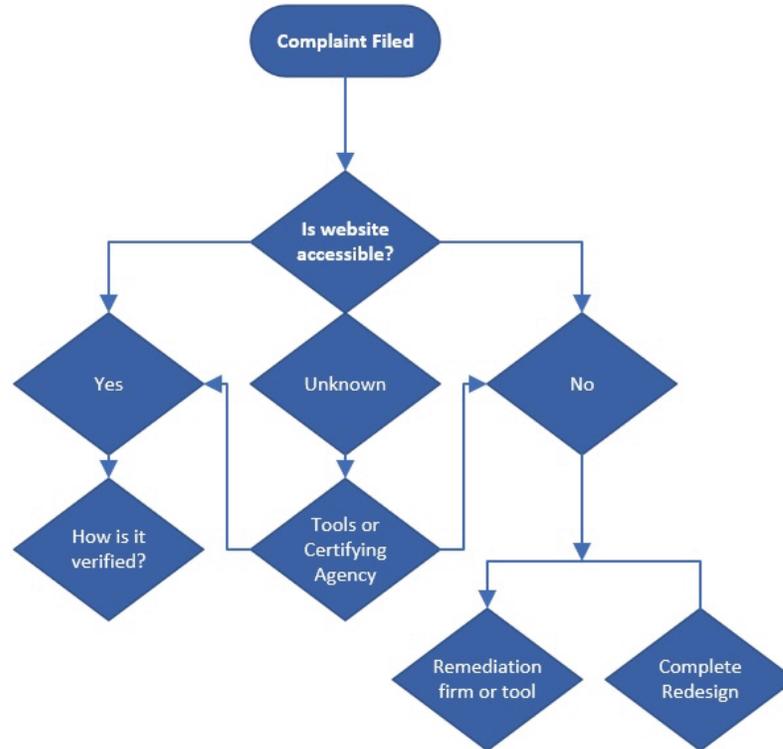


Figure 1. The proposed flow from a complaint being filed to remediation

5. Indemnification remediation / transfer of liability is yet another possibility.

As of now, no providers of tools or consulting services for accessibility are required to guarantee their work through indemnification. Using the indemnification approach, if a theoretical company, Widgets, Inc., hired a theoretical consulting firm, Accessibility and Family, to remediate their website for accessibility, the procurement contract would be required to contain a clause whereby Accessibility and Family would indemnify Widgets, Inc. against any lawsuits for an inaccessible website for a period of six months after the work is completed. At this point, companies which provide consulting services and tools for evaluating or remediating for accessibility generally do not

indemnify their clients against lawsuits, and as far as we know, there are no such requirements at the state or federal levels. While the use of indemnification clauses is gaining attention in the procurement of technologies by universities and K-12 education (many of which are afraid of being sued for inaccessible technology),²⁰⁴ the indemnification model used for websites would need to be different. Purchasing a piece of hardware, which generally will not change over time, is different from developing or remediating a website for accessibility, since the website will certainly change within months. Therefore, the indemnification clause in the latter case will need to have a shorter timeline, perhaps three to six months. In line with the previous suggestion about certification of people, firms, or technologies that evaluate or remediate for accessibility, there could potentially be a link between the certification of expertise and the requirement to indemnify for a short period of time—a requirement almost akin to “malpractice insurance” used by healthcare workers.

There is currently no barrier to entry for accessibility remediation services, so their output may be of varied quality, with some instances of fraud. Given the existing problem with drive-by lawsuits, requiring or encouraging indemnification could be an option. Web accessibility overlay transactions provide an example of why indemnification could be useful. Currently, overlay companies claim to fix all aspects of a website related to accessibility by providing an overlay tool, which does not actually fix any of the underlying code and does not address a majority of the accessibility problems.²⁰⁵ Over 700 individuals, including accessibility experts and advocates, have signed a statement against the use of overlays and their deceptive marketing,²⁰⁶ and companies that have installed overlays are still being sued for having inaccessible websites.²⁰⁷ Perhaps these companies should be required to provide indemnification in case their clients are

204. S.B. 617, 2022 Leg., 444th Sess. (Md. 2022).

205. See Timothy Springer, Lies, Damned Lies, Overlays and Widgets, LINKEDIN (June 25, 2020), <https://www.linkedin.com/pulse/lies-damned-overlays-widgets-timothy-springer/>; see generally *Legal Update: Accessibility Overlay Edition*, LAINEY FEINGOLD (Dec. 28, 2021), <https://www.lflegal.com/2021/11/overlay-legal-update/>.

206. See *Overlay Fact Sheet*, *supra* note 55.

207. See, e.g., Complaint for Declaratory and Injunctive Relief at 12-16, *Murphy v. Eyebobs, LLC*, No. 1:21-cv-17, 2021 WL 5331389 (W.D. Pa. Jan. 7, 2021) (documenting how overlays did not actually make the website accessible). For an ongoing update of cases where the use of overlays did not protect companies from lawsuits for inaccessible websites, see *Legal Update*, *supra* note 205.

sued. And perhaps companies that are certified to audit or remediate accessibility should be required to bear a responsibility to provide insurance/indemnity for a period of time.

CONCLUSION

In the existing legal framework for web accessibility for public accommodations under Title III of the ADA, organizations that are sued struggle to understand the tools and guidelines that can help them remediate their websites for accessibility and often fall back on simply settling a suit to “make it go away” rather than actually addressing the issues of accessibility. As a result, frivolous lawsuits continue to be filed, all while people living with disabilities are denied their statutorily protected right to accessible public accommodations. For the rights of people with disabilities to be protected and to move the ADA’s goals of inclusion forward, the legal framework needs to be clarified. This Article argues that the major weakness of the existing legal framework for web accessibility for public accommodations is that it does not even acknowledge the existence of automated tools and guidelines, making compliance much harder. Automated tools and guidelines are necessary for defining and validating accessibility, and without them, there is an environment of confusion that encourages an increased number of web accessibility lawsuits. Potential legal solutions which incorporate tools and guidelines that this Article has discussed include: (1) new statutes, (2) new/updated regulations, (3) heightened pleading standards, (4) legal certification of individuals, organizations, and tools that evaluate or remediate web accessibility, and (5) the encouragement or requirement of indemnification for accessibility remediation vendors.