

# NOTE

## WEBSITES, WELLNESS, AND WINN-DIXIE: TELEHEALTH ACCESSIBILITY DURING COVID-19 AND BEYOND

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### INTRODUCTION

In a matter of weeks, everything changed. Schools closed, the economy shut down, and even the simple act of going to the grocery store became a risk. The onset of the COVID-19 pandemic coupled with stay-at-home orders in early 2020 led to a sharp rise in the use of the internet for health care purposes.<sup>1</sup> For example, American telehealth usage increased by 7800% between February and April of 2020 alone.<sup>2</sup> While the usage has decreased somewhat as the pandemic has waned, as of July 2021 it had “stabilized at levels [thirty-eight

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† J.D., Cornell Law School, 2023. This Note is dedicated to my friends Joshua Olshaw and Rehan Baddeliyanage for constantly inspiring me to advocate for what I believe in, even though they are no longer here with us. I also want to express my appreciation for my parents Sandra and Joseph, my partner Esmé, and the Notes Editors of *Cornell Law Review*—each of you had more of an impact on this piece than you will ever know. All errors are mine.

<sup>1</sup> Oleg Bestenny, Greg Gilbert, Alex Harris & Jennifer Rost, *Telehealth: A Quarter-Trillion-Dollar Post-COVID-19 Reality?*, MCKINSEY & CO. (July 9, 2021), <https://www.mckinsey.com/industries/healthcare-systems-and-services/our-insights/telehealth-a-quarter-trillion-dollar-post-covid-19-reality> [https://perma.cc/J5D8-U3WS].

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

times] higher than [usage was] before the pandemic.”<sup>3</sup> Going forward, health care experts predict that, especially as society is now more accustomed to remote health care, telehealth is likely to remain a widespread method of providing health care.<sup>4</sup>

While telehealth offers a wide array of benefits, including lower health costs and—in many cases—increased patient convenience,<sup>5</sup> it also presents access concerns for people with disabilities, particularly for (but not limited to) patients who are blind or deaf.<sup>6</sup> During the pandemic, people with disabilities struggled to find proper access to health care. According to a report by the disability services organization Easterseals, approximately forty-six percent of those who had used Easterseals services lost access to health care between the beginning of the public health emergency in March 2020 and April 2021.<sup>7</sup> Furthermore, forty-two percent of those surveyed did not engage in telehealth, citing, among other reasons, “access issues” or “feeling [telehealth] would not serve their needs.”<sup>8</sup> Given the high likelihood that telehealth will remain significant in the landscape of American health care going forward, legal and policy experts have expressed concerns about the potential effects this may have on people with disabilities.<sup>9</sup>

This Note will focus on the relationship between websites and Title III of the Americans with Disabilities Act (ADA)<sup>10</sup> with

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

<sup>4</sup> See Thiru M. Annaswamy, Monica Verduzco-Gutierrez, & Lex Frieden, *Telemedicine Barriers and Challenges for Persons with Disabilities: COVID-19 and Beyond*, 13 *DISABILITY HEALTH J.*, 1, 2 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7346769/> [<https://perma.cc/424V-X2EL>].

<sup>5</sup> Brian William Hasselfeld, *Benefits of Telemedicine*, *JOHNS HOPKINS MEDICINE*, <https://www.hopkinsmedicine.org/health/treatment-tests-and-therapies/benefits-of-telemedicine> [<https://perma.cc/NZG2-N8WC>] (last visited Sept. 26, 2021).

<sup>6</sup> See *Easy Ways to Make Your Website More Accessible*, *MEDIACURRENT* (Mar. 23, 2016), <https://www.mediacurrent.com/blog/easy-ways-make-your-website-more-accessible/> [<https://perma.cc/5BUQ-TD87>].

<sup>7</sup> EASTERSEALS, *COVID-19'S IMPACT ON PEOPLE WITH DISABILITIES 4* (2021), <https://www.easterseals.com/shared-components/document-library/media-room/easterseals-study-on-the-impact-of-covid-full.pdf> [<https://perma.cc/3AW6-DQZD>].

<sup>8</sup> *Id.* at 28.

<sup>9</sup> Annaswamy, Verduzco-Gutierrez & Frieden, *supra* note 4, at 2.

<sup>10</sup> It is important to consider that, inter alia, Title II of the ADA, Section 504 of the Rehabilitation Act, and Section 1557 of the Affordable Care Act (ACA) may also impact telehealth access. Blake E. Reid, Christian Vogler & Zainab Alkebsi, *Telehealth and Telework Accessibility in a Pandemic-Induced Virtual World*, *U. COLO. L. REV. F.* 1, 5 n.17 (2020). However, Title II primarily applies to governmental institutions. *Id.* Furthermore, Section 1557 of the ACA applies to some health-care entities—granting the antidiscrimination protections of Section

a specific emphasis on websites that provide telehealth services. First, I will explore the historical context behind the ADA and the ways in which this context supports its application to telehealth. Second, I will argue that, while the “sufficient nexus” test<sup>11</sup> used in several circuits poses various legal and policy issues that make it unsuited to execute the ADA’s purpose of preventing discrimination, telehealth succeeds under both this test as well as its alternative, the “privately operated” test. Third, I will discuss the implications of establishing that Title III applies to telehealth both within and beyond the health care field, while suggesting how relevant stakeholders can adapt to such a change.<sup>12</sup>

## I

### BACKGROUND

#### A. Telehealth

The United States Department of Health and Human Services (HHS) defines telehealth as “the use of electronic information and telecommunications technologies to support and promote long-distance clinical health care, patient and professional health-related education, and public health and health administration.”<sup>13</sup> While telehealth has received a lot of

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504 to some health care providers that may otherwise have only been subject to Title III—but only those that receive federal funding. *Id.* Furthermore, regulations promulgated by the Trump administration specifically exempted “health insurance companies and most private health plans” from Section 1557. Wayne Turner, *Health Insurers Should be Wary of Trump Regulatory Rollback*, NAT’L HEALTH L. PROGRAM (Aug. 6, 2020), <https://healthlaw.org/health-insurers-should-be-wary-of-trump-regulatory-rollback/> [<https://perma.cc/P5BE-X6ZC>]. The same set of regulations also narrowed the types of federal funding that qualify providers. MaryBeth Musumeci et al., *The Trump Administration’s Final Rule on Section 1557 Non-Discrimination Regulations Under the ACA and Current Status*, KAISER FAM. FOUND. (Sept. 18, 2020), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/the-trump-administrations-final-rule-on-section-1557-non-discrimination-regulations-under-the-aca-and-current-status/> [<https://perma.cc/QWM5-7BYM>]. Given these limitations, one can conclude that Title III is currently the most relevant piece of legislation regarding universal telehealth access at this time, and these other pieces of legislation are beyond the scope of this Note.

<sup>11</sup> This test requires a website to have a strong enough relationship with a physical location such as a store or office to fall under Title III. *Infra* Part I.C.

<sup>12</sup> While there are a variety of public policy considerations to make regarding the ADA and accessibility in general, especially as they pertain to health care, this Note will consider that secondarily to the underlying legal considerations.

<sup>13</sup> *What is Telehealth?*, U.S. DEP’T OF HEALTH & HUM. SERVS., <https://www.hhs.gov/hipaa/for-professionals/faq/3015/what-is-telehealth/index.html> [<https://perma.cc/RMX7-6FFG>] (last visited Nov. 15, 2021). Note that, while HHS does support ADA enforcement, it does so largely through the supervision of state and local agencies (Title II) and does not directly supervise the ADA

attention recently due to the COVID-19 pandemic, the concept has been around to some extent for over a century, beginning with the use of telegraph communications for injured soldiers during the Civil War.<sup>14</sup> Other early examples include an 1879 article discussing doctors practicing using telephones in lieu of “unnecessary” office visits.<sup>15</sup> Interestingly enough, space exploration and the National Aeronautics and Space Administration (NASA) also contributed to the rise of telehealth, as NASA used two-way television and radios to deliver healthcare to rural communities beginning in the 1970s.<sup>16</sup> However, contemporary telehealth—as is widely considered by the health care field today and as will be considered for the purposes of this Note—unsurprisingly came into being alongside the development of the internet.<sup>17</sup>

Contemporary telehealth can be understood as coming in four forms: (1) live-video conferencing, which is any two-way video conference between a doctor and a patient; (2) asynchronous video, which is the delivery of a patient’s health history electronically; (3) remote patient monitoring, a form of monitoring patient data that is often used with senior citizens; and (4) mobile health, which is the use of applications for “smart devices” such as cell phones or tablets that focus on providing health data.<sup>18</sup> All four of these forms involve the use of websites, whether it be websites directly managed by health care providers or used by such providers via third party platforms<sup>19</sup>

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compliance of private telehealth platforms (which fall under Title III). See *Disability Laws, Regulations, and Guidance*, U.S. DEP’T OF HEALTH & HUM. SERVS., <https://www.hhs.gov/civil-rights/for-individuals/disability/laws-guidance/index.html> [<https://perma.cc/2KAE-ATSA>] (last visited Jan. 17, 2022); *infra* Part I.B.

<sup>14</sup> Karen M. Zundel, *Telemedicine: History, Applications, and Impact on Librarianship*, 84 BULL. MED. LIBR. ASS’N 71, 72 (1996), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC226126/pdf/mlab00098-0087.pdf> [<https://perma.cc/ULC4-CDDT>].

<sup>15</sup> TRACY A. LUSTIG, THE ROLE OF TELEHEALTH IN AN EVOLVING HEALTH CARE ENVIRONMENT: WORKSHOP SUMMARY 11 (2012), [https://www.ncbi.nlm.nih.gov/books/NBK207145/pdf/Bookshelf\\_NBK207145.pdf](https://www.ncbi.nlm.nih.gov/books/NBK207145/pdf/Bookshelf_NBK207145.pdf) [<https://perma.cc/5739-MXGZ>].

<sup>16</sup> See *id.* at 105.

<sup>17</sup> *Id.* at 11.

<sup>18</sup> Renae Rossow, *The Different Types of Telehealth*, ISALUS HEALTHCARE (Aug. 15, 2018), <https://isalushealthcare.com/blog/the-different-types-of-telehealth/> [<https://perma.cc/ZR3J-RQ4N>].

<sup>19</sup> See *id.*

## B. The Americans with Disabilities Act & Title III

Congress enacted the Americans with Disabilities Act (ADA) on July 26, 1990, to ensure access to public accommodations and facilities for people with disabilities.<sup>20</sup> The ADA defines disability as “a physical or mental impairment that substantially limits one or more major life activities.”<sup>21</sup> The ADA is a wide-reaching piece of legislation, but this Note will focus on Title III of the Act.<sup>22</sup> Title III consists of regulations imposed upon businesses and non-profit service providers—including public accommodations. Specifically, Title III bans discrimination based on disability “in the activities of places of public accommodations . . . and requires [that] newly constructed or altered places of public accommodation . . . comply with the ADA Standards.”<sup>23</sup>

Drafted over thirty years ago, ADA has been widely criticized by legal scholars and analysts for being outdated.<sup>24</sup> A large part of this criticism pertains to how—and if—the ADA applies to websites.<sup>25</sup> The internet did not exist in its current form at the time of the ADA’s drafting; thus, websites were not a point of consideration by lawmakers when creating the ADA.<sup>26</sup> As a result, whether websites are places of public accommodation under Title III, and thus subject to ADA requirements, is unclear.<sup>27</sup> In turn, given that health care providers fall under the “public accommodation” component of Title III, the question of whether telehealth performed over the

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<sup>20</sup> *Introduction to the ADA*, ADA.GOV, [https://www.ada.gov/ada\\_intro.htm](https://www.ada.gov/ada_intro.htm) [<https://perma.cc/EUB3-QL6C>] (last visited Sep. 27, 2021).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Public Accommodations and Commercial Facilities (Title III)*, ADA.GOV, [https://www.ada.gov/ada\\_title\\_III.htm](https://www.ada.gov/ada_title_III.htm) [<https://perma.cc/V6R4-L8KU>] (last visited Sept. 20, 2022); see also 42 U.S.C. § 12183 (describing ADA requirements for new constructions and alterations in public accommodations).

<sup>24</sup> See, e.g., Mason Marks, *Amid COVID-19, the Americans with Disabilities Act Turns 30. It Needs to Be Updated*, L.A. TIMES (July 25, 2020), <https://www.latimes.com/opinion/story/2020-07-25/ada-30-update-covid19-americans-with-disabilities-act> [<https://perma.cc/6LUB-3L2T>].

<sup>25</sup> *Id.*

<sup>26</sup> The first website did not become accessible to the public until August 6, 1991, almost a year after the enactment of the ADA. See Josie Fischels, *A Look Back at the Very First Website Ever Launched, 30 Years Later*, NPR (Aug. 6, 2021), <https://www.npr.org/2021/08/06/1025554426/a-look-back-at-the-very-first-website-ever-launched-30-years-later> [<https://perma.cc/6K7Y-B6HD>].

<sup>27</sup> See *Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearing Before the H. Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. (2000), [http://commdocs.house.gov/committees/judiciary/hju65010.000/hju65010\\_of.htm](http://commdocs.house.gov/committees/judiciary/hju65010.000/hju65010_of.htm) [<https://perma.cc/Y2KY-2UBT>].

internet by such providers are subject to ADA requirements is also unclear at this time.<sup>28</sup>

Adding further to the confusion regarding the application of the ADA to websites is the ambiguity that has been created by the legislative and executive branches. Congress has yet to issue any formal guidance surrounding this issue or to “clarify] the scope of the ADA in terms of website accessibility compliance for private companies.”<sup>29</sup> Instead, in 2018, several Republican senators formally called on the Department of Justice (DOJ), the government agency primarily responsible for enforcing the ADA, to “resolve uncertainty regarding website accessibility obligations” in a letter to then-Attorney General Jeff Sessions.<sup>30</sup> These calls have yet to be met.<sup>31</sup>

The DOJ’s enforcement mechanisms have not resolved these problems either. Over the past two decades, the DOJ has “issued, and then abandoned, several phases of agency guidance” regarding website accessibility.<sup>32</sup> The most notable example of this began in 2010, when the DOJ announced its intent to amend Title III to address website accessibility within areas of public accommodation.<sup>33</sup> Seven years later, however, these plans were formally abandoned, with the DOJ citing a need to determine whether such regulations were “necessary and appropriate.”<sup>34</sup> The abandonment of these plans also appears to have been politically motivated, arising out of a need to comply with then-President Donald Trump’s Executive Order 13,771, which required government agencies to

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<sup>28</sup> See Reid, Vogler & Alkebsi, *supra* note 10, at 7.

<sup>29</sup> Jason P. Brown & Robert T. Quackenboss, *The Muddy Waters of ADA Website Compliance May Become Less Murky in 2019*, HUNTON ANDREWS KURTH (Jan. 3, 2019), [https://www.huntonlaborblog.com/2019/01/articles/public-accommodations/muddy-waters-ada-website-compliance-may-become-less-murky-2019/#\\_ftnref2](https://www.huntonlaborblog.com/2019/01/articles/public-accommodations/muddy-waters-ada-website-compliance-may-become-less-murky-2019/#_ftnref2) [<https://perma.cc/RJ2K-U47D>].

<sup>30</sup> Letter from Senator Charles E. Grassley et al., to the Honorable Jeff Sessions, Att’y Gen., U.S. Dep’t of Just. (Sept. 4, 2018), <https://www.judiciary.senate.gov/imo/media/doc/2018-1004%20Grassley,%20Rounds,%20Tillis,%20Crapo,%20Cornyn,%20Ernst%20to%20Justice%20Dept.%20-%20ADA%20Website%20Accessibility.pdf> [<https://perma.cc/KNS4-W3M5>].

<sup>31</sup> Brown & Quackenboss, *supra* note 29.

<sup>32</sup> *Id.*

<sup>33</sup> See Carly Malamud, *Split Circuits Make More Trouble for the Disabled Community During COVID-19*, AMERICAN U. J. GENDER, SOC. POLICY & L. (Nov. 20, 2020), [http://www.jgspl.org/split-circuits-make-more-trouble-for-the-disabled-community-during-covid-19/#\\_ftnref18](http://www.jgspl.org/split-circuits-make-more-trouble-for-the-disabled-community-during-covid-19/#_ftnref18) [<https://perma.cc/EV3A-RSUX>]; Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions, 82 Fed. Reg. 60932, 60932 (Dec. 26, 2017), <https://www.govinfo.gov/content/pkg/FR-2017-12-26/pdf/2017-27510.pdf> [<https://perma.cc/MTT4-N58C>] [hereinafter Notice of Withdrawal].

<sup>34</sup> Notice of Withdrawal, *supra* note 33.

eliminate two or more regulations for each new regulation they issued.<sup>35</sup> As a party to litigation and amici, the DOJ has also interpreted the ADA as requiring private entities to ensure that their websites follow accessibility requirements.<sup>36</sup> However, this interpretation is not legally binding regulation.<sup>37</sup>

### C. The History and Interpretation of the ADA

The history of the ADA began long before its passage in 1990.<sup>38</sup> The racially-focused Civil Rights Movement of the 1960s inspired various other forms of civil rights advocacy—including those focused on disability rights.<sup>39</sup> However, the Civil Rights Act of 1964 did not include protections for people with disabilities.<sup>40</sup> Section 504 of the Rehabilitation Act of 1973 provided anti-discriminatory protection for people with disabilities, but the legislation only applied to entities that received federal funding.<sup>41</sup> In the late 1970s and early 1980s, the federal government developed an agency called the National Council on Disability (NCD) to offer insights and recommendations for federal policies impacting people with disabilities.<sup>42</sup> In response to the lack of protections granted by

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<sup>35</sup> Elizabeth Pendo, *The Costs of Uncertainty: The DOJ's Stalled Progress on Accessible Medical Equipment Under the Americans with Disabilities Act*, 12 ST. LOUIS U. J. HEALTH L. & POL'Y 351, 358 (2019), <https://scholarship.law.slu.edu/cgi/viewcontent.cgi?article=1350&context=Faculty>

<sup>36</sup> George M. Powers, Lex Frieden, & Vinh Nguyen, *Telemedicine: Access to Health Care for People with Disabilities*, 17 HOUS. J. HEALTH L. & POL'Y 7, 17 (2017).

<sup>37</sup> See *id.* at 18 (implying that the DOJ's interpretation does not resolve the ambiguity regarding the relationship between websites and Title III of the ADA).

<sup>38</sup> Arlene Mayerson, *The History of the Americans with Disabilities Act: A Movement Perspective*, DISABILITY RTS. EDUC. & DEF. FUND (1992), <https://dredf.org/about-us/publications/the-history-of-the-ada/> [<https://perma.cc/GL9H-N5NH>].

<sup>39</sup> *A Brief History of the Disability Rights Movement*, ANTI-DEFAMATION LEAGUE (May 3, 2022), <https://www.adl.org/education/resources/backgrounders/disability-rights-movement> [<https://perma.cc/42RK-NVQT>].

<sup>40</sup> *Id.* The Civil Rights Act of 1964 prohibits discrimination on the basis of race, religion, sex, and national origin. See Civil Rights Act of 1964, Pub. L. No. 88-353, 78 Stat. 241 (1964). Disability rights have often been labeled as the “overlooked civil rights issue” by historians and scholars because, unlike many other forms of civil rights, people often conceptualize disability using an “impairment model” (the idea that one must cure their disability in order to receive equality) rather than a “civil rights model.” See Doris Zames Fleischer & Frieda Zames, *Disability Rights: The Overlooked Civil Rights Issue*, 25 DISABILITY STUD. Q. (2005), <https://dsq-sds.org/article/view/629/806> [<https://perma.cc/4ZNG-LDF4>].

<sup>41</sup> *ADA History—In Their Own Words: Part One*, ADMIN. CMTY. LIVING, <https://acl.gov/ada/origins-of-the-ada> [<https://perma.cc/9ZE5-RWQK>] (last visited Mar. 7, 2022). Notably, “many small and individual health care providers” were not subject to Section 504. *Id.*

<sup>42</sup> *Id.*

Section 504, the NDC released a report in 1986 that influenced the first draft of what would become the ADA.<sup>43</sup> In April of 1988, Senators Lowell Weicker and Tom Harkin, of Connecticut and Iowa respectively, introduced the ADA to Congress, and it would be enacted as law two years later.<sup>44</sup>

Given this history, the ADA has been described as “the culmination of decades of political activism by and for the [fifty] million Americans living with a disability who were seeking equal rights after centuries of discrimination, isolation and dehumanization.”<sup>45</sup> Protests for disability rights had become commonplace throughout the 1980s, and the ADA’s passage is believed to have been accelerated due to a now-famous protest outside the Capitol on March 12, 1990, as Congress was debating what would become of the ADA.<sup>46</sup>

At its core, the ADA is a civil rights law.<sup>47</sup> It prohibits discrimination based on ability status while simultaneously requiring that public places provide accommodations that help grant access to people with “any kind of disability.”<sup>48</sup> The ADA includes as public places subject to its application places of employment (Title I), public services (Title II), public accommodations (Title III), and telecommunications (Title IV). The ADA makes its goals clear, stating:

It is the purpose of this chapter—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Josh Cunningham, *ADA Turns 30: Supporters Celebrate Progress for Those with Disabilities*, NAT’L CONF. OF STATE LEGISLATURES (July 8, 2020), <https://www.ncsl.org/research/labor-and-employment/the-ada-turns-30-magazine2020.aspx> [<https://perma.cc/BZ2T-VQV2>].

<sup>46</sup> *Id.* This protest came to be known as the “Capitol Crawl” because the Capitol did not have wheelchair ramps at the time (as there was no legislation requiring such accommodations). Those protesting from wheelchairs began to crawl up the steps of the building. *See id.*; Stephen Kaufman, *They Abandoned Their Wheelchairs and Crawled Up the Capitol Steps*, SHAREAMERICA (Mar. 12, 2015), <https://share.america.gov/crawling-up-steps-demand-their-rights/> [<https://perma.cc/A8K3-YD97>].

<sup>47</sup> *See* Fleischer & Zames, *supra* note 40.

<sup>48</sup> *See* Cunningham, *supra* note 45.



(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.<sup>49</sup>

The ADA defines “a person with a disability” in three ways. Firstly, the definition includes (1) anyone “who has a physical or mental impairment that substantially limits one or more major life activit[ies].”<sup>50</sup> The legislation also pertains to people who (2) have a record of a disability or (3) are considered to have a disability, even if they do not in reality have such disability.<sup>51</sup> Furthermore, the legislation does not define many of its key terms, most notably “substantially limits” and “major life activity,” leaving courts with the responsibility of interpretation.<sup>52</sup>

Title III of the ADA focuses on requirements for spaces of “public accommodation,” stating that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment . . . of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”<sup>53</sup> This statement is followed by an explanation of what constitutes “discrimination,” including, *inter alia*,

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 . . . .<sup>54</sup>

Title III also attempts to define the term “public accommodation,” stating that the term encompasses:

(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

<sup>49</sup> 42 U.S.C. § 12101(b).

<sup>50</sup> *What is the Definition of Disability Under the ADA?*, ADA NAT'L NETWORK, <https://adata.org/faq/what-definition-disability-under-ada> [<https://perma.cc/2RMB-PMNJ>] (last visited Nov. 1, 2022).

<sup>51</sup> *Id.*

<sup>52</sup> Priya Elayath, Note, *Americans with Disabilities Act's Title III Public Accommodations and Its Application to Web Accessibility and Telemedicine*, 17 U. ST. THOMAS L.J. 156, 160 (2020).

<sup>53</sup> 42 U.S.C. § 12182(a).

<sup>54</sup> 42 U.S.C. § 12182(b)(2)(A)(iii) (emphasis added).

- occupied by the proprietor of such establishment as the residence of such proprietor;
- (B) a restaurant, bar, or other establishment serving food or drink;
- (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
- (D) an auditorium, convention center, lecture hall, or other place of public gathering;
- (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
- (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
- (G) a terminal, depot, or other station used for specified public transportation;
- (H) a museum, library, gallery, or other place of public display or collection;
- (I) a park, zoo, amusement park, or other place of recreation;
- (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
- (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
- (L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.<sup>55</sup>

On September 25, 2008, then-President George W. Bush signed the ADA Amendments Act of 2008 (ADAAA).<sup>56</sup> In the aftermath of a number of Supreme Court cases that had interpreted the text of the ADA narrowly,<sup>57</sup> Congress passed the ADAAA to broaden what it means for a person to have a disability.<sup>58</sup> While the three primary forms of the definition remained, the ADAAA established that “[t]he definition of ‘disability’ should be interpreted broadly,” expanded the term

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<sup>55</sup> 42 U.S.C. § 12181(7).

<sup>56</sup> *The Americans with Disabilities Act Amendments Act of 2008*, EEOC, <https://www.eeoc.gov/statutes/americans-disabilities-act-amendments-act-2008> [<https://perma.cc/T2G6-QEP4>] (last visited Mar. 7, 2022) [hereinafter *ADA Amendments Act*].

<sup>57</sup> See *Sutton v. Unites Airlines, Inc.*, 527 U.S. 471, 475 (1999) (holding that the term “substantial limitation” requires more than just the inability to perform a particular task); *Toyota Motor Mfg., Ky. Inc. v. Williams*, 534 U.S. 184, 187 (2002) (holding that “substantial limitation” is an exceptionally high standard). These cases were later abrogated. See *infra* note 60 and accompanying text.

<sup>58</sup> *ADA Amendments Act of 2008*, HOWARD U. L. LIBR., <https://library.law.howard.edu/civilrightshistory/disabled/adaamendments> [<https://perma.cc/CY56-8L8M>] (last visited Nov. 18, 2021).

“[m]ajor life activities” to include “the operation of major bodily functions,” and clarified the meaning of “physical and mental impairments” by providing specific examples including “dyslexia and Attention-Deficit/Hyperactivity Disorder (ADHD)” as well as “cancer, diabetes, and epilepsy.”<sup>59</sup> The ADAAA also overturned several of the aforementioned Supreme Court cases that Congress considered to be overly restrictive in their definitions of disability.<sup>60</sup> However, the legislation did not at all address the relationship between the ADA and websites.

#### D. Website Accessibility Case Law

As a result of this statutory silence, circuit courts are split on the ADA’s applicability to websites. The First<sup>61</sup> and Seventh<sup>62</sup> Circuits have, in recent years, held that all privately operated websites that fall within Title III are required to follow ADA guidelines.<sup>63</sup> Three other Circuits—the Third<sup>64</sup>, Sixth<sup>65</sup>, and Ninth<sup>66</sup>—have opted to use a “sufficient nexus test” when determining whether the ADA applies to non-physical locations such as websites. According to this test, a website must have a “sufficient nexus” to a physical place of business, such as a store or office.<sup>67</sup> In the case of the Third and Sixth Circuits, this has functionally meant that the services in question must specifically involve a physical location, and would indicate that

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<sup>59</sup> *Questions and Answers About the Department of Justice’s Final Rule Implementing the ADA Amendments Act of 2008*, ADA.GOV, [https://www.ada.gov/regs2016/adaaa\\_qa.html](https://www.ada.gov/regs2016/adaaa_qa.html) [<https://perma.cc/L9ED-ZZ2P>] (last visited Nov. 18, 2021).

<sup>60</sup> *Fact Sheet on the EEOC’s Final Regulations Implementing the ADA*, EEOC (May 3, 2011), <https://www.eeoc.gov/laws/guidance/fact-sheet-eeocs-final-regulations-implementing-adaaa> [<https://perma.cc/TC48-6RPJ>].

<sup>61</sup> See *Carparts Distrib. Ctr. v. Auto Wholesaler’s Ass’n of New England*, 37 F.3d 12, 20 (1st Cir. 1994); *Nat’l Ass’n of the Deaf v. Netflix*, 869 F. Supp. 2d 196, 196 (D. Mass. 2012).

<sup>62</sup> *Morgan v. Joint Admin. Bd., Ret. Plan of Pillsbury*, 268 F.3d 456, 459 (7th Cir. 2001).

<sup>63</sup> A recent district court in the Fourth Circuit found that a physical location is not required, but this has yet to be solidified by the Fourth Circuit. See *Mejico v. Alba Web Designs, LLC*, 515 F. Supp. 3d 424, 433-34 (W.D. Va. 2021) (“[T]he court is persuaded that places of ‘public accommodation’ are not limited to brick-and-mortar establishments and instead include commercial websites that offer goods and services.”).

<sup>64</sup> *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 613 (3rd Cir. 1998).

<sup>65</sup> *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1011 (6th Cir. 1997).

<sup>66</sup> *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898, 904–05 (9th Cir. 2019).

<sup>67</sup> *Id.*; see also *Jancik v. Redbox Automated Retail, LLC*, No. SACV 13-1387-DOC (RNBx), 2014 WL 1920751, at \*8–9 (C.D. Cal. May 14, 2014) (finding that the defendant company’s online streaming services did not have a sufficient nexus to their physical DVD kiosks and, thus, was not subject to Title III requirements).

websites are not places of public accommodation.<sup>68</sup> The Ninth Circuit, however, has demonstrated a more flexible interpretation of “sufficient nexus,” having established that websites can have such nexuses with physical locations.<sup>69</sup> The Second Circuit is itself divided over this issue, with different district courts determining both that websites are places of public accommodation as well as that they must belong to businesses with physical locations to fall under such categorization.<sup>70</sup>

This split has only been made more complicated by the Eleventh Circuit, which declared in April 2021 in *Gil v. Winn-Dixie Stores* that websites are not places of public accommodations at all and thus are not subject to Title III to begin with.<sup>71</sup> This marks a much more stringent approach than those used by other circuits in the past.

*Gil*—the first case focused on the applicability of the ADA to websites to go to trial in 2017—has come to symbolize the circuit split and general ambiguity surrounding this issue.<sup>72</sup> Originally, the district court found that the defendant, the Winn-Dixie grocery store chain, had discriminated against a visually-impaired customer by failing to program the website so that it functioned with screen readers.<sup>73</sup> The court reasoned that, by having a website with specific functions for customers,

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<sup>68</sup> *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000) (explaining the origin of the sufficient nexus doctrine in these three Circuits).

<sup>69</sup> *Robles*, 913 F.3d at 905.

<sup>70</sup> *Compare Nat'l Fed'n of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565, 576 (D. Vt. 2015) (ruling that websites are places of public accommodation should they “fall within any of the general categories of public accommodations listed in the statute”) *with Winegard v. Newsday LLC*, 556 F. Supp. 3d 173, 174 (E.D.N.Y. 2021) (ruling that websites need to be connected physical location to be considered places of public accommodation).

<sup>71</sup> *Gil v. Winn-Dixie Stores, Inc.*, 993 F.3d 1266, 1270 (11th Cir. 2021) (citations omitted); Michael Pryor, Christine Samsel, Jonathan Sandler & Nicholas Santucci, *Circuit Courts Further Diverge on Website Accessibility*, BROWNSTEIN (Apr. 26, 2021), [https://www.bhfs.com/insights/alerts-articles/2021/circuit-courts-further-diverge-on-website-accessibility#\\_ftn1](https://www.bhfs.com/insights/alerts-articles/2021/circuit-courts-further-diverge-on-website-accessibility#_ftn1) [<https://perma.cc/B2R3-L4JW>]. While not related to telehealth specifically, the reasoning of the court in this case would imply that telehealth platforms would not be privy to ADA requirements either.

<sup>72</sup> *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340, 1349–50 (S.D. Fla. 2017).

<sup>73</sup> *Gil*, 257 F. Supp. 3d at 1349. “Screen readers are software programs that allow blind or visually impaired users to read the text that is displayed on the computer screen with a speech synthesizer or braille display.” *Screen Readers*, AM. FOUND. FOR THE BLIND, <https://www.afb.org/blindness-and-low-vision/using-technology/assistive-technology-products/screen-readers> [<https://perma.cc/RK6S-37VD>] (last visited Sept. 19, 2022).

such as placing prescription orders and redeeming coupons, “[Winn-Dixie’s] website is heavily integrated with Winn-Dixie’s physical store locations and operates as a gateway to the physical store locations.”<sup>74</sup> Winn-Dixie, thus, was expected under the ADA to “adapt its website for visually impaired shoppers like [the plaintiff].”<sup>75</sup> Four years later, however, the Eleventh Circuit reversed the decision, instead applying a textualist approach to Title III.<sup>76</sup> The court argued that, because websites are not one of the twelve enumerated places of public accommodation under Title III of the ADA, they did not fall under its purview.<sup>77</sup> This case has fostered controversy due to its narrow interpretation and is seen by many as a step backwards in the disability rights movement.<sup>78</sup>

## II

### ANALYSIS

#### A. Telehealth as a Place of Public Accommodation

Courts have adopted two primary viewpoints regarding how to determine whether websites fall under the ADA.<sup>79</sup> Because Title III of the ADA potentially affects a diverse array of websites—from e-commerce to streaming services to food delivery services—a variety of different types of other cases from recent years regarding the application of Title III are relevant to telehealth accessibility. The first side of the circuit split—which poses that all websites are places of public accommodation—more accurately aligns with the intention and text of the ADA while avoiding the negative outcomes

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<sup>74</sup> *Id.*

<sup>75</sup> Lisa Brauner, Gary Smith & Brian Wallen, *Website Compliance with the ADA: Gil v. Winn-Dixie Stores and a Web of Confusion for Businesses and Nonprofits*, J.D. SUPRA (May 6, 2021), <https://www.jdsupra.com/legalnews/website-compliance-with-the-ada-gil-v-5213145/> [https://perma.cc/495R-TLHX].

<sup>76</sup> *Gil*, 993 F.3d at 1274–75.

<sup>77</sup> *Id.* at 1276–77.

<sup>78</sup> See Lainey Feingold, *Narrow Winn-Dixie Court Opinion Limits Certain Types of Web Accessibility Lawsuits in Three U.S. States*, LF LEGAL (Apr. 11, 2021), <https://www.lflegal.com/2021/04/winn-dixie-appeal/> [https://perma.cc/CN25-CSAT] (“[T]he [Winn-Dixie] Opinion ignores the language and intent of the ADA, the rights of disabled people, and the reality of the 21st century digital world . . .”). The case also divided the hearing panel itself; it was a 2-1 decision with the dissenting judge arguing that the district court ruling should stand. *Id.*; see *Gil*, 993 F.3d at 1284–99 (Pryor, J., dissenting).

<sup>79</sup> William Goren, *Nexus, Doe, or 42 USC § 12181(7): When Must an Internet Site Be Accessible to Persons with Disabilities?*, UNDERSTANDING THE ADA (June 29, 2020), <https://www.understandingtheada.com/blog/2020/06/29/nexus-doe-42-usc-§121817-internet-site-accessibility/> [https://perma.cc/85SB-6F36].

resulting from the second side's nexus test. Telehealth, however, in fact meets the requirements for both tests and, regardless of what rule a circuit employs, should be covered by the ADA.

The intent and context of the ADA combined with the terminology used in Title III indicate that the accommodations it lists were not designed to be (and, thus, should not be interpreted as) exhaustive in the way they are interpreted by the Eleventh Circuit in *Gil*. The 2008 Amendments represent a desire from lawmakers to assume a broader approach to applying the ADA, and the DOJ itself has made statements suggesting that the enumerated locations under Title III are insufficient.<sup>80</sup> Furthermore, the twelve enumerated groups are littered with the use of terminologies such as “or other establishment[s]” and “or other place[s].”<sup>81</sup> This language suggests that the list is not designed to include every specific area of public accommodation.<sup>82</sup>

Setting aside the flaws in the Eleventh Circuit's reasoning in *Gil*, and, by extension, the Third and Sixth Circuits, the question then becomes how to determine whether telehealth should be considered an area of public accommodation. The first side of the remaining split would essentially guarantee that telehealth would fall under the ADA.<sup>83</sup> For instance, *National Association of the Deaf v. Netflix* involved an individual plaintiff and non-profit organization suing Netflix for failing to provide closed captioning for some of its streaming services.<sup>84</sup> The District of Massachusetts ruled that Title III is not solely confined to cover enumerated spaces, and that web-only businesses (such as Netflix) are subject to the purview of the ADA.<sup>85</sup>

Furthermore, in 2015, the District of Vermont argued for a broader interpretation of Title III in *National Federation of the Blind v. Scribd Inc.*<sup>86</sup> In this case, the plaintiff, who identified

<sup>80</sup> *Infra* subpart II.B.

<sup>81</sup> 42 U.S.C. § 12181(7).

<sup>82</sup> *See, e.g.*, *Brown v. BPS Direct, LLC*, No. LA CV 14-04622 JAK (JEMx), 2014 U.S. Dist. LEXIS 197419, at \*10 (C.D. Cal. Oct. 6, 2014) (“[T]his list is not exhaustive . . .”).

<sup>83</sup> Jonathan Ko, *Disability, History, and Law, Part 2: The ADA, the Internet, and the Next 30 Years*, NWSIDEBAR (July 24, 2020), <https://nwsidebar.wsba.org/2020/07/24/disability-history-and-law-part-2-the-ada-the-internet-and-the-next-30-years/> [<https://perma.cc/7WZH-LDGH>]. .

<sup>84</sup> *Nat'l Ass'n of the Deaf v. Netflix*, 869 F.Supp.2d 196, 196 (D. Mass. 2012).

<sup>85</sup> *Id.*

<sup>86</sup> 97 F. Supp. 3d 565 (D. Vt. 2015).

as blind, sued Scribd<sup>87</sup> because the company's website and mobile applications were not accessible to people with visual impairments.<sup>88</sup> The court ruled in favor of the plaintiff, claiming:

The Internet is central to every aspect of the “economic and social mainstream of American life.” In such a society, “excluding businesses that sell services through the Internet from the ADA would run afoul of the purposes of the ADA and would severely frustrate Congress’s intent that individuals with disabilities fully enjoy the goods, services, privileges, and advantages available indiscriminately to other members of the general public.”<sup>89</sup>

The second viewpoint states that, while websites are not places of public accommodations by themselves, a plaintiff with a disability can make a claim for ADA violations if a denial of equal access to a website prevented the plaintiff from equal access to the goods and services offered at the defendant's physical location or store.<sup>90</sup> Thus, if the website is found to have a “sufficient nexus” to the defendant's physical location, then the ADA may apply to the website's accessibility standards. A notable example of this is the Ninth Circuit case *Robles v. Domino's Pizza, LLC*.<sup>91</sup> In *Robles*, the plaintiff sued Domino's because its website for ordering pizzas was incompatible with the plaintiff's assistive technology.<sup>92</sup> Despite the case being originally dismissed, the Ninth Circuit found that, because Domino's pizza delivery service constituted a “service” of Domino's physical stores, their delivery website was a place of public accommodation and fell under application of the ADA—even if only because of its connection with physical Domino's stores.<sup>93</sup>

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<sup>87</sup> Scribd is a “digital library that operates reading subscription services on its website and on apps for mobile phones and tablets.” *Id.* at 567.

<sup>88</sup> *Id.* at 566–67; see *National Federation of the Blind Applauds Ruling in Scribd Case*, NAT'L FED'N OF THE BLIND (Mar. 20, 2015), <https://nfb.org/about-us/press-room/national-federation-blind-applauds-ruling-scribd-case> [<https://perma.cc/G8V9-6EBP>].

<sup>89</sup> *Nat'l Fed'n of the Blind*, 97 F. Supp. 3d at 575–76 (first quoting *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001); then quoting *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 200 (D. Mass. 2012) (internal citation omitted)).

<sup>90</sup> Goren, *supra* note 79. Note that such claims would almost certainly be unsuccessful in the Third and Sixth Circuits. See *supra* note 68.

<sup>91</sup> 913 F.3d 898 (9th Cir. 2019).

<sup>92</sup> *Id.* at 902–03.

<sup>93</sup> *Id.* at 904–05. Domino's notably petitioned for a writ of certiorari to have the Supreme Court review the case. *Domino's Pizza, LLC v. Robles*, 140 S. Ct. 122, 122 (2019). Had the writ been granted, the Supreme Court could have resolved any uncertainty regarding the applicability of the ADA to websites.

While the nexus test has been shown to allow relief for plaintiffs with disabilities in some situations, it also creates a series of problems. For example, a byproduct of this model is that video streaming websites, exclusively e-commerce retail websites, and massive open online courses (MOOCs) are all free to avoid ADA requirements because they do not have a brick-and-mortar location to connect their “services” to.<sup>94</sup> Furthermore, as the court in *National Association of the Deaf* reasoned, if courts only choose to enforce the ADA to websites for organizations that are in public (and thus have physical stores), “many businesses that provide services to a customer’s home—such as plumbers, pizza delivery services, or moving companies—would be exempt from the ADA.”<sup>95</sup> In other words, the nexus test theoretically removes ADA applicability to an entire slew of industries.

An additional problem with the nexus test is that, as the difference in the rulings of *Gil* and *Robles* shows, courts have been—in the words of ADA scholar William Goren—“all over the place with respect to what is a sufficient nexus.”<sup>96</sup> Because of a lack of certainty over what constitutes a nexus, the test as a whole adds further ambiguity to an already ambiguous problem.<sup>97</sup>

There is also no specific language in the ADA suggesting that a physical location is required for the legislation to apply. The ADA and its associated regulation state that places of public accommodation must provide any auxiliary aids and services that are needed to ensure equal access to whatever the place of public accommodation is designed to offer to the public.<sup>98</sup> However, this rule does not suggest any real physical

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However, the Court denied the writ without providing any specific reason for doing so. *Id.* (stating only that the petition is denied); Nina Overdoff, *Robles v. Domino’s Pizza Explained*, EQUIDOX, <https://equidox.co/blog/robles-v-dominos-pizza-explained-no-published-guidelines-doesnt-mean-no-standards/> [https://perma.cc/ZE6E-8JBS] (last visited Nov. 19, 2021). This is particularly curious considering the Supreme Court’s history of denying deference to the EEOC. See Theodore W. Wern, *Judicial Deference to EEOC Interpretations of the Civil Rights Act, the ADA, and the ADEA: Is the EEOC a Second Class Agency?*, 60 OHIO ST. L.J. 1533, 1533 (1999).

<sup>94</sup> Malamud, *supra* note 33.

<sup>95</sup> *Id.* (citing Nat’l Ass’n of the Deaf v. Netflix, 869 F. Supp. 2d 196, 201–02 (D. Mass. 2012)).

<sup>96</sup> Goren, *supra* note 79.

<sup>97</sup> *Id.*

<sup>98</sup> 28 C.F.R. § 36.303. The term “auxiliary aids and services” includes the “[a]cquisition or modification of equipment or devices” and “[o]ther similar services and actions”—both of which could be considered pertinent to telehealth. *Id.* at § 36.303(b)(3)–(4).



requirement.<sup>99</sup> As a result, any form of, for example, speech-to-text or hearing aids that may be considered auxiliary aids or services for telehealth are no different from ramps or other physical structures (or even the same services) that would be beneficial to a physical location—both are simply serving to ensure equal access to a specific location. While providers may be reluctant to modify their telehealth platforms due to the time and resources that it would entail, doing so is, from a regulatory perspective, equivalent to ensuring their physical offices are accessible.

In addition, there are a variety of sources in lieu of specific case law or legislation that support the idea that the ADA is intended to include websites as areas of public accommodation. In 2018, then-Assistant Attorney General Stephen Boyd sent a letter on behalf of the DOJ to House Representative Ted Budd stating that the DOJ considers the ADA to apply to websites for organizations that ordinarily would be considered public accommodations.<sup>100</sup> The letter also emphasized that this is the case despite the lack of any formal regulation.<sup>101</sup>

The Supreme Court has also hinted that it believes websites to be areas of public accommodation, or at least that they would consider the *Gil* approach to be insufficient. In

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<sup>99</sup> Goren, *supra* note 79. Goren offers Zoom—a widely-used service especially since the onset of the pandemic—as an example of this. *Id.* Goren, who is deaf, can hear to a limited level when using hearing aids, but needs to dial into Zoom through a phone (as well as log in online) to properly hear without lipreading. *Id.* As a result, Zoom—which is a video communication service and thus does not have a physical place—must provide an auxiliary aid in the form of a dial-in number for users such as Goren to properly access its services. *Id.*

<sup>100</sup> Prac. L. Com. Transactions, *DOJ Letter Comments on ADA Website Compliance Flexibility*, THOMSON REUTERS (Oct. 18, 2018), [https://1.next.westlaw.com/Document/Id224bc7ad21c11e8a5b3e3d9e23d7429/View/FullText.html?originationContext=DocHeader&contextData=\(Sc.Default\)&transitionType=document&needToInjectTerms=false&isplcsc=true&firstPage=true&bhcp=1](https://1.next.westlaw.com/Document/Id224bc7ad21c11e8a5b3e3d9e23d7429/View/FullText.html?originationContext=DocHeader&contextData=(Sc.Default)&transitionType=document&needToInjectTerms=false&isplcsc=true&firstPage=true&bhcp=1) [<https://perma.cc/FL6X-FHJ7>]. The context of this letter also further demonstrates the lack of general clarity; it came in response to a bipartisan request that the DOJ either issue formal website accessibility regulations or declare that the ADA does not apply to websites. *Id.*; *DOJ Reaffirms Position that ADA Applies to Websites*, LEVEL ACCESS, <https://www.levelaccess.com/doj-reaffirms-position-that-ada-applies-to-websites/> [<https://perma.cc/PXJ5-ZKYF>] (last visited Sept. 20, 2022). Boyd's letter does not "specifically address their concerns." *DOJ Letter Comments on ADA Website Compliance Flexibility, supra*. Boyd also states that, until the adoption of formal regulation, places of public accommodation have a degree of flexibility in the standards they use to comply with the ADA. *Id.* This creates implementation of any changes to current legislation more difficult, as such legislation would have to clearly define a standard of compliance to be effective. *See id.*

<sup>101</sup> *Id.*

*South Dakota v. Wayfair, Inc.* in 2018, the Supreme Court held that a retailer does not need to have a physical presence in a state for that state to be able to impose a sales tax on the retailer.<sup>102</sup> While this may not seem facially relevant to website accessibility, the two issues are in many ways analogous: both involve a debate over whether businesses need to have a physical presence to be subjected to something (whether it be a law or taxes).<sup>103</sup> Furthermore, the Court made a variety of statements showing a disdain for physical presence requirements for business in a legal context, citing them as long-criticized and “removed from economic reality.”<sup>104</sup> In *Wayfair*, the Court was largely concerned about market inequalities resulting from some businesses being subjected to restrictions or regulations whereas their internet-exclusive counterparts were not.<sup>105</sup> This reasoning suggests that the Supreme Court would feel similarly about accommodation requirements. Holding physical businesses to ADA standards but not internet-exclusive businesses creates the very same market inequity that the Court expressed fear of in *Wayfair*.

Furthermore, the Court also stressed the importance of considering the effects the internet has had on the way society functions since the early 1990s, especially when considering the merits of a physical presence requirement.<sup>106</sup> Such reasoning sounds strikingly similar to that adopted by the District of Vermont in *National Federation of the Blind*.<sup>107</sup> By its own admission then, the Court would likely have similar thoughts regarding the interpretation of the ADA, given the legislation was drafted at the same time period.<sup>108</sup> At a minimum, the Court, in order to be consistent with this reasoning, would have to consider the ADA to encompass websites and hold that any physical location requirements for ADA application are invalid.

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<sup>102</sup> 138 S. Ct. 2080, 2098–99 (2018).

<sup>103</sup> See *id.*; William Goren, *Why You Don't Want to Be a Test Case and How to Stop Serial Website Plaintiffs*, UNDERSTANDING THE ADA (June 25, 2018), <https://www.understandingtheada.com/blog/2018/06/25/why-you-dont-want-to-be-a-test-case-and-how-to-stop-serial-website-plaintiffs/> [<https://perma.cc/D9PW-JDY8>].

<sup>104</sup> *Wayfair*, 138 S. Ct. at 2092.

<sup>105</sup> Goren, *supra* note 103.

<sup>106</sup> The Court makes this specific distinction because its ruling overturned its earlier decision in *Quill v. North Dakota*, 510 U.S. 859 (1992). *Wayfair*, 138 S. Ct. at 2097.

<sup>107</sup> See 97 F. Supp. 3d 565, 575–76.

<sup>108</sup> Goren, *supra* note 79.

Even if one wanted to avoid arguing that websites are places of public accommodation in general, the purpose of telehealth in providing health care makes it so that telehealth would fall under ADA applicability regardless.<sup>109</sup> Telehealth is often done through one's primary care doctor, meaning that, in these cases, it would fall under the "professional office of a health care provider."<sup>110</sup> Should the telehealth provider have a physical location, the provider could also fall under the "other service establishment" standard of the same section<sup>111</sup>—especially given that the ADA is designed to be interpreted broadly.<sup>112</sup> This would be so regardless of whether the provider considers themselves to be a health care service.<sup>113</sup> Because of this, the argument becomes less about if telehealth has a sufficient nexus to a physical location and more about if that physical location is necessary.

## B. Implications and Benefits

Any determination that telehealth platforms are places of public accommodation, and thus subject to the ADA, could have serious repercussions for both the health care industry as well as the internet as a whole. First and foremost, such a determination would potentially open the door to all website retailers becoming subjected to ADA requirements.<sup>114</sup> As demonstrated by the cases discussed, whether websites count as areas of public accommodation is a source of heavy controversy—driven by the circuit split fueling this ambiguity in the first place. The logic behind subjecting telehealth providers to accessibility standards applies to all websites.<sup>115</sup> The internet is becoming an increasingly essential part of our society, and—especially in the pandemic era—the need to have access to the internet is constantly increasing.<sup>116</sup> In a world

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<sup>109</sup> Any determination that all websites were to be subjected to ADA requirements would have massive effects across industries, and these effects are beyond the scope of this Note. For more on the potential effects, however, see Anthony R. McClure, *Websites May Be Places of Public Accommodation Subject to the ADA*, AM. BAR ASS'N (Mar. 18, 2019), <https://www.americanbar.org/groups/litigation/publications/litigation-news/featured-articles/2019/websites-may-be-places-public-accommodation-subject-the-ada/> [<https://perma.cc/RK3F-7KFJ>].

<sup>110</sup> 42 U.S.C. § 12181(7)(F).

<sup>111</sup> *Id.*

<sup>112</sup> *ADA Amendments Act*, *supra* note 56.

<sup>113</sup> Elayath, *supra* note 52, at 172.

<sup>114</sup> *Id.* at 173. The large-scale impact of this issue is perhaps part of why the Supreme Court is hesitant to make any rulings on it.

<sup>115</sup> *Id.* at 159.

<sup>116</sup> *Id.*; see Annaswamy, *supra* note 4, at 2.

that sees more than 6,000 tweets, 40,000 Google searches, and 2 million emails every *second*, accessibility to these platforms is pivotal.<sup>117</sup>

It is important to note that the immediate impact of any such interpretation—whether it be through the courts or the legislature—would be limited. As quoted earlier, Title III specifically grants an exception to the organizations and businesses it encompasses regarding any accommodation that would place an “undue burden” on that organization or business.<sup>118</sup> Such a burden constitutes any ADA requirement that would “cause a significant difficulty or expense if carried out.”<sup>119</sup> As a result, telehealth providers would not be expected to make changes to their websites that they could not afford or, for other reasons, reasonably implement. However, it would still be a massive step in the right direction in terms of ensuring access to these platforms. In addition, if a specific service or aid is an undue burden, then the organization or business must develop a viable alternative—meaning that they cannot simply do nothing because an ideal course of action is infeasible.<sup>120</sup>

Placing established ADA requirements on telehealth platforms also raises the question of what standards telehealth providers would be expected to comply with. The probable source of these standards would likely be the Web Content Accessibility Guidelines (WCAG), which are a series of accessibility guidelines that exists for website developers as a part of the global Web Accessibility Initiative.<sup>121</sup> In 2020, Congressmen from both parties introduced a bill in the House of Representatives called the Online Accessibility Act, which attempted to codify the WCAG 2.0 accessibility standard (one of the WCAG systems of guidelines) as the requirement for a website to comply with Title III.<sup>122</sup> The bill died in Committee,

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<sup>117</sup> Stephanie Pappas, *How Big Is the Internet, Really?*, LIVE SCIENCE (Mar. 18, 2016), <https://www.livescience.com/54094-how-big-is-the-internet.html> [<https://perma.cc/92UA-ZPVZ>].

<sup>118</sup> 42 U.S.C. § 12182(b)(2)(A)(iii).

<sup>119</sup> *Undue Burden*, NE. ADA CTR., <https://northeastada.org/glossary/undue-burden> [<https://perma.cc/3C5W-G9WE>] (last visited Jan. 1, 2022).

<sup>120</sup> *Id.*

<sup>121</sup> See *WCAG 2 Overview*, WC3 WEB ACCESSIBILITY INITIATIVE, <https://www.w3.org/WAI/standards-guidelines/wcag/> [<https://perma.cc/CHV2-4DTM>] (last updated Nov. 1, 2022).

<sup>122</sup> Jason P. Brown & Robert T. Quackenboss, *Looking Ahead to Potential Developments in Online Accessibility Law*, NAT'L L. REV. (Feb. 24, 2021), <https://www.natlawreview.com/article/looking-ahead-to-potential-developments-online-accessibility-law> [<https://perma.cc/W96N-B4SF>]. This bill was co-introduced by

in part because of criticism it faced from disability advocates for not using the most recent guidelines issued by the WCAG.<sup>123</sup> At the time, the most recent standards would have been the WCAG 2.1 guidelines, but—given that an updated set of guidelines (WCAG 2.2) are due for release in early 2023, and an even broader set (WCAG 3.0) are expected to be released in the next few years—using one of these updated guidelines may be ideal for guaranteeing the most up-to-date accessibility standards would be met.<sup>124</sup>

To comply with these standards, telehealth providers can implement a variety of features into their platforms to help ensure access for patients with disabilities. For instance, a text-to-speech app could be beneficial on both sides of the patient-client relationship—patients with speech impediments could use such a feature to translate what they are saying so that the doctor has more clarity, while the doctor could use such a feature to help clients with hearing impairments understand without the need to lip read.<sup>125</sup> Making websites “compatible with screen readers and offer[ing] larger sized text” on the website can also help ensure accessibility.<sup>126</sup> While these types of initiatives may incur financial costs (even if they do not rise to the level of establishing a substantial burden), telehealth providers may benefit from cost-sharing with any third parties that are involved with the telehealth process, such as companies that operate scheduling platforms or video software that make up part of the provider’s telehealth

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the same Ted Budd who, as discussed in this Note, in 2018 sent a letter to the DOJ requesting clarity on ADA applicability to websites. *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*; *What’s New in WCAG 2.2 Draft*, WC3 WEB ACCESSIBILITY INITIATIVE, <https://www.w3.org/WAI/standards-guidelines/wcag/new-in-22/> [https://perma.cc/QD8K-BSPP] (last updated Nov. 1, 2022); *WCAG 3 Introduction*, WC3 WEB ACCESSIBILITY INITIATIVE, <https://www.w3.org/WAI/standards-guidelines/wcag/wcag3-intro/> [https://perma.cc/P392-BQNE] (last updated July 6, 2022).

<sup>125</sup> Marlene Maheu, *How to Make Telehealth More Accessible to Disabled People in Recovery*, TELEHEALTH.ORG (Dec. 1, 2017), <https://telehealth.org/telehealth-more-accessible-to-disabled-people-in-recovery/> [https://perma.cc/LC55-VUA3].

<sup>126</sup> *Improving Access to Telehealth*, TELEHEALTH.HHS.GOV, <https://telehealth.hhs.gov/providers/health-equity-in-telehealth/improving-access-to-telehealth/> [https://perma.cc/QB2V-NLDW] (last visited Dec. 18, 2021). For an extensive list of tools, systems, and testing processes used by the United States government for its own websites that could be helpful for telehealth providers, see *Create Accessible Software & Websites*, SECTION508.GOV, <https://www.section508.gov/develop/software-websites/> [https://perma.cc/WH9U-K9K8] (July 2018).

offerings.<sup>127</sup> The provider would still be liable for any hypothetical Title III violations, but the fact that Title III provides for joint and several liability means that these third parties may be subject to liability as well—perhaps incentivizing them to agree to cost-share.<sup>128</sup>

Clarification that the ADA applies to telehealth could affect telehealth usage well after the COVID-19 pandemic ends. Prior to the onset of the pandemic, telehealth had several stringent regulations pertaining to, among other things, Medicaid reimbursements and Health Insurance Portability and Accountability Act (HIPAA)<sup>129</sup> compliance that limited its widespread use. The federal government relaxed these regulations at the onset of the COVID-19 pandemic to increase access to telehealth during a time of social distancing and stay-at-home orders.<sup>130</sup> Members of Congress have drafted various bills in an effort to prolong such flexibilities to after the pandemic ends, but, with lower levels of public knowledge and support, have yet to be successful.<sup>131</sup> As things stand, the restrictions would return when the pandemic ends.<sup>132</sup> This

<sup>127</sup> See Frank Morris & Shira Blank, *Telehealth Providers Should Beware ADA Litigation*, LAW 360 (July 22, 2020), <https://www.law360.com/articles/1294337/telehealth-providers-should-beware-ada-litigation> [<https://perma.cc/XEZ7-2ZZJ>].

<sup>128</sup> *Id.*

<sup>129</sup> HIPAA is “a federal law [requiring] the creation of national standards to protect sensitive patient health information from being disclosed without the patient’s consent or knowledge.” *Health Insurance Portability and Accountability Act of 1996 (HIPAA)*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/phlp/publications/topic/hipaa.html> [<https://perma.cc/X793-FVN4>] (last visited Nov. 4, 2022). In other words, HIPAA requirements pertain to patient privacy.

<sup>130</sup> Jordan Scott, *How Telemedicine Requirements and Policies Will Change Post-Pandemic*, HEALTHTECH MAG. (July 30, 2021), <https://healthtechmagazine.net/article/2021/07/how-telemedicine-requirements-and-policies-will-change-post-pandemic-perfcon> [<https://perma.cc/6T25-64CK>].

<sup>131</sup> Allie Reed, *Bills to Avoid ‘Telehealth Cliff’ Delayed by Higher Priorities*, BL (Oct. 15, 2021), <https://news.bloomberglaw.com/health-law-and-business/bills-to-avoid-telehealth-cliff-delayed-by-higher-priorities> [<https://perma.cc/U9YK-BY8V>].

<sup>132</sup> *Id.* Exactly what metric will determine “when the pandemic ends” is unclear. President Joseph Biden, for instance, has already declared the pandemic to be over. Becky Sullivan, *How Biden’s Declaring the Pandemic ‘Over’ Complicates Efforts to Fight COVID*, NPR (Sept. 20, 2022), <https://www.npr.org/sections/health-shots/2022/09/20/1123883468/biden-pandemic-over-complicates-fight> [<https://perma.cc/KJH8-QG5C>]. HHS, on the other hand, recently renewed these flexible policies until January 11, 2023, but such flexibility is subject to further extensions. See *Telehealth Policy Changes After the COVID-19 Public Health Emergency*, U.S. DEP’T OF HEALTH & HUM. SERVS., <https://telehealth.hhs.gov/providers/policy-changes-during-the-covid-19-public-health-emergency/policy-changes-after-the-covid-19-public-health-emergency/> [<https://perma.cc/VA75-YH98>] (last updated Oct. 28, 2022).

has led to concerns of a “telehealth cliff” forming after the pandemic where people that became used to the flexibility of telehealth (such as Medicare reimbursement) will face the shock of no longer receiving it when the flexibilities are discontinued.<sup>133</sup> Clarifying telehealth as an area of public accommodation, and thus emphasizing the importance of telehealth to the public, may help educate people on the issue of this cliff and the need to avoid it. As a result, it would make bills prolonging these flexibilities more politically feasible through increased public support. This could be especially helpful given that telehealth is expected to remain relevant post-COVID.<sup>134</sup>

Additionally, resolving the legal questions surrounding the ADA’s applicability to telehealth platforms would help to prevent a continued flurry of litigation by plaintiffs with disabilities against telehealth providers (and other websites) for violating the ADA (by alleging these websites are places of public accommodation). These types of cases have been steadily increasing over the past several years and were on the rise before the pandemic began. In 2016, 262 of such cases were filed in the United States, but by 2019 that amount had increased by over 1,000% to 2,235, perhaps spurred in part by *Gil* (which first went to trial in 2017).<sup>135</sup> These lawsuits are only expected to increase in the foreseeable future—perhaps sharply, and particularly lawsuits against telehealth providers—due to the remote, internet-heavy pandemic world society has been forced to live in recently.<sup>136</sup> Without clarity as to whether telehealth platforms are considered areas of public accommodation and subject to Title III of the ADA, these lawsuits are only likely to continue.

Given the apparent unwillingness of the Supreme Court or the DOJ to address this issue when called upon, congressional action updating the ADA to specifically include telehealth as places of public accommodation may be the ideal option for resolving the current ambiguity. While Congress has faced political gridlock in recent years, bipartisan support has historically existed both for the ADA in general as well as for

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<sup>133</sup> *Id.*

<sup>134</sup> Annaswamy, *supra* note 4, at 1–2.

<sup>135</sup> Joseph “Chip” Sheppard III & Andrew T. Peebles, *Confronting the Rise in ADA Website Accessibility Lawsuits Against Businesses*, MO. BAR (Oct. 8, 2021), <https://news.mobar.org/confronting-the-rise-in-ada-website-accessibility-lawsuits-against-businesses/> [<https://perma.cc/FLQ9-U7AF>].

<sup>136</sup> Morris & Blank, *supra* note 127.

clarity surrounding its applicability.<sup>137</sup> Furthermore, Congress's task would be simpler than might be expected because guidelines already exist to ensure that government websites meet accessibility standards.<sup>138</sup> Congress's task would largely just be altering those standards to best fit telehealth platforms.<sup>139</sup> While this would require effort, Congress would not be starting from scratch.

Furthermore, ADA requirements for telehealth may help to ensure that telehealth is properly maintained and operative should remote health care ever become necessary for the general population in the future. While, in an ideal world, social distancing and stay-at-home orders will not take place again any time soon, the reality is that there is little to no way of knowing what the future may hold. Having a robust and accessible system of telehealth in place could help ensure as little access as possible is lost to health care services for those with disabilities during times when remote care becomes absolutely necessary for the general population.<sup>140</sup> Simultaneously, it can help ensure an avenue for patients to receive health care when the doctor or patient is sick and there are risks of transmission for illnesses such as the flu (in situations where both parties are still feeling well enough to participate in a remote appointment).

Finally, increasing access to telehealth may in turn increase access to mental health services. According to Mental Health America, nineteen percent of Americans (forty-seven million people) experience some form of mental illness, although this number is likely higher because of underreporting due to societal stigmas regarding mental health.<sup>141</sup> The mental health crisis in the United States is

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<sup>137</sup> Brown & Quackenboss, *supra* note 122.

<sup>138</sup> Elayath, *supra* note 52, at 173 (citing 29 U.S.C. § 794d (requiring federal agency websites to provide employees with disabilities "access to and use of information and data that is comparable to the access to and use of the information and data by Federal employees [without disabilities]" and to provide the same information and data for members of the public with and without disabilities)). While these standards would need to be modified somewhat to suit the context of telehealth and other private websites, they do provide a useful starting point—especially in tandem with WCAG guidelines.

<sup>139</sup> See *id.* at 173.

<sup>140</sup> Mauricio Sirvent, *How Telemedicine Can Help Prepare for the Next Pandemic*, SOC TELEMED, <https://www.soctelemed.com/blog/how-telemedicine-can-prepare-for-next-pandemic/> [<https://perma.cc/9HRT-UA8M>] (last visited Mar. 7, 2022).

<sup>141</sup> *Prevalence of Mental Illness 2021*, MENTAL HEALTH AM., <https://mhanational.org/issues/2021/mental-health-america-prevalence-data> [<https://perma.cc/QDD7-885K>] (last visited Mar. 7, 2022); Jolynn Tumolo, *Prevalence of*



believed to have only been worsened by the pandemic as well, as people have experienced feelings of isolation, grief, and uncertainty.<sup>142</sup> Mental health struggles are exacerbated among Americans with disabilities as well—adults with disabilities are estimated to experience suffering from mental health challenges at five times the rate of people without disabilities.<sup>143</sup> Research performed at Yale University concluded that telehealth makes mental health appointments seem easier and more accessible for children and teenagers, reduces transportation requirements, increases convenience, and makes group therapy easier—especially in cases of broken or separated families where meeting physically creates complications to begin with.<sup>144</sup> In fact, many people are preferring to use telehealth for these types of appointments even as in-person options become available again.<sup>145</sup> While a remote health care environment may not work for everybody, it can make mental health treatment easier for many people—both those with and without disabilities.<sup>146</sup> Increasing access to treatment through telehealth can only help to ensure accessible mental health care now and after COVID.

As an aside, the longstanding ambiguity surrounding this issue provides one of several reasons for Congress to amend the ADA—something that it has not done since 2008.<sup>147</sup> While equality for people with disabilities has increased in the thirty years since the ADA was conceived, people with disabilities are still twice as likely to be unemployed or live in poverty as people without disabilities, and this figure has remained constant since the onset of the ADA.<sup>148</sup> Furthermore, inaccessible polling places have also been cited as a contemporary challenge

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*Mental Illness Might be Underreported*, PSYCH CONG. NETWORK (Jan. 15, 2014), <https://www.hmpgloballearningnetwork.com/site/pcn/article/prevalence-mental-illness-might-be-underreported> [<https://perma.cc/GM65-C3SH>].

<sup>142</sup> *COVID-19 and Your Mental Health*, MAYO CLINIC (Nov. 23, 2021), <https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/mental-health-covid-19/art-20482731> [<https://perma.cc/J387-K57Z>].

<sup>143</sup> *The Mental Health of People with Disabilities*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/ncbddd/disabilityandhealth/features/mental-health-for-all.html> [<https://perma.cc/8U6A-CBE3>] (Nov. 30, 2020).

<sup>144</sup> Carrie MacMillan, *Why Telehealth for Mental Health Care Is Working*, YALE MED. (Sep. 16, 2021), <https://www.yalemedicine.org/news/telehealth-for-mental-health> [<https://perma.cc/B9WV-DXPV>].

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *See Timeline of the Americans with Disabilities Act*, ADA NAT'L NETWORK, <https://adata.org/ada-timeline> [<https://perma.cc/SH4E-RBTV>] (last visited Dec. 29, 2021).

<sup>148</sup> Abigail Abrams, *30 Years After a Landmark Disability Law, the Fight for Access and Equality Continues*, TIME (July 23, 2020), <https://time.com/>

not addressed by the ADA, which can create a vicious cycle of those most affected by these issues being unable to participate in political processes that could help lead to these issues being resolved.<sup>149</sup> A broader update could help address these other issues—which, while outside the scope of this Note, are nonetheless important.

The Supreme Court's denial of certiorari in *Robles* suggests that it is unlikely to hear any cases pertaining to telehealth accessibility in the near future—meaning that the circuit split is likely to only continue without legislative change. This in and of itself can lead to further problems, including forum shopping (in search of a Circuit with more favorable views on telehealth or websites generally as places of public accommodation) and confusion for providers and patients as to what the accessibility requirements truly are for these platforms.<sup>150</sup> These problems can only be prevented by remedying the inconsistency surrounding how the ADA applies to telehealth in the first place.

#### CONCLUSION

While ability status differs in many ways from other forms of protected traits such as race or gender—disabilities are not always visible or permanent, for instance, and can encompass a broad range of characteristics—it is crucial to remember that telehealth accessibility for people with disabilities is, above all else, an issue of civil rights. The ADA exists to make sure that people with disabilities have the same access to public accommodations as those without disabilities. Keeping this goal in mind, along with the importance of having access to health care both during and after the COVID-19 pandemic, telehealth providers should be expected to ensure accessibility for patients with disabilities in the same way they would be expected to do so for a physical doctor's office.

The ADA, while a massive step in the right direction, has significant room for growth in ensuring the civil rights of people with disabilities—specifically as they pertain to health care. Action must be taken to ensure that those with disabilities do not have these rights narrowed or even taken away, as the Eleventh Circuit's recent ruling in *Gil* shows is a real threat. However, continued inaction is no longer a viable option, and

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5870468/americans-with-disabilities-act-coronavirus/ [https://perma.cc/X2L7-QKMB].

<sup>149</sup> *Id.*

<sup>150</sup> See Elayath, *supra* note 52, at 172.

puts the access of countless people with disabilities to the health services they need at risk.

