"LET'S GET 'PHYGITAL'": HOW THE COLLISION OF PHYSICAL AND DIGITAL COMMERCE COMPELS THE END OF THE NEXUS STANDARD IN ADA ADJUDICATION

Abstract: As COVID-19 rapidly spread across the globe in early 2020, nations closed their borders and ordered citizens to stay at home to minimize the virus's spread. As a result of these stay-at-home orders, businesses shifted online or hybridized physical and digital ("phygital") operations to survive. While online shopping, or e-commerce, was prevalent pre-pandemic, this new necessity to obtain goods and services via websites exacerbated existing accessibility challenges for many disabled individuals. Some of these individuals filed website accessibility lawsuits under Title III of the Americans with Disabilities Act, relying on the nexus standard (which extends Title III coverage to websites that have a significant connection to a physical place) to enforce compliance. This Note proposes that phygital commerce, necessary since the start of the pandemic, will prevail post-pandemic and makes the nexus standard illusory, particularly as physical places shift to serve native digital businesses that originated online. This Note further recommends eliminating the nexus standard to prevent confusing and inconsistent results in its application and encourages Congress to reconsider formally addressing websites and other nonphysical places in Title III.

INTRODUCTION

"Online has really become the front door to stores . . . ."[1] "Bricks-and-mortar is an extension of our online business . . . . [s]tores are like an inexpensive billboard."[2] "We are entering the world of 'phygital'—physical and digital at the same time . . . ."[3] Since early 2020, when COVID-19 interrupted and

[1] *See* Sara Castellanos, *Retailers See E-Commerce Investments Pay Off Big as Coronavirus Keeps Shoppers Home*, WALL ST. J. (Aug. 19, 2020), https://www.wsj.com/articles/retailers-see-e-commerce-investments-pay-off-big-as-coronavirus-keeps-shoppers-home-11597871064 [https://perma.cc/Z2KY-C7EM] (quoting the senior vice president of Home Depot, who explained the value and growth of e-commerce sales through the COVID-19 pandemic).

[2] *See* Suzanne Kapner, *E-Commerce Needs Real Store Locations Now More Than Ever*, WALL ST. J. (Nov. 25, 2021), https://www.wsj.com/articles/e-commerce-needs-real-store-locations-now-more-than-ever-11637836200 [https://perma.cc/7GA4-4KNE] (quoting the founder of Untuckit, an e-commerce apparel retailer that began online and expanded into "[b]ricks-and-mortar" (i.e., physical) retail to support its online services).

[3] *See* Praveen Adhi, Eric Hazan, Sajal Kohli & Kelsey Robinson, *Omnichannel Shopping in 2030*, MCKINSEY & CO. (Apr. 9, 2021), https://www.mckinsey.com/business-functions/marketing-and-sales/our-insights/omnichannel-shopping-in-2030 [https://perma.cc/LVX2-3SM7] (explaining the shift to and forthcoming expansion of integrated physical and digital retail experiences).

altered daily life around the world, business owners, consultants, and analysts predicted and reported on the pandemic's dramatic impact on retail stores, cinemas, and other places of public accommodation.[4] By April 20, 2020, government officials in most states compelled more than three hundred million people to stay home for weeks, necessitating a shift from everyday physical access to public accommodations like grocery stores, churches, gyms, and schools to online or hybrid physical-digital access to these same places.[5] The physical-digital divide not only shrank and morphed into a hybrid "phygital" experience during COVID-19, but a role-reversal also continues to play out, with physical places increasingly being reimagined to serve digital places as e-commerce grows exponentially.[6]

While stay-at-home and social distancing orders affected the livelihoods of all Americans, the restrictions in many ways burdened disabled people the most.[7] Not only were people with disabilities unable to leave their homes to

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[4] Castellanos, *supra* note 1; Kapner, *supra* note 2; Adhi et al., *supra* note 3; *see* Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. §§ 12181(7), 12182(a) (defining "place[s] of public accommodation" as "entities" whose "operations . . . affect commerce" and mandating these entities to protect disabled people from discrimination when they patronize such places); *see also The Retail Evolution's Great Acceleration*, DELOITTE, https://www2.deloitte.com/us/en/pages/consumer-business/articles/retail-recession.html [https://perma.cc/6HDX-7N5W] (noting the swift movement to online shopping from the pandemic's early days); Lucas Shaw, *Here Are the Ways the Pandemic Changed Hollywood*, BLOOMBERG BUSINESSWEEK (May 26, 2021), https://www.bloomberg.com/news/features/2021-05-26/pandemic-and-entertainment-how-hollywood-has-been-changed-by-covid [https://perma.cc/3JZX-V8LR] (stating that movie theater closures during the COVID-19 pandemic impacted the film industry); Frank Griffin, *COVID-19 and Public Accommodations Under the Americans with Disabilities Act: Getting Americans Safely Back to Restaurants, Theaters, Gyms, and "Normal*," 65 ST. LOUIS U. L.J. 251, 252 (2021) (explaining that the COVID-19 pandemic had an irreversible impact on public accommodation operations).

[5] *See* Sarah Mervosh, Denise Lu & Vanessa Swales, *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES (Apr. 20, 2020), https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html [https://perma.cc/9NUH-FDCL] (explaining that because Americans were compelled to stay home, they needed to find socially distant ways to pursue daily activities like education, shopping, exercise, and worship).

[6] *See* John Krukowski, *Just Don't Call It a Warehouse: Repurposing Unused Retail Spaces to Support E-Commerce*, BISNOW (Dec. 10, 2021), https://www.bisnow.com/new-york/news/retail/retail-ecommerce-goulstonandstorrs-studiob-110756 [https://perma.cc/2PKG-4C6W] (explaining how empty retail stores are being converted to logistics and distribution locations for e-commerce sales); Kathy Gramling, Jeff Orschell & Joshua Chernoff, *How E-Commerce Fits into Retail's Post-Pandemic Future*, HARV. BUS. REV. (May 11, 2021), https://hbr.org/2021/05/how-e-commerce-fits-into-retails-post-pandemic-future [https://perma.cc/87Z5-QLLN] (reporting that nearly 40% of consumers plan to transact purchases online and pick up their online orders in person even after the pandemic subsides).

[7] *See* Abigail Abrams, *'This Is Really Life or Death.' For People with Disabilities, Coronavirus Is Making It Harder Than Ever to Receive Care*, TIME (Apr. 24, 2020), https://time.com/5826098/coronavirus-people-with-disabilities/ [https://perma.cc/JX3K-B5KG] (noting that COVID-19 community-wide stay-at-home requirements impacted not only how disabled persons accessed services and healthcare outside the home, but also restricted their ability to receive in-home care which is often a necessity despite the pandemic quarantine orders); *see also* Complaint for Declaratory and Injunctive Relief at 3, Blejewski v. All Things BBQ, Inc., No. 3:21-cv-01258-JBA (D. Conn. Sept. 22, 2021) (alleging that, due to their greater vulnerability during the COVID-19 pandemic, disabled persons are

shop for groceries and other essentials, but many, for instance, found their aides unwilling to jeopardize their own health by continuing to provide in-home services.[8] Further, people with disabilities, who often felt isolated before government officials ordered citizens to stay at home, experienced profoundly greater feelings of isolation during COVID-19, with many suffering depressive episodes during the pandemic.[9] Denied equal access to necessary goods and services provided by places of public accommodation, some disabled individuals sought relief under Title III of the Americans with Disabilities Act (ADA), a federal statute that protects and promotes the rights of disabled persons to enjoy fair and equitable treatment in society.[10]

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compelled to stay home and thus depend upon remote and online access to commerce). Even when people with disabilities can venture from home during the pandemic, some, like those with visual impairments, fear they are extra susceptible to contracting the coronavirus because they rely on their sense of touch to understand much of the world around them; needing to touch more surfaces puts these individuals at greater risk of catching COVID-19. *See* Scott MacFarlane, Rick Yarborough & Jeff Piper, *Blind Community Faces Shopping Challenges During Pandemic*, NBC4 WASH. (May 4, 2020), https://www.nbcwashington.com/news/local/blind-community-faces-shopping-challenges-during-pandemic/2292837/ [https://perma.cc/XCC7-8X82] (reporting that blind Washington, D.C. residents feared shopping in physical stores during the pandemic because of their need to touch so many surfaces to find products and their dependence on being physically close to clerks and other retail workers to help them locate goods or benefit from services). This Note uses terms like "disabled people" and "people with disabilities" interchangeably merely as a style preference and is not intended to endorse or dismiss language preferences. *See* s.e. smith, *Why I Say 'Disabled Person' Instead of 'Person with Disabilities*,*'* REWIRE NEWS GRP. (Sept. 14, 2016), https://rewirenewsgroup.com/article/2016/09/14/say-disabled-person-instead-person-disabilities/ [https://perma.cc/F2T9-JEA8] (explaining that, as a disabled woman, the author prefers "[i]dentity-first language" in which the disability precedes the person because it provides not only a sense of belonging, but stems from social advocacy schools of thought (also known as the "social model"), whereas "person-first language," such as "person with disabilities," stems from a "medical model" of language and can make the disability feel more like something to be resolved). *But see* Meg E. Ziegler, Note, *Disabling Language: Why Legal Terminology Should Comport with a Social Model of Disability*, 61 B.C. L. REV. 1183, 1184 (2020) (suggesting that "person-first language" comports with the "social model" and "promotes inclusion").

[8] *See* Abrams, *supra* note 7 (stating that some healthcare workers who provided in-home assistance lacked their own healthcare benefits, like insurance or paid time off for illness, and thus declined to continue home visits during the pandemic).

[9] *See* Katie Wang, Robert B. Manning, III, Kathleen R. Bogart, Jonathan M. Adler et al., *Predicting Depression and Anxiety Among Adults with Disabilities During the COVID-19 Pandemic*, 67 REHAB. PSYCH. 179, 179, 182 (2022) (finding that 272 out of 441 disabled adults involved in the study demonstrated "major depressive disorder," acknowledging that "[s]ocial isolation was the strongest predictor of depression and anxiety"). The authors noted that even before COVID-19, disabled people had smaller social circles than people without disabilities. *Id*. at 180.

[10] *See, e.g.*, Haney v. Pritzker, 563 F. Supp. 3d 840, 845 (N.D. Ill. 2021) (stating that the disabled plaintiff filed suit alleging unlawful discrimination because the Illinois state government extended the COVID-19 closure of a support program for people with disabilities even as other public accommodations were permitted to reopen); *see also* 42 U.S.C. § 12182 (prohibiting places of public accommodation from discriminating against people with disabilities).

Even after stay-at-home restrictions lifted, disabled persons struggled to access the public accommodations they enjoyed before COVID-19.[11] For example, John McDonald, a man with developmental disabilities, was unable to return to his daily social and occupational activities at a community facility for disabled individuals because the state government extended its closure even while reopening other daily facilities like schools.[12] Danielle McCann, a blind woman, struggled to find a COVID-19 testing facility that could accommodate her need to walk through rather than drive through, preventing her from enjoying services that required proof of a negative COVID-19 test.[13]

Given these examples, some may think people with disabilities only face discrimination in physical settings, suggesting that digital services are more of a blessing.[14] Instead, the digital environment presents unique challenges for disabled people, like websites that fail to sync with assistive technologies designed to vocalize screen text or track eye movements.[15] When digital services combined with physical places to become the preferred or only means of accessing commodities like groceries during COVID-19, disabled Americans

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[11] *See, e.g.*, *Haney*, 563 F. Supp. 3d at 846–47 (explaining that even as the State of Illinois began lifting restrictions and reopening its public accommodations, the government extended the closure of "Adult Day Sites," allegedly discriminating against the disabled plaintiff who benefited from such social services).

[12] *Id.* at 846. McDonald attended the community program for two decades and learned job skills like packing building materials. *Id.*

[13] Danielle McCann, *Getting COVID-Tested While Blind: Self-Advocacy (& a Lot of Phone Calls)*, WORLD INST. ON DISABILITY (Sept. 23, 2020), https://wid.org/getting-covid-tested-while-blind-self-advocacy-a-lot-of-phone-calls/ [https://perma.cc/FCC3-LC6M]; *see also* Abby Isaacs, *Increasing At-Home COVID Test Accessibility for the Blind*, WMAR 2 BALT. (Jan. 5, 2022), https://www.wmar2news.com/news/coronavirus/increasing-at-home-covid-test-accessibility-for-the-blind [https://perma.cc/8KQN-SA4R] (noting that blind people are unable to interpret COVID-19 tests alone because there is no audio or tactile indication of the result, requiring them to have a sighted person nearby to tell them the result and, thus, potentially exposing their aide to the virus). The author notes that blind persons with access to smartphones and reliable cellular service could use video-calling technology to prevent potential exposure, but adds that not all blind people are so privileged. Isaacs, *supra*.

[14] *See, e.g.*, John Hanc, *Life Is Complicated: Distance Learning Helps*, N.Y. TIMES (Nov. 1, 2018), https://www.nytimes.com/2018/11/01/education/learning/life-is-complicated-distance-learning-helps.html [https://perma.cc/F6PD-R7R7] (describing online education as an example of a digital benefit for disabled people). This article details one disabled man's positive experience with online learning as it pulled "a veil over [his] disability" and gave him an equal opportunity for advanced education and a chance to participate in society more fully. *Id.*

[15] *See, e.g.*, *What Is Assistive Technology?*, U. WASH.: DISABILITIES, OPPORTUNITIES, INTERNETWORKING & TECH. (Apr. 29, 2019), https://www.washington.edu/doit/what-assistive-technology [https://perma.cc/GZ64-5P3M] (detailing various assistive technologies, including screen readers which vocalize text from a screen); Jonathan Cheng, *Samsung Takes Eye-Scrolling Technology to Disabled Community*, WALL ST. J. (Nov. 25, 2014), https://www.wsj.com/articles/BL-KRTB-7030 [https://perma.cc/PF5W-DG9A] (describing hardware that interprets eye movements to replicate the movements of a computer mouse).

struggled to use these services because of accessibility shortcomings on both ends of the transaction.[16]

Although many Americans, disabled and nondisabled alike, desire a return to something resembling "normal," most people agree that changes like e-commerce and phygital retail will persist.[17] As a result, the ADA's nexus standard, which largely relies on an entity operating primarily a physical place of public accommodation that is supported by web-based services, has begun to appear outdated.[18] In ADA adjudication, courts have applied the nexus standard (also called the nexus theory or nexus test) to determine whether nonphysical places, like websites, are governed by the Act.[19] Most courts look for a distinct, logical connection that links the nonphysical place or service with access to an ADA-governed physical place of public accommodation.[20] Part I of this Note explores the use of the nexus standard in ADA adjudication of the

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[16] *See* Kathleen R. Bogart, *How Stores' COVID-19 Policies Affect the Disabled Community*, PSYCH. TODAY (Apr. 2, 2021), https://www.psychologytoday.com/us/blog/disability-is-diversity/202104/how-stores-covid-19-policies-affect-the-disabled-community [https://perma.cc/Q7DV-MRG3] (explaining how even services like "special shopping hours" reserved for frontline workers, the elderly, and disabled patrons still jeopardized the health and safety of people with disabilities); Hilary George-Parkin, *Home Delivery Has Helped China Through Its Coronavirus Crisis. The U.S. Needs to Catch Up*, VOX (Mar. 25, 2020), https://www.vox.com/the-goods/2020/3/25/21193817/home-delivery-china-coronavirus-us-alibaba-amazon [https://perma.cc/C55W-9UJ8] (explaining how some online grocery delivery services were suspended or fully scheduled for weeks in the United States, making the service effectively unavailable).

[17] *See, e.g.*, Mike Welsh, *The Future Is Phygital: Physical and Digital*, MOBIQUITY (Apr. 19, 2021), https://www.mobiquity.com/insights/the-future-is-phygital [https://perma.cc/27B5-ZQS3] (noting that the term "phygital" became popular during the COVID-19 pandemic and that its success and promise foretell its ongoing use and advancement as a retail strategy); Joi Thomas, *Technology and Worship: The 'Phygital' Church Is Here to Stay*, AFRO NEWS (Nov. 18, 2021), https://afro.com/technology-and-worship-the-phygital-church-is-here-to-stay/ [https://perma.cc/99TD-CRSX] (reflecting on many churches' immediate responses to COVID-19 by congregating over Zoom or in parking lots, and anticipating similar flexible approaches to worship in the future).

[18] *See* Pappas v. Bethesda Hosp. Ass'n, 861 F. Supp. 616, 620 (S.D. Ohio 1994) (introducing the possibility of a nexus between the discriminatory denial of services and the physical place of public accommodation offering those services); Johanna Smith & John Inazu, *Virtual Access: A New Framework for Disability and Human Flourishing in an Online World*, 2021 WIS. L. REV. 719, 768 (noting that the nexus standard has become "antiquated" and fails to address the modern digital landscape).

[19] *See, e.g.*, Randy Pavlicko, Note, *The Future of the Americans with Disabilities Act: Website Accessibility Litigation After COVID-19*, 69 CLEV. STATE L. REV. 953, 961 (2021) (describing the nexus standard as an analysis of "the connection between the product or service offered through a company's website or mobile app to a company's physical location"); *see also* Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 953 (N.D. Cal. 2006) (referring to the nexus standard as "the nexus theory"); Martinez v. San Diego Cnty. Credit Union, 50 Cal. App. 5th 1048, 1065 (2020) (calling the nexus standard "the nexus test").

[20] *See, e.g.*, *Target*, 452 F. Supp. 2d at 952 (explaining that courts require plaintiffs to plead a "nexus" between the defendant's physical location and the allegedly discriminatory provision of goods or services); Pavlicko, *supra* note 19, at 961; *see also* 42 U.S.C. § 12181(7) (defining "public accommodation" with an exhaustive list of applicable places, facilities, and services governed by Title III of the ADA).

accessibility of nonphysical places.[21] Part II discusses the challenges and conflicts presented by the nexus standard before and during the COVID-19 pandemic.[22] Part III argues that courts should reject the nexus standard because it has become redundant given the collapse of the physical-digital divide and therefore impedes Title III's full protection and promotion of disabled persons' equitable access to and enjoyment of public accommodations.[23]

I. Applying the Nexus Standard Under Title III of the ADA

Title III of the ADA requires places of public accommodation to provide nondiscriminatory access to people with disabilities so that disabled and nondisabled individuals alike can enjoy the "goods, services, facilities, privileges, advantages, or accommodations" of these places.[24] Although the Title does not specify that public accommodations be physical, most courts that have adjudicated Title III cases interpreted the Act to govern physical locations exclusively because Congress defined "public accommodation" with an exhaustive list of examples that are plainly physical places.[25] Courts developed the nexus standard to resolve discrimination against disabled people when they attempt to access goods or services that were not exclusively or immediately provided in physical locations, but were nonetheless provided by entities that arguably meet the "public accommodation" definition.[26]

Although most courts considering Title III cases apply the nexus standard, some courts that favor a strict textualist interpretation of the Act struggle to recognize how the statute could govern nonphysical entities and therefore do not embrace the standard.[27] On the other hand, courts that regularly apply and endorse the nexus standard favor a more purposive interpretation of the ADA, recognizing that Congress intended the Act to end discrimination against disa-

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[21] *See infra* notes 24–102 and accompanying text.

[22] *See infra* notes 103–166 and accompanying text.

[23] *See infra* notes 167–204 and accompanying text.

[24] 42 U.S.C. § 12182(a).

[25] *See id.* § 12181(7)(A)–(L) (enumerating an exhaustive list of public accommodations, all of which appear to be physical locations); *see, e.g.*, Gil v. Winn-Dixie Stores, Inc., 993 F.3d 1266, 1277 (11th Cir.) (reasoning that because all the examples Congress provided in Title III's "public accommodation" definition are physical locations, "public accommodations" can therefore only be physical places), *vacated as moot*, 21 F.4th 775 (11th Cir. 2021).

[26] *See, e.g.*, Pappas v. Bethesda Hosp. Ass'n, 861 F. Supp. 616, 620 (S.D. Ohio 1994) (suggesting the use of a nexus test to identify unlawful discrimination to prevent entities from denying access to services or goods at the physical location that provides such services or goods).

[27] *See, e.g.*, Anderson v. Macy's Inc., No. 2:12-cv-00556, 2012 WL 3155717, at *4 (W.D. Pa. Aug. 2, 2012) (declining to extend Title III to cover websites because the Third Circuit limits "public accommodation" to physical places). Although the Third Circuit has yet to hold that a sufficient nexus exists, the court nevertheless has applied the test. *See, e.g.*, Ford v. Schering-Plough Corp., 145 F.3d 601, 613 (3d Cir. 1998) (applying the nexus standard, but finding no connection between the insurance office and the plaintiff's employer-provided insurance policy).

bled people and to adapt to advances in technology.[28] These differences in statutory interpretation also contributed to the Title III circuit split regarding the broader question of whether the Act applies to websites notwithstanding a nexus.[29] For the purposes of this Note, the discussion of website accessibility cases will focus on the nexus theory and any statutory interpretation that contributed to a court's holding regarding that standard.[30]

This Part explores the evolution of the nexus standard as it has been applied to cases in which plaintiffs assert the ADA's applicability to nonphysical places of public accommodation.[31] Section A provides a brief overview of the purpose and scope of Title III of the ADA, identifying contentious language in the Title and how various interpretations have led to creative, if conflicting, applications of the statute, including the development of the nexus standard.[32] Section B discusses how courts applied the nexus standard in early cases, particularly in the well-known "insurance cases."[33] Section C concludes with an examination of the nexus standard as courts applied it to website accessibility cases, with a discussion of cases spanning pre-COVID-19 through the present day.[34]

A. The Purpose and Scope of Title III of the ADA

In 1990, Congress enacted the ADA, an expansive statute aimed at ending widespread discrimination against persons with disabilities.[35] Congress intended the Act to empower disabled individuals' enjoyment of and involvement in the

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[28] *See, e.g.*, Robles v. Domino's Pizza, LLC, 913 F.3d 898, 904–05 (9th Cir.) (finding that the nexus between Domino's digital sales services and physical locations was "critical" in determining that the ADA governed the digital services because the ADA's purpose is to completely end discrimination against disabled people), *cert. denied*, 140 S. Ct. 122 (2019).

[29] *Compare* Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1115 (9th Cir. 2000) (finding that an employer-provided insurance plan is not a place of public accommodation), *and Ford*, 145 F.3d at 613 (same), *with* Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999) (finding that nonphysical places like websites are public accommodations), *and* Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New Eng., 37 F.3d 12, 19 (1st Cir. 1994) (finding Title III's language broad enough to include nonphysical places). *See also* Blake E. Reid, *Internet Architecture and Disability*, 95 IND. L.J. 591, 598–99 (2020) (explaining the circuit split regarding Title III's applicability to websites, in which some circuits find that Title III unambiguously governs websites, some circuits require a nexus, and other circuits have yet to acknowledge a sufficient nexus and thus limit Title III coverage to physical places).

[30] *See infra* notes 64–102 and accompanying text.

[31] *See infra* notes 24–102 and accompanying text; *see also* 42 U.S.C. § 12181(7); Rendon v. Valleycrest Prods., Ltd., 294 F.3d 1279, 1284 & n.8 (11th Cir. 2002) (noting the existence of a nexus in determining that an inaccessible telephone hotline, by gatekeeping access to a physical place of public accommodation, must comply with Title III).

[32] *See infra* notes 35–44 and accompanying text.

[33] *See infra* notes 45–63 and accompanying text.

[34] *See infra* notes 64–102 and accompanying text.

[35] *See* 42 U.S.C. § 12101(b)(1) (explaining that the ADA's purpose is to eradicate prejudicial treatment of disabled people).

riches and benefits of American society.[36] To accomplish these goals, Titles I, II, and III of the ADA define the respective obligations of employers, public entities, and private entities operating places of public accommodation to prevent such discrimination.[37]

Title III requires places of public accommodation whose activities impact commerce—such as hotels, shops, and gyms—to eliminate discrimination against disabled persons by providing them with a reasonably integrated environment that affords them the opportunity to engage in that location's offerings without forcing them to do so separately or differently.[38] For example, public accommodations must create and preserve pathways that can accommodate people who use mobility aids like wheelchairs, or be willing and able to communicate effectively with deaf patrons, even by passing notes in lieu of more sophisticated services if appropriate in the circumstances.[39] The Title exhaustively lists the types of public accommodations it covers, providing specific examples which, while illustrative, have also contributed to conflicting interpretations of the Title's scope.[40]

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[36] *See* Remarks on Signing the Americans with Disabilities Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1163 (July 26, 1990) (noting that the ADA contains broad guarantees for disabled persons, including the protection of their rights to live autonomously and to integrate into a society that reasonably accommodates them).

[37] 42 U.S.C. §§ 12112, 12132, 12182.

[38] *See* 42 U.S.C. § 12181(7)(A), (E), (L) (including hotels and other lodgings, shops like grocery and apparel stores, and fitness and exercise centers in the list of covered public accommodations whose activities sufficiently impact commerce); *id.* § 12182(b)(1)(A)(iii) (prohibiting businesses from proclaiming integration while requiring disabled people to enjoy their goods and services separately).

[39] *See ADA Update: A Primer for Small Business*, U.S. DEP'T JUST., C.R. DIV., https://www.ada.gov/regs2010/smallbusiness/smallbusprimer2010.htm [https://perma.cc/RJ5C-4V67] (explaining how businesses can accommodate disabled patrons by, for example, ensuring that "accessible route[s]" remain clear and maneuverable for people using wheelchairs, and by allowing rudimentary accommodations for deaf people, such as notes for simple exchanges, while clarifying that more involved conversations, like discussing a serious medical diagnosis, require better accommodations like sign language).

[40] *See* 42 U.S.C. § 12181(7)(A)–(L) (enumerating twelve categories of public accommodations, including entities providing lodging, entertainment, sales, and social services); *see also* Kelly E. Konkright, *An Analysis of the Application of Title III of the Americans with Disabilities Act to Private Internet Access Providers*, 37 IDAHO L. REV. 713, 723 & n.87 (2001) (explaining that, by removing language that could have broadened the scope of "public accommodation," the House of Representatives intended for the enumerated categories to be an exhaustive list of public accommodations covered by Title III (first citing H.R. REP. NO. 101-558, at 41 (1990) (Conf. Rep.); and then citing H.R. REP. NO. 101485(III), at 54 (1990) (Conf. Rep.))). Despite legislative history confirming that § 12181(7) is meant to be exhaustive, Congress's use of general terms to expand its enumerated examples paired with the Act's purpose to abolish everyday discrimination against the disabled led some courts to read § 12181(7) more broadly than other courts. *See, e.g.*, 42 U.S.C. § 12181(7)(F) (listing places of public accommodation like "laundromat" and "travel service" followed by the general language "or other service establishment" to expand the list); *id.* § 12101(b)(1), (4) (stating the Act's intention to end the daily prejudicial treatment of disabled individuals); Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28, 33 (2d Cir. 1999), *amended by* 204 F.3d 392 (2d Cir. 2000) (holding that places of

Particularly challenging for adjudication of Title III cases is the presence or absence of significant words in the Title; for instance, although the listed accommodations arguably are all physical locations, like "zoo" or "theater," the Title does not literally specify that the places must be physical.[41] Because Title III lacks the word "physical," courts interpret the term "place of public accommodation" differently despite the examples of physical locations.[42] Further, some courts have highlighted the Title's requirement for the anti-discriminatory provision of goods and services *of*, not *in*, places of public accommodation, expanding protection to accommodations beyond physical places.[43] Together, the ab-

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public accommodation, as defined by § 12181(7) of Title III, need not provide services for use *in* places of public accommodation for the Title to apply and, therefore, expanding the Title's scope).

[41] *See* 42 U.S.C. § 12181(7)(C), (I) (providing examples of public accommodations, but notably omitting a physicality requirement). Another complication interpreting Title III absent the word "physical" is the Act's adoption prior to widespread access to and use of the Internet—Congress arguably did not envision the Internet's integration into daily life and its impact on commerce, although it could have meant for the Act to cover such nonphysical transactional methods as shopping by mail-order catalog or cable television. *See* Sarah E. Zehentner, Note, *The Rise of ADA Title III: How Congress and the Department of Justice Can Solve Predatory Litigation*, 86 BROOK. L. REV. 701, 703 (2021) (commenting that Congress overlooked the nascent significance of the Internet when it enacted the ADA). For example, QVC, a televised home-shopping network, was established in 1986, four years before the ADA's enactment. *See* Jake Rossen, *15 Things You Might Not Know About QVC*, MENTAL FLOSS (Aug. 12, 2015), https://www.mentalfloss.com/article/67266/14-things-you-might-not-know-about-qvc [https://perma.cc/Y8UZ-6BRU] (stating that QVC launched in 1986 with its first product being "a Windsor Shower Companion" AM/FM radio); *see also supra* note 72 (explaining the advent of the Internet).

[42] *Compare* Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New Eng., 37 F.3d 12, 19 (1st Cir. 1994) (finding that the plain language of Title III does not necessitate that places of public accommodation be physical buildings with physical entry), *with* Magee v. Coca-Cola Refreshments USA, Inc., 833 F.3d 530, 534 (5th Cir. 2016) (using canons of statutory construction regarding the interpretation of lists to find that Title III requires places of public accommodation to be physical locations). *See also* Richard E. Moberly, *The Americans with Disabilities Act in Cyberspace: Applying the "Nexus" Approach to Private Internet Websites*, 55 MERCER L. REV. 963, 981–82 (2004) (noting that courts adhering to rigid statutory interpretation, particularly in light of Congress's and the Attorney General's reticence to specify coverage of nonphysical entities in Title III, denied the Act's applicability to a range of cases through the 1990s and early 2000s that addressed entities lacking a physical location). Before website cases dominated Title III adjudication, and concurrent with a string of notable insurance cases, plaintiffs filed cases alleging discrimination in the provision of goods and services against youth sports leagues, televised football games, and a newspaper book review, among other organizations. *Id.* The courts in each case held that the entities, lacking "physicality," were not places of public accommodation. *Id.*

[43] *See, e.g.*, Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 953 (N.D. Cal. 2006) (quoting 42 U.S.C. § 12182(a)) (stating that Title III protects disabled people from discrimination so they can partake "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations *of* any place of public accommodation . . . . not services [etc.] *in* a place of public accommodation"). The *Target* court asserted that misinterpreting "of" would inappropriately restrict and negate the language of the ADA. *Id.*; *see also Pallozzi*, 198 F.3d at 33 (confirming that "[t]he term 'of' does not generally mean 'in'"). Further supporting an accurately plain reading of "of," notable legal scholar Karl Llewellyn pithily noted in his survey of canons of statutory construction that "[e]very word and clause must be given effect" and be understood by its "ordinary meaning."

sence of the word "physical" and debate over the use of "of" have been especially significant in the evolving application of the nexus standard.[44]

B. Early Nexus Standard Cases

In 1994, in *Pappas v. Bethesda Hospital Ass'n*, the U.S. District Court for the Southern District of Ohio first alluded to the necessity of a nexus between supposed discriminatory behavior and a place of public accommodation under Title III.[45] As the earliest case to mention a nexus theory between disability discrimination and places of public accommodation, the court merely hinted at the availability of pleading a causal connection, yet unleashed a standard that has influenced Title III adjudication for decades.[46] In *Pappas*, the plaintiff, a nurse whose employer denied her family employer-provided health insurance, alleged that her employer discriminatorily withheld the coverage due to her husband's and child's disabilities, thus violating the ADA.[47] The court declined to apply Title III to the insurance policy because the plaintiff obtained it through her employer and not directly from the insurance office (the place of public accommodation).[48] The discrimination, therefore, was not connected to the plaintiff's inability to access the public accommodation's service and thus lacked a nexus that could have entitled the plaintiff to Title III relief.[49]

Although the court in *Pappas* only briefly mentioned a nexus in dicta, several circuit courts applied this nexus standard in a subsequent string of employer-provided insurance cases, refining the theory to require a connection between the insurance policy and the insurance office rather than the place of employment.[50]

Karl. N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 404 (1950).

[44] *See, e.g.*, Gil v. Winn-Dixie Stores, Inc., 993 F.3d 1266, 1294–95 (11th Cir.) (Pryor, J., dissenting) (arguing that goods and services "of" a public accommodation are not equivalent to services "in" a public accommodation, thus suggesting a physical location is irrelevant to the ADA's requirements), *vacated as moot*, 21 F.4th 775 (11th Cir. 2021).

[45] *See* Pappas v. Bethesda Hosp. Ass'n, 861 F. Supp. 616, 620 (S.D. Ohio 1994) (noting that the plaintiff failed to allege a connection, or nexus, between the discriminatory denial of services and the physical place of public accommodation offering those services).

[46] *Id.* By introducing the concept of a nexus to Title III adjudication, the court in *Pappas* provided plaintiffs with greater flexibility to allege that physical and, importantly, nonphysical entities (a) were covered under Title III's definition of places of public accommodation and (b) violated the Title's non-discrimination provision. *See, e.g.*, Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1011 (6th Cir. 1997) (citing *Pappas* in using a nexus theory in its analysis).

[47] *Pappas*, 861 F. Supp. at 617.

[48] *Id.* at 619–20.

[49] *Id.* at 620.

[50] *Id.*; *see Parker*, 121 F.3d at 1011 (finding that because the plaintiff obtained her insurance benefits from her employer rather than directly from the insurance office, no nexus existed between the discrimination and the services provided by the place of public accommodation); Ford v. Schering-Plough Corp., 145 F.3d 601, 612–13 (3d Cir. 1998) (same); Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114–15 (9th Cir. 2000) (following the holdings of *Parker* and *Ford* to find no

Because the employment locations facilitated the coverage but were not the immediate sources of the policies, most courts held that the nexus was nonexistent and, thus, that the employers had not violated Title III.[51] In cases where the plaintiff sued both the employer and the insurance company, this same "middle man" facilitation prevented the plaintiffs from prevailing against the insurer.[52]

Prior to the website accessibility cases, which now account for a significant portion of Title III litigation, the insurance cases were the most notable Title III cases discussing the Act's applicability to nonphysical places and the appropriateness of using the nexus standard to extend Title III's coverage.[53] Nevertheless, other courts also discussed this physicality issue and applied the nexus theory to public accommodations other than insurance offices and websites.[54]

Notably, in 2002, in *Rendon v. Valleycrest Productions, Ltd.*, the U.S. Court of Appeals for the Eleventh Circuit found that the plaintiff sufficiently demonstrated a nexus between the defendant's telephone hotline and their television studio.[55] Here, the defendant produced the popular television game show "Who

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nexus between the discriminatory provision of insurance policies and the place of public accommodation in the plaintiff's circumstances). Some courts denied the need for a nexus between an insurance policy and any place of public accommodation. *See, e.g.*, Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New Eng., 37 F.3d 12, 20 (1st Cir. 1994) (explaining that by excluding the word "physical," Title III is not limited to physical structures and, thus, that goods and services, whether sold in a building or remotely via phone or post, are protected by the Act).

[51] *See Parker*, 121 F.3d at 1010–11 (stating that an insurance policy provided by one's employer does not qualify as "a good offered by a place of public accommodation" because, among other reasons, members of the public are not welcome to enter the employer's building and acquire the same policy).

[52] *See, e.g.*, *id.* at 1011 (explaining that because the plaintiff did not enter the insurer's office to acquire her insurance policy, the insurance office is not a public accommodation connected to the allegedly discriminatory policy).

[53] *See Ford*, 145 F.3d at 613 (holding that the defendant could not have engaged in prohibited discrimination due to the lack of a nexus between the insurance policy and the insurance office); *Parker*, 121 F.3d at 1011 (same).

[54] *See, e.g.*, Rendon v. Valleycrest Prods., Ltd., 294 F.3d 1279, 1285 n.8 (11th Cir. 2002) (acknowledging that a telephone hotline had a nexus with a place of public accommodation).

[55] *Id.* Although the Eleventh Circuit stated in *Gil v. Winn-Dixie Stores, Inc.* that the *Rendon* court did *not* apply a nexus standard (particularly as the court only mentioned the nexus in a footnote), the *Gil* opinion has since been vacated, allowing one to read *Rendon* as other courts and some scholars do, that is, as applying a nexus standard. *See* Gil v. Winn-Dixie Stores, Inc., 993 F.3d 1266, 1281 (11th Cir.) (citing *Rendon*, 294 F.3d at 1285 n.8) (claiming that the court in *Rendon* "did not adopt or otherwise endorse a 'nexus' standard" but merely noted that the insurance cases "from *other* circuits" could be understood to impose such a standard), *vacated as moot*, 21 F.4th 775 (11th Cir. 2021); *see also* Access Now, Inc. v. Sw. Airlines, Co., 227 F. Supp. 2d 1312, 1320–21 (S.D. Fla. 2002) (noting that, although the plaintiffs in the instant case failed to successfully allege a nexus connecting the defendant's discriminatory service to its place of public accommodation, the plaintiffs correctly identified the circumstances in *Rendon* as an example of such a nexus), *appeal dismissed*, 385 F.3d 1324 (11th Cir. 2004); Moberly, *supra* note 42, at 974 (illustrating the concept of the Title III nexus standard with *Rendon*); Nikki D. Kessling, *Why The* Target *"Nexus Test" Leaves Disabled Americans Disconnected: A Better Approach to Determine Whether Private Commercial Websites Are "Places of Public Accommodation,"* 45 HOUS. L. REV. 991, 1020 (2008) (noting that the court in *Rendon* clari-

Wants to Be A Millionaire" and identified contestants through a telephone-based trivia game.[56] Because show producers selected potential contestants based on their speed in answering the telephone game questions, callers with disabilities that slowed their response time (such as hearing impairments or mobility limitations) were significantly disadvantaged and, thus, did not receive an equal opportunity to appear on the game show as required by Title III.[57] Although the telephone hotline was not a physical place of public accommodation, the Eleventh Circuit determined that it was an "intangible barrier" that precluded the disabled individuals' enjoyment of the benefits of the defendant's physical location.[58] Reading Title III to cover both physical and nonphysical obstructions that impede access to public accommodations, the court applied the nexus standard to hold that the telephone hotline violated the ADA.[59]

Twenty years after *Rendon*, although plaintiffs continue to file Title III lawsuits against nonphysical entities other than websites,[60] claims of website accessibility discrimination have become increasingly prevalent.[61] The development of the nexus standard through Title III's early, non-website cases provided a foundation for plaintiffs to allege that inaccessible websites, particularly those operated by entities with physical places of public accommodation, unlawfully discriminated against individuals with disabilities.[62] Nonetheless, the nexus

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fied that even offsite discrimination can violate Title III if a nexus exists between the allegedly discriminatory service and the defendant's physical location).

[56] *See Rendon*, 294 F.3d at 1280 (explaining the defendant's "fast finger" quiz, available to potential contestants who wish to qualify for an appearance on "Who Wants to Be A Millionaire" by placing a toll-free telephone call).

[57] *Id.* at 1280–81; *see* 42 U.S.C. § 12182(b)(1)(A)(i)–(iii) (prohibiting the restriction or unequal provision of an "opportunity" for disabled individuals to engage in or enjoy "the goods, services, facilities, privileges, advantages, or accommodations" of a place of public accommodation).

[58] *Rendon*, 294 F.3d at 1283, 1286.

[59] *See id.* at 1285–86, 1285 n.8 (explaining that a nexus clearly exists between the telephone hotline and the defendant's television studio).

[60] *See, e.g.*, Dominguez v. Banana Republic, LLC, 1:19-cv-10171-GHW, 2020 WL 1950496, at *1 (S.D.N.Y. Apr. 23, 2020) (alleging that gift cards without Braille discriminated against visually impaired persons, thus violating the ADA). *Dominguez v. Banana Republic, LLC* was one of more than two hundred Title III lawsuits filed in late 2019 and early 2020 against retailers who failed to provide Braille gift cards. Minh Vu & Michael Steinberg, *Businesses Get Early Victory in Lawsuit Demanding Braille Gift Cards*, SEYFARTH SHAW ADA TITLE III: NEWS & INSIGHTS (Apr. 24, 2020), https://www.adatitleiii.com/2020/04/businesses-get-early-victory-in-lawsuit-demanding-braille-gift-cards/ [https://perma.cc/2MRU-5GRP].

[61] *See* Minh N. Vu, *Crystal Ball 2022: More Aggressive DOJ Enforcement, More Lawsuits, and Maybe a New Rulemaking*, SEYFARTH SHAW ADA TITLE III: NEWS & INSIGHTS (Jan. 4, 2022) https://www.adatitleiii.com/2022/01/crystal-ball-2022-more-aggressive-doj-enforcement-more-lawsuits-and-maybe-a-new-rulemaking/ [https://perma.cc/XF7P-H7DA] (noting the numerous lawsuits alleging discrimination due to inaccessible websites).

[62] *See, e.g.*, *Rendon*, 294 F.3d at 1285 n.8 (noting that the existence of "a nexus between the challenged service and the premises of the public accommodation" can necessitate ADA compliance and holding that such a nexus existed between a telephone hotline and its related physical place of public accommodation); Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1011 (6th Cir. 1997) (applying the

standard, applied by courts attempting to faithfully interpret the ADA while appropriately stretching its language to serve the Act's purpose, risks irrelevance in an increasingly digital—and phygital—world.[63]

C. The Nexus Standard Applied to Websites

As the Internet became a common household service and commercial entities exploited its ubiquity to expand their operations, disability discrimination complaints against websites and other digital entities increased.[64] Despite some early cases in which notable judges suggested or explicitly stated that Title III applied to websites, the nexus standard became an important tool for plaintiffs alleging website discrimination, particularly before websites began to closely

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nexus theory, but finding that no nexus existed between the allegedly discriminatory insurance policy and the place of public accommodation); Price v. City of Ocala, 375 F. Supp. 3d 1264, 1269 (M.D. Fla. 2019) (stating that a nexus standard, when present, extends Title III's applicability to websites that prevent access to physical places of public accommodation (citing *Rendon*, 294 F.3d at 1284)).

[63] *See, e.g.*, Kessling, *supra* note 55, at 1024 (alluding to the challenges a Title III website nexus standard can cause, such as excluding purely online businesses with no physical place of public accommodation from ADA compliance or requiring an entity with both a physical location and a website to make its website compliant only where its components relate to the services of the physical place of public accommodation, resulting in a website with spots of legal non-compliance).

[64] *See Internet/Broadband Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/internet-broadband/ [https://perma.cc/Z2J3-YDHK] (stating that in 2000, approximately 50% of American adults had access to the Internet, while in 2021, more than 90% of American adults have Internet access); Peter H. Lewis, *Attention Shoppers: Internet Is Open*, N.Y. TIMES (Aug. 12, 1994), https://www.nytimes.com/1994/08/12/business/attention-shoppers-internet-is-open.html [https://perma.cc/2FDK-3XN3] (reporting on supposedly the first Internet-based sales transaction, which occurred at 12:00 pm on August 11, 1994). After this transaction confirmed the possibility of secure, encrypted payment over the Internet, companies began establishing online retail sites. Lewis, *supra*; *see Amazon Opens for Business*, HISTORY, https://www.history.com/this-day-in-history/amazon-opens-for-business [https://perma.cc/4GYF-2MGA] (noting that online retailer Amazon began its Internet-based business on July 16, 1995); Brad Tuttle, *8 Amazing Things People Said When Online Shopping Was Born 20 Years Ago*, MONEY (Aug. 15, 2014), https://money.com/online-shopping-history-anniversary/ [https://perma.cc/2AHP-7QMA] (stating that, in just the last quarter of 1999, the United States Census Bureau reported Internet sales in excess of $5 billion); *see also* Kristina M. Launey & Minh N. Vu, *Federal Website Accessibility Lawsuits Increased in 2020 Despite Mid-year Pandemic Lull*, SEYFARTH SHAW ADA TITLE III: NEWS & INSIGHTS (Apr. 28, 2021), https://www.adatitleiii.com/2021/04/federal-website-accessibility-lawsuits-increased-in-2020-despite-mid-year-pandemic-lull/ [https://perma.cc/KG2P-6JVC] (noting that claims alleging discriminatory website access drastically increased between 2017 and 2020, with just over 800 lawsuits filed in 2017 and more than 2,500 filed in 2020). Nearly the entire decade of the 1990s passed without any website accessibility lawsuits being filed, and then, in 1999, the National Federation of the Blind sued America Online, Inc., alleging that the Internet provider's digital platform was incompatible with screen readers used by visually impaired individuals attempting to access the service. *See generally* Complaint and Request for Injunctive Relief, Nat'l Fed'n of the Blind v. Am. Online, Inc., No. 99 cv 12303 EFH (D. Mass. Nov. 9, 1999) (alleging that America Online violated Title III of the ADA by creating an Internet access service that failed to work with assistive technologies like screen readers that provide visually impaired persons with access to computer-based text and images).

resemble in spirit, if not in form, the places of public accommodation defined in 42 U.S.C. § 12181.[65]

Although the nexus theory has aided plaintiffs who claimed that the ADA applies to websites,[66] there is a circuit split over whether websites are covered under Title III, with a majority of courts applying strict textual interpretation to hold that the statute's plain language shows Congress either did not intend for the Act to cover nonphysical places like websites or did not consider that it could.[67] By contrast, other courts have accepted that when a substantial connection exists between a website and a physical place of public accommodation, that nexus can command the website's compliance with Title III, finding that this

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[65] *See, e.g.*, Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999) (stating that websites, just like any other physical or nonphysical "facility," must be operated in compliance with the ADA). Judge Richard A. Posner, a towering, but arguably divisive, legal figure, composed this succinct and plain statement regarding Title III's applicability to websites, providing valuable support for courts that broadly interpreted the ADA to cover websites and other nonphysical places. *Id.*; *see* Nat'l Fed'n of the Blind v. Scribd Inc., 97 F. Supp. 3d 565, 570 (D. Vt. 2015) (citing *Doe* to confirm that the ADA covers nonphysical places, including websites); *see also* Lincoln Caplan, *Rhetoric and Law*, HARV. MAG. (Jan.–Feb. 2016), https://www.harvardmagazine.com/2015/12/rhetoric-and-law [https://perma.cc/6VUS-ZXQQ] (calling Judge Posner "America's most contentious legal reformer"). It is possible that Judge Posner's opinion in *Doe*, delivered in June 1999, inspired the National Federation of the Blind to file suit against America Online in November 1999, becoming the first case to directly allege website accessibility discrimination. *See supra* note 64 (illustrating the development of Internet access).

[66] *See, e.g.*, Robles v. Domino's Pizza, LLC, 913 F.3d 898, 905 (9th Cir.) (finding that the plaintiff sufficiently alleged discrimination based on a connection between the defendant's website/mobile application and its restaurants and explaining that the nexus was essential to the court's findings), *cert. denied*, 140 S. Ct. 122 (2019).

[67] *Compare Doe*, 179 F.3d at 559 (acknowledging that Title III clearly applies to websites), *with* Access Now, Inc. v. Sw. Airlines, Co., 227 F. Supp. 2d 1312, 1318–19 (S.D. Fla. 2002) (finding that websites are not covered by Title III according to the Title's plain language and by the canon of statutory construction *ejusdem generis*, which compels any "general words" that follow enumerated examples like those in Title III's definition of places of public accommodation to be understood as similar to those examples (quoting Allen v. A.G. Thomas, 161 F.3d 667, 671 (11th Cir. 1998))), *appeal dismissed*, 385 F.3d 1324 (11th Cir. 2004); *see also* Moberly, *supra* note 42, at 981–82 (suggesting that both Congress's and the Department of Justice's chosen words, as well as their silence on the ADA's applicability to websites and other intangible spaces, indicate that the Act is not meant to apply to nonphysical places like websites). The U.S. Courts of Appeals for the Third, Fifth, Sixth, and Ninth Circuits adhere to the majority view that Title III identifies only physical places as public accommodations. *See* Ford v. Schering-Plough Corp., 145 F.3d 601, 614 (3d Cir. 1998) (finding that places without physical locations are not public accommodations); Magee v. Coca-Cola Refreshments USA, Inc., 833 F.3d 530, 534–35 (5th Cir. 2016) (same); Stoutenborough v. Nat'l Football League, Inc., 59 F.3d 580, 583 (6th Cir. 1995) (same); *Robles*, 913 F.3d at 905 (same). In contrast, the U.S. Courts of Appeals for the First, Second, and Seventh Circuits hold the minority view that Title III's language is broad enough to define nonphysical places as public accommodations. *See* Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New Eng., 37 F.3d 12, 19 (1st Cir. 1994) (finding that Title III's definition for "place of public accommodation" is sufficiently broad or ambiguous to include nonphysical places); Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28, 32 (2d Cir. 1999) (same); *Doe*, 179 F.3d at 559 (same).

approach comports with a purposive interpretation of the ADA.[68] This Section examines how courts applied the nexus theory before the COVID-19 pandemic,[69] and how the nexus standard has been used in complaints and opinions since the COVID-19 pandemic began.[70]

1. The Nexus Standard and Websites, Pre-COVID-19

The ADA supports divergent interpretations regarding its application to websites based on whether the court favors rigid textualist construction or a more generous purposive reading.[71] For courts adhering to originalist or textualist interpretation, there is little flexibility in the Act's language and provenance to permit its application to websites given that the World Wide Web was not created until just before the ADA's enactment.[72] In contrast, courts favoring purposivism find the Act's legislative history supports a broader reading of Title III's language.[73] On both sides of the split, the courts contended with the nexus theory

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[68] *See, e.g.*, *Robles*, 913 F.3d at 905 (determining that a nexus between a website and a physical place of public accommodation requires that website's compliance with Title III). Although the Ninth Circuit does not find that Title III covers nonphysical places, it applies the nexus theory to extend liability in the presence of a clear connection between a physical place of public accommodation and unequal access to that public accommodation's goods and services. *Id.*

[69] *See infra* notes 71–90 and accompanying text.

[70] *See infra* notes 91–102 and accompanying text.

[71] *See* Moberly, *supra* note 42, at 971–72 (comparing the *Access Now* court's rigid textualist construction that led it to find Title III did not apply to websites with a National Council on Disability (NCD) position paper in which the NCD elevated the ADA's comprehensive charge to eliminate discrimination as justification for applying the Act to websites). The NCD "is an independent federal agency" established in 1978 that guides the branches of the government on disability policy. *About Us*, NAT'L COUNCIL ON DISABILITY, https://www.ncd.gov/about [https://perma.cc/FR89-GFR5]; *see supra* note 67 (comparing two cases on either side of the circuit split).

[72] *See* Moberly, *supra* note 42, at 979 (noting that the Act refers neither to the Internet nor websites because they were not yet widely available, making congressional intent to cover them highly unlikely). Although early iterations of the Internet date to the late 1960s, these first networks were contained within government and academic institutions, while the World Wide Web was created in 1989, but not widely used until Internet access became a more common household service. *See* William Craig, *The History of the Internet in a Nutshell*, WEBFX (Aug. 12, 2022), https://www.webfx.com/blog/web-design/the-history-of-the-internet-in-a-nutshell/ [https://perma.cc/3ZRX-ATEA] (remarking that institutions like Stanford, UCLA, Harvard, and MIT were the first to connect their networks, with commercial Internet service arriving in 1990); *Tim Berners-Lee*, W3C (Aug. 9, 2022), https://www.w3.org/People/Berners-Lee/ [https://perma.cc/S9F9-MVUT] (stating that Berners-Lee "invented the World Wide Web in 1989"). While Congress evidently could not have considered the impact of the Internet on daily life in 1990, congressional history suggests that the ADA was meant to protect against discrimination as technology evolved. *See* H.R. REP. NO. 101-485(II), at 108 (1990) (Conf. Rep.) (explaining that the House Committee on Education and Labor supported the ADA's ongoing and evolving application even as technology advanced in forthcoming years).

[73] *See, e.g.*, Castillo v. Jo-Ann Stores, LLC, 286 F. Supp. 3d 870, 874–75 (N.D. Ohio 2018) (addressing the ADA's legislative history, particularly remarks supporting a broad reading of Title III's enumerated examples of places of public accommodation (citing PGA Tour, Inc. v. Martin, 532 U.S. 661, 667 (2001))).

and its application to websites.[74] Although many of the thousands of website accessibility cases heard before the COVID-19 pandemic involved the nexus theory, three cases significantly contributed to the nexus standard's development.[75]

In 2002, in *Access Now, Inc. v. Southwest Airlines, Co.*, the U.S. District Court for the Southern District of Florida became the first court to hold that websites were not places of public accommodation, allowing, however, that a nexus could nonetheless require ADA compliance.[76] In this case the plaintiffs alleged that the online ticket service available at the defendant's website, Southwest.com, was incompatible with screen readers used by visually impaired individuals.[77] The plaintiffs, however, failed to allege a nexus between the website and Southwest's physical ticket counters, which led the court to dismiss their case.[78] On appeal, the plaintiffs attempted to argue the nexus standard, but the U.S. Court of Appeals for the Eleventh Circuit was unwilling to consider a new argument, finding the case insufficiently compelling for such a breach of procedure.[79] Although the plaintiffs were unable to introduce the nexus standard on appeal, the Eleventh Circuit's acknowledgment of the standard strengthened the theory's viability for future website accessibility claims.[80]

In 2006, in *National Federation of the Blind v. Target Corp.*, the U.S. District Court for the Northern District of California applied the nexus theory to find that defendant Target's website, to the extent it supported a disabled individual's

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[74] *Compare* Access Now, Inc. v. Sw. Airlines, Co., 227 F. Supp. 2d 1312, 1321 (S.D. Fla. 2002) (finding that without a sufficiently pleaded nexus standard, the defendant's website need not comply with Title III as websites are not places of public accommodation), *appeal dismissed*, 385 F.3d 1324 (11th Cir. 2004), *with* Del-Orden v. Bonobos, Inc., 17 Civ. 2744 (PAE), 2017 WL 6547902, at *4, *11 (S.D.N.Y. Dec. 20, 2017) (finding that websites are, by default, covered by Title III, but that the nexus theory was also available for the plaintiff in alleging discriminatory lack of access to the defendant's website).

[75] *See, e.g.*, Martinez v. San Diego Cnty. Credit Union, 50 Cal. App. 5th 1048, 1054 (2020) (stating that the plaintiff's complaint, filed in 2017, sufficiently pleaded a nexus between the defendant's website and its place of public accommodation); *see infra* notes 76–90 (discussing the three website accessibility cases that most contributed to the development of the nexus standard).

[76] *See Access Now*, 227 F. Supp. 2d at 1320–21 (holding that Title III's plain language denies coverage of websites, but permitting use of a nexus standard to expand Title III coverage when a plaintiff sufficiently pleads a connection between the website and a place of public accommodation); *see also* Kessling, *supra* note 55, at 1020 (stating that the district court in *Access Now* was the earliest court to hold that Title III did not apply to websites).

[77] *Access Now*, 227 F. Supp. 2d at 1316.

[78] *Id.* at 1319. Although the plaintiffs cited *Rendon v. Valleycrest Productions Ltd.*, the court declined to inferentially read an implicit nexus standard in the complaint. *Id.* at 1321.

[79] Access Now, Inc. v. Sw. Airlines, Co., 385 F.3d 1324, 1329–30 (11th Cir. 2004). By dismissing this appeal, the Eleventh Circuit would not consider whether websites are places of public accommodation until 2021, when it heard *Gil v. Winn-Dixie Stores, Inc*. *Id.*; 993 F.3d 1266, 1274 (11th Cir.), *vacated as moot*, 21 F.4th 775 (11th Cir. 2021). Because the *Gil* opinion was ultimately vacated, the Eleventh Circuit remains silent on whether websites are places of public accommodation; nonetheless, and significant to this Note, the vacated opinion does allow *Rendon* to be read as applying a nexus standard. *See Gil*, 21 F.4th 775, 776 (11th Cir. 2021).

[80] *Access Now*, 385 F.3d at 1329.

equitable access to the "goods and services" in Target's physical locations, must comply with Title III of the ADA.[81] The parts of the website unrelated to Target's stores, however, were not required to comply with the ADA as these aspects lacked a nexus to a place of public accommodation.[82] This decision, while a significant blow to one of America's largest retailers, nevertheless promulgated a nexus standard that threatened to exclude vast numbers of entities and their websites from Title III coverage.[83] It also led to the arbitrary exclusion of plaintiffs whose claims insufficiently alleged an injury related to the website, or whose shopping experiences at Target or Target.com did not adequately reflect website accessibility issues.[84] These issues foreshadow the challenge of fairly applying a nexus between an entity's website and its physical locations in an increasingly phygital commercial setting.[85]

Finally, in 2019, in *Robles v. Domino's Pizza*, the U.S. Court of Appeals for the Ninth Circuit explicitly pointed to the nexus between Domino's website/mobile application and its physical locations to find that Title III required the website's and mobile app's compliance with anti-discriminatory measures.[86] In *Robles*, the visually impaired plaintiff alleged that Domino's strongly promoted and heavily used website and app were both incompatible with his screen reader, denying him the equal privilege of accessing all of

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[81] Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 956 (N.D. Cal. 2006).

[82] *Id.*

[83] *See Top 100 Retailers 2021 List*, NAT'L RETAIL FED'N (Sept. 27, 2021), https://nrf.com/resources/top-retailers/top-100-retailers/top-100-retailers-2021-list [https://perma.cc/P96W-4AR6] (listing Target as the seventh largest retail company by sales in the United States). In 2008, Target settled with the National Federation of the Blind, agreeing to modify Target.com, provide ongoing training for website employees, and pay $6 million in monetary damages. *National Federation of the Blind v. Target Corporation*, SE. ADA CTR., https://adasoutheast.org/court/national-federation-of-the-blind-v-target-corporation-2/ [https://perma.cc/BQ58-99P5]; *see also* Kessling, *supra* note 55, at 1024 (noting that the *Target* nexus approach "completely excludes online only businesses from Title III's requirements"). In 2006, the year *Target* was decided, e-commerce revenue exceeded $100 billion. *E-Commerce Hits All-Time High in 2006*, EMARKETER (Jan. 8, 2007), https://www.emarketer.com/Article/E-Commerce-Hits-All-Time-High-2006/1004446 [https://perma.cc/SN2C-BWEG]. While this figure likely includes both online-only and hybrid phygital businesses, it illustrates the magnitude of online shopping activity and the potential difficulty courts face in applying the nexus standard. *See* Kessling, *supra* note 55, at 995 (arguing that the nexus theory applied by the *Target* court would lead to "absurd results" given the variety of online and/or physical commercial transaction possibilities).

[84] *See* Kessling, *supra* note 55, at 1023 (explaining that the U.S. District Court for the Northern District of California, in proceedings for certifying a class for the class action against Target, arbitrarily included or excluded plaintiffs based on whether they liked shopping at Target.com more than at Target stores and whether they could access Target.com prior to acquiring goods or services in a physical Target location).

[85] *See, e.g.*, Smith & Inazu, *supra* note 18, at 768 (acknowledging that the various types of online activity generate difficulty for which the nexus standard is ill-equipped).

[86] Robles v. Domino's Pizza, LLC, 913 F.3d 898, 905 (9th Cir.), *cert. denied*, 140 S. Ct. 122 (2019).

Domino's services.[87] In applying the nexus standard, the court distinguished Domino's digital services from the nonphysical insurance policy in *Weyer v. Twentieth Century Fox Corp.* to determine that, unlike the nonexistent nexus between the insurance policy and a place of public accommodation, Domino's website and mobile app were clearly connected to the operations at its physical storefronts.[88] The Ninth Circuit, despite not reading Title III to unconditionally apply to websites or apps, firmly applied a modern nexus standard.[89] This modern interpretation of Title III accounts for the changing reality of how people access phygital public accommodations, subtly, but importantly, expanding the nexus theory to cover mobile applications.[90]

2. The Nexus Standard and Websites During COVID-19 and Present Day

In 2020 and 2021, courts mostly heard Title III cases filed prior to the pandemic in which plaintiffs could not have alleged discrimination specific to or exacerbated by COVID-19 and the restrictions it placed on everyday life.[91] New Title III cases, however, continued to be filed throughout the pandemic, with plaintiffs directly addressing the challenges COVID-19 presented for disabled persons seeking reasonable access to places of public accommodation.[92]

For example, in *Calcano v. Camp Experience Stores, Inc.*, the visually impaired plaintiff pleaded that the defendant unlawfully discriminated against him because its website was incompatible with the plaintiff's screen reader, denying the plaintiff equal access to the defendant's services.[93] The plaintiff asserted that

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[87] *Id.* at 902. Domino's website and app provided services such as a store locator tool and the ability to order food for pickup at the physical restaurant or for delivery to one's home. *Id.* at 905.

[88] *See id.* (explaining, for example, that patrons use the Domino's website or app to locate storefronts and place orders before visiting the storefront for pickup); Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1115 (9th Cir. 2000) (explaining that no nexus existed between an employer-provided insurance policy and the insurer's place of public accommodation).

[89] *See Robles*, 913 F.3d at 905 & n.6 (noting that in this case, the court need not analyze Title III to determine if inaccessible websites unrelated to physical access are governed by the Act).

[90] *Id.*; *see* Ernesto Claeyssen, Note, *Buy It on the 'Gram: The Need to Extend the Americans with Disabilities Act to the E-Commerce World*, 72 RUTGERS U. L. REV. 1517, 1542 (2020) (stating that companies like Instagram, whose social media platform is commonly accessed via its mobile application, have facilitated app-based e-commerce transactions between its users); John Herrman, *Will TikTok Make You Buy It?*, N.Y. TIMES (Oct. 2, 2021), https://www.nytimes.com/2021/10/02/style/tiktok-shopping-viral-products.html [https://perma.cc/HNZ4-APB9] (explaining that the social media app TikTok promoted TikTok Shopping, a feature meant to support commercial transactions within the app, potentially turning TikTok into "a virtual mall").

[91] *See, e.g.*, Murphy v. Bob Cochran Motors, Inc., No. 1:19-cv-239-SPB, 2020 WL 5757200, at *2–3 (W.D. Pa. Sept. 28, 2020) (indicating that the suit was filed on December 4, 2019, just prior to the pandemic, but decided on September 28, 2020, well into the first year of COVID-19).

[92] *See, e.g.*, Class Action Complaint at 1–2, Calcano v. Camp Experience Stores, Inc., No. 1:22-cv-1310 (S.D.N.Y. Feb. 16, 2022) (asserting that the defendant's website, by denying the plaintiff "full and equal access," violated the ADA).

[93] *Id.* at 3.

such discrimination was especially grave during COVID-19 as officials recommended extended social isolation for disabled people, forcing them to rely on digital commerce for their health and safety.[94] Further, the plaintiff pointed to the nexus between the defendant's website and its physical location to argue for Title III protection of his rights, calling the website an entryway to the defendant's services.[95] Because his access to the defendant's offerings was obstructed by both COVID-19 protective measures and the incompatible website, the plaintiff urged the court to acknowledge the unlawful discrimination and provide relief under the ADA.[96]

Plaintiffs filed a record-breaking number of Title III suits in 2021.[97] Although scholars are still tallying the cases attributable to inaccessible websites, if those cases equal or exceed those filed in 2020, then more than five thousand website accessibility claims will have been made during the first two years of the COVID-19 era.[98] One theme already emerging from the pandemic is the growing prevalence of predatory litigation, with plaintiff's attorneys flocking to advantageous jurisdictions to file website accessibility suits.[99] Of the thousands of

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[94] *Id.*

[95] *Id.* at 6.

[96] *Id.* at 2.

[97] Minh Vu, Kristina Launey & Susan Ryan, *ADA Title III Federal Lawsuit Filings Hit an All Time High*, SEYFARTH SHAW ADA TITLE III: NEWS & INSIGHTS (Feb. 17, 2022) [hereinafter *2021 ADA Filings*], https://www.adatitleiii.com/2022/02/ada-title-iii-federal-lawsuit-filings-hit-an-all-time-high/ [https://perma.cc/N2EF-DNQM]. Although in 2022 plaintiffs continue to file lawsuits alleging discrimination under Title III, filings have dropped by 22% compared to the number of lawsuits filed in the first six months of 2021. Minh Vu, Kristina Launey & Susan Ryan, *2022 ADA Title III Mid-Year Federal Lawsuit Filings Drop 22% Compared to 2021*, SEYFARTH SHAW ADA TITLE III: NEWS & INSIGHTS (July 12, 2022) [hereinafter *Mid-Year ADA Filings*], https://www.adatitleiii.com/2022/07/2022-ada-title-iii-mid-year-federal-lawsuit-filings-drop-22-compared-to-2021/ [https://perma.cc/XQ3Y-T7VH]. The authors suggest that one cause for the drop in filings could be that courts are evaluating pleadings with more intense scrutiny and pursuing action against attorneys filing allegedly fraudulent lawsuits. *Mid-Year ADA Filings*, *supra*. As a result, firms could be more cautious about pursuing website accessibility litigation in 2022. *Id.*

[98] Kristina M. Launey & Minh N. Vu, *Federal Website Accessibility Lawsuits Increased in 2020 Despite Mid-Year Pandemic Lull*, SEYFARTH SHAW ADA TITLE III: NEWS & INSIGHTS (Apr. 28, 2021), https://www.adatitleiii.com/2021/04/federal-website-accessibility-lawsuits-increased-in-2020-despite-mid-year-pandemic-lull/ [https://perma.cc/NQ8G-B8GH]. In 2020, more than 2,500 website accessibility lawsuits were filed in federal courts, comprising nearly 23% of all Title III lawsuits. *Id.* Although the filing of Title III complaints slightly slowed in 2020 compared to 2019, attorneys at Seyfarth Shaw who monitor Title III cases reported record-breaking filings in 2021. *See 2021 ADA Filings*, *supra* note 97 (noting that plaintiffs filed more than eleven thousand Title III lawsuits in 2021, a 4% increase over 2020's filings, and a 320% increase in filings since Seyfarth Shaw began observing Title III lawsuits in 2013).

[99] *See* Julia N. Sarnoff & John W. Egan, *Forum Shopping for a Website Lawsuit Over the Holidays? Look No Further Than the SDNY*, SEYFARTH SHAW ADA TITLE III: NEWS & INSIGHTS (Dec. 21, 2021), https://www.adatitleiii.com/2021/12/forum-shopping-for-a-website-lawsuit-over-the-holidays-look-no-further-than-the-sdny/ [https://perma.cc/NR66-FULJ] (explaining that in the last quarter of 2021, plaintiffs filed more than 680 online accessibility complaints in New York federal courts, with nearly 90% filed in the state's Southern District, strongly suggesting forum shopping for a supportive

lawsuits filed, hundreds are boilerplate complaints targeting, for instance, hotels or art galleries.[100] Some courts are less inclined to favor such prolific, albeit valid, filing and disapprove of wasting judicial resources on activist litigation.[101] Nevertheless, the nexus standard was stridently represented in COVID-19 website accessibility filings despite concerns that the theory fails to fulfill Title III's purpose to protect against disability discrimination.[102]

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jurisdiction). "Predatory litigation" is a label that critics apply to aggressive and opportunistic plaintiffs and attorneys who file lawsuits seeking to quickly settle; because litigation is often more costly than the settlement, businesses tend to concede to a settlement. *See* Ryan Donovan, *Finding Solutions to Predatory Litigation Alleged Under ADA*, CREDIT UNION TIMES (Feb. 23, 2018), https://www.cutimes.com/2018/02/23/finding-solutions-to-predatory-litigation-alleged-under-ada/?slreturn=20220115182026 [https://perma.cc/8VTV-JYDR] (calling predatory litigation a "cash cow" for lawyers who know how to exploit unpredictable website accessibility requirements under the ADA). Predatory litigation is also a recognized concern in healthcare law, patent law, and antitrust law. *See generally Litigation as a Predatory Practice: Hearing Before the Subcomm. on Intell. Prop., Competition, and the Internet of the H. Comm. on the Judiciary*, 112th Cong. (2012) (noting the challenges—such as high costs and harassing discovery requests—of "frivolous" and abusive lawsuits in areas like healthcare, intellectual property, and antitrust).

[100] *See* Lotus Cannon & Minh Vu, *NY Federal Judge Puts the Kibosh on 17 Reservations Website Lawsuits Filed by Same Plaintiff*, SEYFARTH SHAW ADA TITLE III: NEWS & INSIGHTS (July 7, 2021), https://www.adatitleiii.com/2021/07/ny-federal-judge-puts-the-kibosh-on-17-reservations-website-lawsuits-filed-by-same-plaintiff/ [https://perma.cc/MJE3-CFUL] (noting that Judge Brenda K. Sannes found the plaintiff, a disabled woman from Florida, lacked standing in seventeen lawsuits alleging that hotel websites provided insufficient accessibility information about their physical locations). The plaintiff, Deborah Laufer, has filed more than six hundred Title III lawsuits against hotels and other lodging facilities since 2018. *Id.*; *see* Zehentner, *supra* note 41, at 701 (illustrating predatory Title III litigation with a string of lawsuits filed against art galleries, in alphabetical order, over the course of a few days).

[101] *See* Cannon & Vu, *supra* note 100 (noting Judge Sannes's order to dismiss Laufer's active cases because her role as a "tester"—someone who files lawsuits for advocacy purposes and not necessarily as a result of genuine injury—showed a lack of standing). *But see* Jasmine Harris & Karen Tani, *Debunking Disability Enforcement Myths*, REGUL. REV. (Oct. 25, 2021), https://www.theregreview.org/2021/10/25/harris-tani-debunking-disability-enforcement-myths/ [https://perma.cc/B6HK-KBCN] (arguing against notions that ADA lawsuits are innately dubious and proposing instead that the system and the Act are working as intended and that Title III predatory litigation is more of a misunderstanding than a reality). *See also* Lainey Feingold, *What Can Structured Negotiation Offer the Business Attorney? A Lot!*, ABA: BUS. L. TODAY (Sept. 28, 2017), https://www.americanbar.org/groups/business_law/publications/blt/2017/09/05_feingold/ [https://perma.cc/6855-72NH] (offering "[s]tructured [n]egotiation," a conflict resolution method outside the court system, as a cost-effective and more amiable alternative to litigating disability discrimination claims).

[102] *See, e.g.*, Class Action Complaint and Jury Demand, Murphy v. Yossi Milo Gallery, Inc., No. 21 CV 9417 (S.D.N.Y. Nov. 15, 2021) (alleging that the defendant's website violated Title III of the ADA through its nexus to the defendant's physical location, and further arguing that such discrimination was especially grave during COVID-19). The boilerplate language in this complaint appears in dozens of similar lawsuits filed against other art galleries. Zehentner, *supra* note 41, at 701; *see also* Smith & Inazu, *supra* note 18, at 767 (calling for the end of the Title III nexus standard because it cannot support the complicated aspects of the Internet).

II. CHALLENGES, CONCERNS, AND CRITICISMS OF THE NEXUS STANDARD

Although the nexus standard proved successful for some disabled plaintiffs who alleged that a website discriminatorily denied them access to a place of public accommodation, some scholars have criticized the standard's inconsistent application and mixed results.[103] Even cases in which plaintiffs prevailed against highly visible defendants such as Target resulted in ambiguous and imperfect resolutions to restore accessibility.[104] Nevertheless, once courts endorsed the nexus standard, more plaintiffs claimed a physical-digital nexus, particularly in website accessibility lawsuits.[105] Although circuit courts are split regarding whether a website independently must comply with Title III, the widespread use of the nexus standard establishes its value, but also illuminates the standard's fickleness in action.[106] Once COVID-19 arrived and commerce moved online, the use of—and concerns with—the nexus standard increased.[107] In particular,

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[103] *See, e.g.*, Kessling, *supra* note 55, at 995 (proposing that the nexus test, as applied in *National Federation for the Blind v. Target*, generates "absurd" outcomes, such as courts requiring one part of a website to comply with Title III while other parts of the same website need not comply).

[104] *See* Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 956 (N.D. Cal. 2006) (concluding that the plaintiffs stated a valid claim regarding inaccessible information on Target's website that denied them "full and equal enjoyment of goods and services" in Target's physical locations, but that the plaintiffs' claim failed regarding other parts of the website not affiliated with Target's storefronts). The court did not clarify how to determine which information is connected to Target's physical facilities. *Id.*; *see* Kessling, *supra* note 55, at 1022 (explaining that the court's conclusion in *Target* presents various problems for future application, including the challenge of identifying which parts of a website are connected to the physical place of public accommodation).

[105] *See generally* Complaint, Vergara v. Luxottica of Am., Inc., No. 1:22-cv-20333 (S.D. Fla. Feb. 1, 2022) (alleging that the defendant's inaccessible website unlawfully discriminates against the visually impaired plaintiff seeking relief under Title III because the website was both connected to and provided entry to the goods and services of the defendant's physical locations).

[106] *See 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 [https://perma.cc/G89Y-VPLT] (noting that some circuit courts hold that websites are places of public accommodation, whereas other circuit courts hold that websites are not places of public accommodation, and that yet another sect of circuit courts holds that websites must comply with Title III because of a nexus between the website and a physical place of public accommodation). When the Eleventh Circuit vacated its *Gil v. Winn-Dixie Stores, Inc.* opinion, which held that websites are not places of public accommodation, the circuit split became binary: a majority of circuit courts hold that websites must only comply with Title III when a nexus exists, and a minority of circuit courts hold that websites (under a broad umbrella of "nonphysical places" in some cases) are places of public accommodation subject to Title III compliance. *See* Carly Malamud, *Split Circuits Make More Trouble for the Disabled Community During COVID-19*, AM. U. J. GENDER SOC. POL'Y & L., https://jgspl.org/split-circuits-make-more-trouble-for-the-disabled-community-during-covid-19/ [https://perma.cc/26HU-24BH] (stating that the First, Second, and Seventh Circuits held that Title III applies to websites because they are places of public accommodation, whereas the Third, Sixth, and Ninth Circuits require a nexus between a website and a place of public accommodation for Title III to apply).

[107] *See, e.g.*, Smith & Inazu, *supra* note 18, at 768 (illustrating the nexus standard's limitations through its inability to regulate "online townhalls," which replace rather than supplement physical townhalls, or websites like Airbnb, which only provide digital access to physical services or goods).

activism-minded plaintiffs continued the practice of serial filing website accessibility lawsuits alleging a nexus.[108]

This Part explores the nexus standard's confusing and inconsistent outcomes and discusses how ongoing changes in commerce continue to complicate how courts apply the standard, often falling short of providing the equal access that the ADA requires.[109] Section A of this Part examines the support for and criticism of the nexus standard's application and outcomes as it became the primary tool for disabled plaintiffs to succeed in website accessibility lawsuits.[110] Section B examines the rise of predatory Title III litigation during COVID-19 in which plaintiffs abuse the nexus standard in order to swiftly settle, focusing less on ending discrimination and more on making quick money.[111] Section C discusses the challenges and opportunities COVID-19 presents in appropriately and successfully applying the nexus standard, especially as the pandemic has altered commerce and inverted the relationship between digital and physical places.[112]

A. Challenges Applying the Nexus Standard to Websites

After the court in *Pappas v. Bethesda Hospital Ass'n* introduced the concept of a nexus test to evaluate whether Title III of the ADA could apply to nonphysical places, plaintiffs began pleading the nexus standard to allege discriminatory provision of insurance policies, education programs, and websites, among other nonphysical entities.[113] Plaintiffs alleging such discrimination outside of a physical place of public accommodation succeeded in courts that emphasized the ADA's purpose of ending discrimination against disabled per-

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[108] *See, e.g.*, Shira M. Blank & Joshua A. Stein, *COVID-19 Accessibility Issues as ADA Turns 30*, EPSTEIN BECKER GREEN: WORKFORCE BULL. (July 13, 2020), https://www.workforcebulletin.com/2020/07/13/covid-19-accessibility-issues-as-ada-turns-30/ [https://perma.cc/C688-42MG] (stating that, largely as a result of the pandemic, lawsuits alleging unlawful discrimination through website inaccessibility began to rise).

[109] *See infra* notes 103–166 and accompanying text; *see also* Smith & Inazu, *supra* note 18, at 768.

[110] *See infra* notes 113–140 and accompanying text.

[111] *See infra* notes 141–153 and accompanying text.

[112] *See infra* notes 154–166 and accompanying text.

[113] *See* Pappas v. Bethesda Hosp. Ass'n, 861 F. Supp. 616, 620 (S.D. Ohio 1994) (indicating that a nexus between a physical place of public accommodation and the source of the alleged discrimination can compel Title III compliance); Reply Brief of Appellants at 9, Weyer v. Twentieth Century Fox Film Corp., No. 98-35215 (9th Cir. Oct. 26, 1998) (arguing that the plaintiff provided "ample evidence" of a nexus between herself and an insurance office as a recipient of an employer-provided insurance policy); Holman *ex rel* J.H. v. Just for Kids, Inc., 248 F. Supp. 3d 1210, 1218 (D. Utah 2017) (explaining that the plaintiff attempted to establish a "close connection" between an educational program and the physical locations at which it operated to establish the program as a "place of public accommodation"); Martinez v. San Diego Cnty. Credit Union, 50 Cal. App. 5th 1048, 1065 (2020) (arguing that the court should apply the nexus standard, if not Title III alone, to consider a credit union's website liable for discrimination against disabled users).

sons.[114] Marrying Title III's language and purpose, the nexus theory gained support as the best available option for addressing discrimination in a burgeoning digital landscape.[115]

Some scholars, for example, praised the nexus standard's recognition of the Internet as essential for access to physical places of public accommodation.[116] Others lauded the nexus standard because, when properly applied, it provided disabled people with the equal enjoyment of public accommodations that Title III grants them.[117] Yet another plaudit for the nexus standard emphasized it as a champion of the ADA's language, honoring Title III's limitations to physical places while embodying the Act's comprehensive charge to end discrimination against people with disabilities.[118]

As the Internet became more ubiquitous in the 2000s and its commercial capabilities increased, however, the nexus standard's shortcomings began to overshadow some of its successes.[119] Bodies like the National Council on Disability (NCD), an independent advisory governmental agency, argued for more generous Title III coverage of websites.[120] In particular, the NCD stated that the nexus standard was insufficient because it still emphasized physicality, thus excluding websites with no connection to a physical place of public accommo-

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[114] *See, e.g.*, Andrews v. Blick Art Materials, LLC, 268 F. Supp. 3d 381, 397 (E.D.N.Y. 2017) (holding that, because the ADA is meant to completely resolve discrimination, a nexus theory is sufficient to achieve the statute's goals while critiquing its necessity).

[115] *See* Moberly, *supra* note 42, at 976 (stating that the nexus standard adheres to the ADA's language and goal while acknowledging the Internet's role in daily life).

[116] *See id.* at 967 (claiming that the nexus theory rightly acknowledges the Internet's role in offering important connections to goods and services sold in physical places).

[117] *See* Michael Goldfarb, Comment, Access Now, Inc. v. Sw. Airlines, Co.—*Using the "Nexus" Approach to Determine Whether a Website Should Be Governed by the Americans with Disabilities Act*, 79 ST. JOHN'S L. REV. 1313, 1334 (2005) (explaining that the nexus standard is an appropriate embodiment of Title III's purpose to provide "equal access" to disabled individuals).

[118] *See* Moberly, *supra* note 42, at 978 (claiming that the nexus standard properly enforces the ADA by limiting strict coverage to physical places while allowing the Act's broad purpose to be accomplished where sufficient connections between the physical and nonphysical exist).

[119] *See* Andrew Perrin & Maeve Duggan, *Americans' Internet Access: 2000–2015*, PEW RSCH. CTR. (June 26, 2015), https://www.pewresearch.org/internet/2015/06/26/americans-internet-access-2000-2015/ [https://perma.cc/6BLK-72YN] (showing that between 2000 and 2015, Internet usage increased from 52% of American adults to 84% of American adults); John B. Horrigan, *Online Shopping: Part 1. Trends in Online Shopping*, PEW RSCH. CTR. (Feb. 13, 2008), https://www.pewresearch.org/internet/2008/02/13/part-1-trends-in-online-shopping/ [https://perma.cc/FZ5Z-277H] (stating that revenue for digital commerce increased more than $20 billion between 2000 and 2007); *When the Americans with Disabilities Act Goes Online: Application of the Americans with Disabilities Act to the Internet and the Worldwide Web*, NAT'L COUNCIL ON DISABILITY (July 10, 2003) [hereinafter NCD Paper], https://ncd.gov/publications/2003/July102003 [https://perma.cc/6K4J-2R6M] (questioning the value of the nexus test because it denies relief from digital prejudice, which is arguably as harmful as physical prejudice).

[120] *See* NCD Paper, *supra* note 119 (asserting that Title III unequivocally applies to websites, and further expressing concern that the nexus standard will perpetuate "untenable and incoherent" differentiation between classes of websites based on their connections to physical locations).

dation.[121] The NCD further anticipated complicated and unfair outcomes resulting from the irregular application of the nexus standard.[122] Similarly, some scholars criticized negative repercussions of such nexus-led victories, while other scholars criticized courts that failed to properly apply the nexus standard or ignored it altogether.[123]

For example, one scholar argued that the district court in *Access Now, Inc. v. Southwest Airlines, Co.* erroneously applied the nexus standard.[124] Although *Access Now* was decided only a few months after the Eleventh Circuit's *Rendon v. Valleycrest Productions, Ltd.* decision, which held that "intangible barriers" that deny access to physical locations demonstrate a nexus sufficient to require Title III compliance, the U.S. District Court for the Southern District of Florida nevertheless declined to extend this holding to cover websites that impede enjoyment of public accommodations.[125] The court reasoned that Southwest's website "ticket counters," unlike the telephone screening process in *Rendon*, did not prevent access to the "goods and services" of a specific physical location; the plaintiffs attempted to use the online ticket counters independ-

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[121] *See id.* (explaining the absurdity of some websites, but not others, being subject to ADA compliance based on the existence of a "tight nexus" between a website and a physical location). Notably, Title III does not specify "physical" as a defining feature of places of public accommodation, but many courts and scholars interpret its exhaustive list of public accommodations as evidence of Congress's intent to limit Title III to physical places. *See* 42 U.S.C. § 12181(7) (defining "public accommodation" with an enumeration of examples that are arguably physical, but failing to use the term "physical" in describing them); Gil v. Winn-Dixie Stores, Inc., 993 F.3d 1266, 1277 (11th Cir.) (concluding that because all of the places Congress identified in Title III are physical, the Act's "plain language" restricts public accommodations to physical locations), *vacated as moot*, 21 F.4th 775 (11th Cir. 2021); Moberly, *supra* note 42, at 967 (stating that Title III is inapplicable to websites because Congress intended the statute only to govern physical places).

[122] *See* NCD Paper, *supra* note 119 (indicating the "impossibility" of consistently applying the nexus standard because of the exponential ways in which physical and digital places can interact, and further foreseeing outcomes in which some websites are governed by the ADA and others are not).

[123] *See* Kessling, *supra* note 55, at 1022–23 (arguing that the court in *Target* applied a complicated version of the nexus standard that "carve[d] up" Target's website so that only certain pages or components were governed by the ADA); Moberly, *supra* note 42, at 995 (asserting that the court in *Access Now* improperly applied the nexus test by analyzing an irrelevant connection that unfairly narrowed the standard).

[124] *See* Access Now, Inc. v. Sw. Airlines, Co., 227 F. Supp. 2d 1312, 1321 (S.D. Fla. 2002) (holding that because Southwest's online ticket counters had no physical location, and were not connected to a physical location, they were not governed by the ADA), *appeal dismissed*, 385 F.3d 1324 (11th Cir. 2004); Moberly, *supra* note 42, at 994–95 (arguing that the court in *Access Now* misapplied the nexus standard by failing to emphasize the connection between services and physical places of public accommodation).

[125] *See* Rendon v. Valleycrest Prods., Ltd., 294 F.3d 1279, 1283 (11th Cir. 2002) (stating that requiring "intangible barriers" to comply with the ADA comports with the statute's plain language); *Access Now*, 227 F. Supp. 2d at 1321 (distinguishing Southwest.com's online ticket counters from the telephone hotline in *Rendon* because the hotline was used to gain entry to a physical television studio whereas the website's ticket counters provided no entry to a physical location).

ent of physical ticket counters, and, thus, no nexus existed between the virtual and physical ticket counters.[126]

Critics contend, however, that the court in *Access Now* did not address the *right* nexus.[127] Rather than seeking a nexus between a virtual ticket counter and the business of selling tickets, the court should have honored the ADA's broad dictates and more widely considered Southwest.com a *service* with a nexus to Southwest as a physical place of public accommodation.[128] Instead, by holding the Southwest.com virtual counters as services distinct from Southwest's physical counters, and finding that websites are not places of public accommodation, the court misapplied the nexus standard.[129]

Other criticisms focus on unpredictable and inconsistent outcomes resulting from successful, if spotty, nexus standard applications.[130] In *National Federation of the Blind v. Target Corp.*, the U.S. District Court for the Northern District of California found that Target.com must comply with Title III of the ADA only where the website shared a nexus with Target's physical stores.[131] The court, however, declined to require Target to make its entire website compliant.[132] This meant, for example, a shirt sold both online and in store must have an ADA-compliant web page, but a web page selling a shirt only online need not comply with Title III.[133] In addition to thus dividing the website, the *Target* court split up the plaintiff class by excluding plaintiffs who acknowledged they favored online shopping, finding that although they faced accessi-

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[126] *Access Now*, 227 F. Supp. 2d at 1321. Although one might argue the airline tickets grant entry to the physical airplane, Title III does not govern airplanes or other "aircraft[s]." *See* 42 U.S.C. § 12181(4), (10) (excluding "aircraft[s]" from covered commercial entities).

[127] Moberly, *supra* note 42, at 995.

[128] *Id.*

[129] *Id.* Because the plaintiffs did not actually plead a nexus (but improperly introduced a nexus on appeal), the Eleventh Circuit declined to evaluate the accuracy of the district court's nexus analysis and further found it "improper" for the circuit court to consider the standard afresh, dismissing the appeal. Access Now, Inc. v. Sw. Airlines, Co., 385 F.3d 1324, 1329–30 (11th Cir. 2004). The Eleventh Circuit thus lacks precedent on the use of the nexus standard in website accessibility cases. *Id.* Although the Eleventh Circuit in *Gil v. Winn-Dixie Stores, Inc.* declined to acknowledge the nexus standard, further asserting that *Rendon* did *not* apply the nexus standard, *Gil* being vacated leaves the issue open in the Circuit. *See* Gil v. Winn-Dixie Stores, Inc., 993 F.3d 1266, 1281 (11th Cir.) (explaining that the court in *Rendon* merely referred to the nexus standard in a footnote, and therefore did not use or validate the nexus theory), *vacated as moot*, 21 F.4th 775 (11th Cir. 2021).

[130] *See* Kessling, *supra* note 55, at 1022–23 (stating that the *Target* court inconsistently applied the nexus theory because the *Target* court "carve[d] up" the website, resulting in complications such as identifying which parts must comply with Title III, while permitting other parts of the website to remain inaccessible to users with disabilities).

[131] Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 956 (N.D. Cal. 2006).

[132] *Id.*

[133] *See id.* (holding that where Target.com "impedes the full and equal enjoyment of goods and services offered in Target stores"—like inaccessible website information about a shirt sold in store—the website must comply with the ADA, but that where services are only available on Target.com—like online-only sales of a shirt—the website is not governed by Title III).

bility issues, these issues did not impede their access to Target stores.[134] The court also excluded from the class one of the original plaintiffs who used Target.com to research purchases before buying them in store, finding that the plaintiff's successful in-store purchase showed no injury.[135]

Together, *Target*'s findings that only websites explicitly connected to physical locations require compliance, and that only plaintiffs who compellingly claim discrimination connected to the physical locations deserve relief, left disabled people uncertain of their entitlement to equal treatment when patronizing public accommodations.[136] Like chess pieces, *Target*'s nexus factors can combine exponentially, resulting in varying and largely unpredictable outcomes even when plaintiffs start with similar circumstances.[137]

Target and other website accessibility cases from the mid-2000s demonstrated the difficulty of meaningfully applying the nexus standard to provide relief for people with disabilities.[138] As e-commerce became a more popular, reliable, and even necessary form of shopping for many Americans, the nexus standard began to appear not just confusing, but outdated.[139] In response, criticism about the value and effectiveness of the nexus standard increased.[140]

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[134] *See* Nat'l Fed'n of the Blind v. Target Corp., No. C 06-01802, 2007 WL 1223755, at *4–5 (N.D. Cal. Apr. 25, 2007) (finding that plaintiffs who favor online shopping, or who find it more convenient than shopping in person, lacked a "compelling" argument for inclusion in the plaintiff class because they failed to demonstrate how the website denied them equal access to Target stores).

[135] *See* Nat'l Fed'n of the Blind v. Target Corp., 582 F. Supp. 2d 1185, 1204 (N.D. Cal. 2007) (stating that the plaintiff did not clearly claim that his inability to "pre-shop" online required him to spend extra time and/or money soliciting additional help to shop in store, and that he therefore failed to demonstrate his injury).

[136] *See* Kessling, *supra* note 55, at 996 (explaining that *Target*'s nexus test can put disabled people in difficult and bewildering legal circumstances because of its inconsistent outcomes).

[137] *See id.* at 992–93, 996 (illustrating *Target*'s inconsistent outcomes with a hypothetical in which a disabled person patronizes four different stores using different combinations of online and in-store access; each visit, depending on whether the patron visited the store online, in person, or both, and whether the store offers online-only or online-paired-with-physical shopping, generated different legal scenarios when applying *Target*'s nexus test).

[138] *See Target*, 452 F. Supp. 2d at 956 (concluding that when websites preclude disabled people from enjoying the "goods and services" of physical locations, those websites, or at least the portions connected to the physical place, must comply with the ADA, yet also holding that websites, or portions thereof, unconnected to a physical place may continue operating without accommodations).

[139] *See* Kevin Lavelle & Web Smith, *E-Commerce 3.0*, WALL ST. J. (Apr. 14, 2013), https://www.wsj.com/articles/BL-232B-800 [https://perma.cc/PS4M-768P] (noting that e-commerce through the 2000s became essential for companies' long-term success); Smith & Inazu, *supra* note 18, at 768 (suggesting that courts should stop using the nexus standard because it is "artificial and antiquated").

[140] *See* Smith & Inazu, *supra* note 18, at 768 (explaining that the nexus standard continues to deny disabled people their rightful place in society).

B. The Prevalence of the Nexus Standard in Predatory Title III Litigation

Predatory litigation is an aggressive, activist tactic that plaintiffs use to generate ADA lawsuits, often with the intent to reach a quick settlement.[141] Potential plaintiffs "prey" on swaths of businesses, online or in person, looking for Title III violations in order to file what are often considered "abusive lawsuits."[142] Although a problem before COVID-19, predatory Title III litigation has increased during the pandemic as Americans relied on digital services for everyday needs.[143] Alongside genuine claims of digital discrimination, predatory plaintiffs flooded the dockets with discrimination lawsuits alleging a nexus between websites and physical storefronts; some of these plaintiffs filed more than twenty such lawsuits per week for multiple weeks.[144]

As noted, many predatory lawsuits settle quickly which is more affordable for defendants than litigation and an attractive outcome for plaintiffs, begetting more predatory lawsuits.[145] Nexus allegations contribute to these swift settlements, particularly in districts quick to apply the standard and find it evident.[146] Settlements, however, do not generate precedent; although economical and efficient resolutions for both parties, settlements are excluded from legal

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[141] *See* Bob Vogel, *The High Cost of Predatory ADA Lawsuits*, NEW MOBILITY (Sept. 1, 2012), https://newmobility.com/the-high-cost-of-predatory-ada-lawsuits/ [https://perma.cc/Y9C4-2SXN] (explaining that predatory litigation is used by people who intentionally look for ADA violations to plead an injury, often seeking a quick settlement rather than a resolution of the discrimination).

[142] *See* Zehentner, *supra* note 41, at 701 (describing a blind plaintiff's methodical, alphabetical filings against a series of art galleries in New York); Evelyn Clark, Note, *Enforcement of the Americans with Disabilities Act: Remedying "Abusive" Litigation While Strengthening Disability Rights*, 26 WASH. & LEE J. C.R. & SOC. JUST. 689, 696, 708 (2020) (explaining that plaintiffs abuse the system by filing lawsuits to coerce defendants into swift settlement agreements).

[143] *See* Sarnoff & Egan, *supra* note 99 (describing an eruption of Internet access lawsuits filed during the pandemic as indicative of "forum shopping" by eager plaintiffs looking for courts sympathetic to claims of digital discrimination against disabled people).

[144] *See, e.g.*, Complaint for Damages and Injunctive Relief for Violations at 3, 6, Gomez v. Reynolds Creative Prods., Inc., No. 3:22-cv-00830-JCS (N.D. Cal. filed Feb. 9, 2022) (alleging that the defendant's website is incompatible with the plaintiff's assistive technology, and, because a nexus exists between the website and the defendant's place of public accommodation, the website must comply with the ADA); Complaint for Damages and Injunctive Relief for Violations at 3, 6, Gomez v. Tin Barn Vineyards, LLC, No. 3:22-cv-00844 (N.D. Cal. Feb. 9, 2022) (same); Complaint for Damages and Injunctive Relief for Violations at 3, 5–6, Gomez v. Ledson, No. 3:22-cv-00829-JSC (N.D. Cal. Feb. 8, 2022) (same). These are just three of the most recent Title III lawsuits filed by Andres Gomez, a "serial plaintiff." Minh N. Vu & Julia N. Sarnoff, *Public Accommodations Are Starting to Win Website Accessibility Lawsuits*, SEYFARTH SHAW ADA TITLE III: NEWS & INSIGHTS (Mar. 24, 2017), https://www.adatitleiii.com/2017/03/public-accommodations-are-starting-to-win-website-accessibility-lawsuits/ [https://perma.cc/9NFD-9Y45].

[145] *See* Zehentner, *supra* note 41, at 709–10 (explaining that most settlements are cheaper than litigation, with businesses generally paying around $16,000, an attractive prospect for attorneys which encourages further filing of similar lawsuits).

[146] *See* Sarnoff & Egan, *supra* note 99 (implying that courts that generously apply Title III to websites make attractive fora for plaintiffs who use the threat of successful litigation to coerce defendants to settle).

discourse and preclude opinions that analyze the relevance of the nexus standard in changing times.[147] Further, Congress's and the Department of Justice's dearth of guidance regarding online spaces under Title III deprives businesses of insight on ADA website accessibility compliance, and thus businesses risk falling victim to preying litigants.[148] Furthermore, although the predatory lawsuits that do make it to trial generate valuable public documentation, they also contribute to the canon of confusing and inconsistent nexus theory outcomes.[149]

Some scholars argue that predatory litigation exemplifies the ADA, finding it uses the statute as intended and brings awareness to disability rights rather than considering it a "con."[150] Others recommend resolving website accessibility issues entirely outside the legal system through mediation or negotiation to maintain civility and achieve quick, customized solutions.[151] Regardless of one's outlook, as long as predatory litigation provides quick settlements, plaintiffs and their attorneys are likely to continue with this approach.[152] Nevertheless, the prevalence of such litigation and its reliance on the nexus standard to encourage a settlement denies us valuable legal insight regarding the ongoing value of the nexus standard.[153]

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[147] *See* Zehentner, *supra* note 41, at 725 (explaining that although settlements may lead some defendants to increase accessibility of their websites, this approach is inefficient for resolving the larger issue of digital accessibility).

[148] *See id.* at 704–05 (addressing the Title III uncertainties that result from Congress's and the DOJ's unclear standards).

[149] *See generally* Helia Garrido Hull, *Vexatious Litigants and the ADA: Strategies to Fairly Address the Need to Improve Access for Individuals with Disabilities*, 26 CORNELL J.L. & PUB. POL'Y 71 (2016) (discussing predatory litigation and its contribution to the ongoing confusion regarding Title III's application, and identifying the National Federation of the Blind as among those repeatedly filing Title III claims). The National Federation of the Blind is "the largest organization of blind people in the United States," advocating for the rights of blind people. *History and Governance*, NAT'L FED'N OF THE BLIND, https://nfb.org/about-us/history-and-governance [https://perma.cc/24KG-LW6J]. This organization was the plaintiff in the pivotal case *National Federation of the Blind v. Target Corp.* that generated inconsistent outcomes with its application of the nexus standard. 452 F. Supp. 2d 946, 946 (N.D. Cal. 2006); *see supra* notes 81–85 and accompanying text.

[150] *See* Harris & Tani, *supra* note 101 (contending that "Congress designed the ADA's enforcement structure to deputize private citizens").

[151] *See* Feingold, *supra* note 101 (advocating for "[s]tructured [n]egotiation" because it is affordable, amicable, and solution-oriented).

[152] *See* Hannah Albarazi, *COVID-19's Impact on Business Fuels ADA Reform Debate*, LAW360 (Nov. 14, 2021), https://www.law360.com/articles/1439804/covid-19-s-impact-on-businesses-fuels-ada-reform-debate [https://perma.cc/K867-8T8F] (stating that Title III cases are increasing through the pandemic, with businesses and their attorneys suffering from the "bounty hunter" approach to litigation as plaintiffs gamble that companies will prefer to pay a settlement rather than trial costs).

[153] *See* JONATHAN LAZAR, DANIEL GOLDSTEIN & ANNE TAYLOR, ENSURING DIGITAL ACCESSIBILITY THROUGH PROCESS AND POLICY 91 (2015) (noting that private settlements exacerbate the ADA's opacity).

C. The Impact of Phygital Spaces on the Nexus Standard

More than a decade after the *Target* decision, some scholars continue to evaluate the challenges in applying the nexus standard.[154] Despite its successes, the nexus standard, limited to websites with an explicit connection to a physical place, appears insufficient to protect access to modern, dynamic commerce.[155] Websites have become increasingly attractive storefronts for business owners, and commerce has grown increasingly phygital during the COVID-19 pandemic as Americans navigate stores, websites, and apps to shop for groceries or bank, for instance.[156] This growth in digital commercial access and usefulness introduced new challenges for the nexus standard, exposing its limitations and betraying its waning applicability in our ever more digital world.[157]

For example, some digital fora, like online business meetings and the impending "metaverse," completely replace physical places rather than merely supplementing them.[158] These entirely digital experiences eliminate the ability

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[154] *Target*, 452 F. Supp. 2d at 956; *see, e.g.*, Samuel H. Ruddy, Note, *Websites, Apps, Accessibility, and Extraterritoriality Under Title III of the Americans with Disabilities Act*, 108 GEO. L.J. ONLINE 80, 101 (2019), https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2019/10/Ruddy-Websites-Apps-Accessibility-and-Extraterritoriality-Under-Title-III-of-the-Americans-with-Disabilities-Act.pdf [https://perma.cc/5QJZ-EQGG] (recommending modernizing the nexus test by requiring its application to data centers that host websites).

[155] *See* Smith & Inazu, *supra* note 18, at 768 (emphasizing the limitations of the nexus test because of its dependence on a physical place of public accommodation, and adding that this restriction fails to serve contemporary accessibility needs in commerce).

[156] *See* Amy Haimerl, *When You're a Small Business, E-Commerce Is Tougher Than It Looks*, N.Y. TIMES (Aug. 24, 2021), https://www.nytimes.com/2021/03/07/business/small-business-e-commerce.html [https://perma.cc/JFV4-V3Z4] (noting that some entrepreneurs bypass physical storefronts and establish themselves online, occasionally finding more success as digital natives than traditional brick-and-mortar stores that attempt to move online); Greg Petro, *The 'Phygital' World: Reinventing the In-Store Experience Digitally*, FORBES (Aug. 6, 2021), https://www.forbes.com/sites/gregpetro/2021/08/06/the-phygital-world-reinventing-the-in-store-experience-digitally/?sh=529198e33863 [https://perma.cc/4K8M-J8ZB] (explaining that mastering a combination of online and offline experiences is a key focus of retailers seeking to span the gap between "bricks-and-clicks" and maximize profits); Gina Acosta, *Why Grocers Should Be Raising Their Phygital Game*, PROGRESSIVE GROCER (Oct. 13, 2021), https://progressivegrocer.com/why-grocers-should-be-raising-their-phygital-game [https://perma.cc/YT4G-ZV7P] (explaining that many grocery shoppers expect and welcome technology to aid their shopping, such as virtual product demonstrations and online coupons); Mohit Joshi & Markos Zachariadis, *'Phygital': A Banking Strategy for the New Isolation Economy*, WORLD ECON. F. (June 5, 2020), https://www.weforum.org/agenda/2020/06/phygital-strategy-isolation-economy/ [https://perma.cc/554M-TVCR] (noting that COVID-19 has hastened banks' online strategies).

[157] *See* Smith & Inazu, *supra* note 18, at 767 (noting that the nexus standard is incapable of accommodating the complexity of interactive physical and digital places).

[158] *See id.* at 767–68 (remarking that digital places like "[o]nline townhalls" that lack a nexus to physical places and instead replace them slip through the cracks of the nexus theory). Although the "metaverse," a communal simulated world, has potential to profoundly accommodate and autonomize people with disabilities, it likewise presents significant barriers, especially if accessibility is an afterthought. *See* Chandra Steele, *WTF Is the Metaverse?*, PCMAG (Dec. 3, 2021), https://www.pcmag.com/how-to/wtf-is-the-metaverse [https://perma.cc/4LUM-H7VK] (explaining the origin and concept of the metaverse); Alexander Lee, *As the Virtual World Takes Shape, Experts Caution Metaverse*

of disabled people who cannot access such virtual environments to plead the nexus standard because there is no physical place to which the website can connect.[159] Other websites and apps connect with physical places, but not as imagined by the existing nexus standard because these digital services—like Airbnb and Swimply—gatekeep access to physical places belonging to third-party persons or entities.[160] This scenario somewhat resembles the early insurance cases, where several circuit courts applied a nexus text in circumstances where a middle man—the employer—furnished the insurance policy on behalf of the insurance provider.[161] Here, however, the relationship is inverted: the digital entities act as the middle man, and the good or service is the potential physical place of public accommodation.[162] Because these online entities are the only way to access physical places, this scenario also resembles *Rendon*'s "intangible barriers" which a plaintiff could cite in support of a nexus.[163] Nev-

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Builders to Prioritize Accessibility, DIGIDAY (Nov. 19, 2021), https://digiday.com/marketing/as-the-virtual-world-takes-shape-experts-caution-metaverse-builders-to-prioritize-accessibility [https://perma.cc/YYB6-G8HA] (noting that despite capabilities for accessible technology, "mindset[s]" must change to ensure ongoing access for people with disabilities in metaverse environments, ideally from the outset of development).

[159] *See* Smith & Inazu, *supra* note 18, at 767–68 (explaining that completely online experiences lack a nexus to a physical place and thus cannot be governed by Title III using the nexus theory).

[160] *Id.* at 768. Airbnb is an online-only website and mobile app service that connects its customers with property rentals, like vacation homes, belonging to private individuals and/or companies. *What Is Airbnb and How Does It Work?*, AIRBNB, https://www.airbnb.com/help/article/2503/what-is-airbnb-and-how-does-it-work [https://perma.cc/5UN8-PQ9D]. Like Airbnb, Swimply is an online-only service that connects customers who want to rent a pool for a period of time with private pool owners. *See* Michael Goldstein, *Will You Share Your Pool with Strangers for Money?*, FORBES (Sept. 5, 2021), https://www.forbes.com/sites/michaelgoldstein/2021/09/05/swimply-will-you-share-your-pool-with-strangers-for-money/?sh=21a82499479f [https://perma.cc/FQY2-54CZ] (explaining that Swimply bills its business as "the Airbnb for swimming pools").

[161] *See, e.g.*, Ford v. Schering-Plough Corp., 145 F.3d 601, 613 (3d Cir. 1998) (holding that because the plaintiff received her insurance policy through her employer—the middleman—and not directly from the insurance company, she lacked a nexus with the physical public accommodation providing the service). Despite applying the nexus standard, courts in these insurance cases routinely denied the existence of a sufficient nexus. *Id.*; *see also* Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1115 (9th Cir. 2000) (same).

[162] *See* Smith & Inazu, *supra* note 18, at 768 (identifying online-only companies as the only "access points" for the physical services they offer). Arguably, the circuit courts that acknowledged a nexus in the insurance cases might be convinced to apply a nexus standard to online-only services like Airbnb; but should the properties themselves fail to satisfy Title III's definition of public accommodation, the nexus standard would remain unavailable. *See* 42 U.S.C. § 12181(7)(A) (excluding "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 . . . as [his] residence" from covered lodgings, which likely removes a significant portion of Airbnb properties from Title III coverage).

[163] *See* Rendon v. Valleycrest Prods., Ltd., 294 F.3d 1279, 1283, 1286 (11th Cir. 2002) (holding that the inaccessibility of a telephone hotline, which was the only way to earn a chance to appear on a televised game show, presented an "intangible barrier[]" to the physical place of public accommodation, i.e., the television studio). The Eleventh Circuit in *Gil v. Winn-Dixie Stores, Inc.* explained that *Rendon* did not apply a nexus standard. *See* Gil v. Winn-Dixie Stores, Inc., 993 F.3d 1266, 1281 (11th Cir.) (determining that the court in *Rendon* did not apply a nexus standard when it announced its "in-

ertheless, requiring plaintiffs to analogize modern realities with potentially irrelevant cases decided well before the current boom of phygital commerce complicates the use of an already conflicting standard.[164]

Because we are still witnessing how COVID-19 will lastingly impact commerce and accessibility, the foregoing merely scratches the surface of how to apply the nexus standard in the current phygital era.[165] Indeed, some critics of the nexus standard wonder whether we should continue to use the standard at all.[166]

III. The End of the Nexus Standard

Given the current and potential variations of physical-digital commerce, the nexus standard appears less capable of providing relief to disabled persons who struggle to navigate unregulated digital and phygital environments because of its focus on a connection between these environments.[167] This Part analyzes the present and forthcoming accessibility challenges phygital commerce presents to people with disabilities, and suggests that the persistence of the nexus standard threatens to diminish the importance of formally addressing digital landscapes as public accommodations.[168] Section A argues that because commerce has changed so drastically since Congress enacted the ADA and since the courts began applying the nexus standard, it is no longer purposeful to use the nexus standard as it was designed to address issues that are now outdated.[169] Section B suggests that ending the use of the nexus standard, although temporarily challenging for disabled people suffering discrimination in digital environments, can renew focus on formal regulation of website accessibility, further recommending such legislative attention to this important area of disability rights.[170]

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tangible barriers" holding), *vacated as moot*, 21 F.4th 775 (11th Cir. 2021). With *Gil* vacated, plaintiffs could assert that *Rendon* did apply a nexus theory, but this claim is unlikely to persuade the Eleventh Circuit, if not other circuit courts. *See id.*; *see also supra* note 55 (explaining how some courts and scholars have interpreted *Rendon* as applying a nexus standard).

[164] *See* Hannah Schwarz, Note, *When the Facts Change: Interpreting Title III of the ADA in the Online Era*, 32 Stan. L. & Pol'y Rev. 363, 385–86 (2021) (noting that the insurance cases are not necessarily appropriate precedent for the website cases, with only a few courts acknowledging the potential irrelevance between the issues in each set of cases).

[165] *See* Omair Tariq, *E-Commerce in 2022: 5 Key Insights on How to Evolve to Stay Ahead*, Fast Co. (Feb. 9, 2022), https://www.fastcompany.com/90716216/e-commerce-in-2022-5-key-insights-on-how-to-evolve-to-stay-ahead [https://perma.cc/YWN4-D5WR] (remarking that the economy remains "in flux" as the pandemic wanes, with COVID-19 anticipated to continue impacting commerce and consumer behavior).

[166] *See* Smith & Inazu, *supra* note 18, at 767 (contemplating whether the nexus standard remains valuable as online services increase in scope and variety).

[167] *Id.* at 768.

[168] *See infra* notes 167–204 and accompanying text.

[169] *See infra* notes 171–186 and accompanying text.

[170] *See infra* notes 187–204 and accompanying text.

A. Phygital Commerce Compels the End of the Nexus Standard

It is undeniable that the nexus standard has contributed to improvements in accessibility and allowed more disabled plaintiffs to prevail in Title III suits.[171] Especially in cases like *Rendon v. Valleycrest Productions, Ltd.*, where an inaccessible telephone hotline was an "intangible barrier[]" to appearing on a television game show, and *Robles v. Domino's Pizza*, where an inaccessible website and mobile app prevented disabled patrons from ordering food from a restaurant, the nexus standard highlighted the farce of denying disabled people equal access simply because that access originated in or was aided by a non-physical place.[172]

Even when public accommodation access that is clearly governed by the ADA (such as entering a physical store rather than visiting its website) is available to persons with disabilities, these individuals should not be punished for wanting to use the more convenient digital alternative.[173] Digital access is no longer a mere "convenience"; rather, it is a lifeline to everyday goods, services, communications, and other necessities.[174] With COVID-19 still impacting Americans in many communities, and with many disabled people being extra vulnerable to the virus and the limitations it has placed on daily life, digital access is of paramount importance for Americans living with disabilities.[175]

Although the nexus standard was a valuable tool for bridging the gap between digital and physical access to public accommodations, the standard has

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[171] *See, e.g.*, Robles v. Domino's Pizza, LLC, 913 F.3d 898, 905 (9th Cir.) (explaining that a nexus was "critical" in finding that Domino's website and mobile app must comply with Title III), *cert. denied*, 140 S. Ct. 122 (2019); Rendon v. Valleycrest Prods., Ltd., 294 F.3d 1279, 1285 n.8 (11th Cir. 2002) (agreeing that a nexus existed between the defendant's inaccessible telephone hotline and its physical place of public accommodation).

[172] *Robles*, 913 F.3d at 905; *Rendon*, 294 F.3d at 1283; *see also* Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New Eng., 37 F.3d 12, 19 (1st Cir. 1994) (reasoning that it would be "irrational" and "absurd" to read the ADA as outlawing discrimination against disabled people who shop at a physical location, but not against disabled people who shop for the same goods or services in other ways, such as by telephone or postal service).

[173] *See* Gil v. Winn-Dixie Stores, Inc., 993 F.3d 1266, 1282 (11th Cir.) (stating that "convenience" does not connote necessity under Title III and therefore online services that simplify access to commerce, but are not required for such access, should not be governed by the ADA), *vacated as moot*, 21 F.4th 775 (11th Cir. 2021); Kessling, *supra* note 55, at 1023 (explaining that the *Target* court rejected plaintiffs based on their digital shopping preferences and capabilities).

[174] *See, e.g.*, Gus Alexiou, *Covid Reminds Us That Web Accessibility Helps All Users, Not Just the Disabled*, FORBES (Aug. 23, 2020), https://www.forbes.com/sites/gusalexiou/2020/08/23/covid-reminds-us-that-web-accessibility-helps-all-users-not-just-the-disabled/?sh=6284c3016df1 [https://perma.cc/W6FY-YFJH] (explaining that the pandemic made digital access to goods like groceries immediately essential).

[175] *See* Rachel Scheier, *A Disabled Activist Talks About Feeling 'Disposable' Amid COVID*, TAMPA BAY TIMES (Feb. 8, 2022), https://www.tampabay.com/news/health/2022/02/08/a-disabled-activist-talks-about-feeling-disposable-during-covid/ [https://perma.cc/22PQ-ZEGX] (describing how many disabled people depend on online services during the pandemic to avoid infection because their conditions place them at higher risk of complications from COVID-19).

outlived its usefulness.[176] By perpetuating a physical-first mindset that envisions websites and other nonphysical resources simply as means to access physical places, the nexus standard ignores the reality of modern commerce.[177] Businesses and patrons alike are championing phygital commerce that blends the best of physical and digital commerce going forward.[178] Although a nexus should thus be apparent in such a hybrid, it is also superfluous: commerce that incorporates the ease and ubiquity of technology with the efficiency of physical access clearly demonstrates the nexus's requisite connection.[179] It would therefore be redundant to require plaintiffs to claim such a nexus for recourse under Title III in many circumstances.[180] Accordingly, courts that continue to enforce the nexus standard are ignoring advancements in commerce and unnecessarily compounding burdens that have plagued the disabled population for decades.[181]

Further, with the nexus standard unavailable for plaintiffs, predatory litigation would be restricted primarily to physical places of public accommoda-

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[176] *See Robles*, 913 F.3d at 905 (concluding that the nexus between the defendant's stores and its digital services warranted protecting under Title III). *But see* Smith & Inazu, *supra* note 18, at 768 (asserting that the nexus standard no longer serves the needs of disabled people and the protection they are meant to receive under the ADA).

[177] Smith & Inazu, *supra* note 18, at 768.

[178] *See* Gramling et al., *supra* note 6 (stating that businesses will need to strategize for both online and physical retail to continue supporting customers and their expectations).

[179] *See* Moberly, *supra* note 42, at 976 (arguing that the Internet's connectivity to physical places provides a way for people with disabilities to access public accommodations). By Moberly's reasoning, Internet-based technology services interwoven with physical places, like the experience Amazon proposes in its new "high-tech fitting rooms," easily fulfills this basic argument for an Internet-public accommodation nexus. *Id.*; *see* Annie Palmer, *Amazon Is Opening a Real-World Clothing Store with High-Tech Fitting Rooms*, CNBC (Jan. 20, 2022), https://www.cnbc.com/2022/01/20/amazon-opening-new-apparel-store-amazon-style-with-fitting-rooms.html [https://perma.cc/DPL6-SWAE] (explaining that shoppers at Amazon's tech-driven retail outlets can scan QR codes with their smartphones to request apparel in their size; the displays will not stock multiple sizes). Amazon will further equip the fitting rooms with interactive tablets allowing shoppers to "rate items or request different styles" without needing to interact with humans or exit the dressing room. Palmer, *supra*.

[180] Smith & Inazu, *supra* note 18, at 768 (noting that the Internet "has made physical presence—or at least a *connection to physical presence*—irrelevant not just to disability access but across a variety of legal contexts" (emphasis added)).

[181] *See* Gramling et al., *supra* note 6 (explaining that commercial progress requires attention to both in-person and online shopping behaviors); Jonathan Lazar & Paul Jaeger, *Reducing Barriers to Online Access for People with Disabilities*, 27 ISSUES SCI. & TECH. 69, 70 (2011) (detailing how from the earliest days of websites research has confirmed the inaccessibility of digital spaces for people with disabilities). Each disability impacts a person's Internet experience differently. Lazar & Jaeger, *supra*. To provide just a few examples, people with visual impairments can struggle to navigate websites that are incompatible with their screen readers; people with motor impairments can be challenged trying to click small buttons on their smartphones; people with hearing loss can be denied the enjoyment of audio or audiovisual materials that lack closed captions; and people with seizure disorders might not be able to visit certain websites or mobile apps because flashing images can negatively impact their condition. *Id.*

tion.[182] Reducing the volume of predatory litigation not only benefits judicial economy, but it also shifts the digital accessibility conversation away from private settlement negotiations and back toward the public arena where it can be properly debated and developed by elected representatives.[183]

Despite the waning usefulness of the nexus standard, it would be imprudent to argue that Title III should forthwith govern all websites and digital spaces.[184] There are valid concerns regarding the Act's applicability to the Internet and how best to implement and enforce regulations in digital space; removing the nexus standard should not overshadow or dismiss these.[185] Instead, moving past the nexus standard will demonstrate both that the nexus no longer serves its purpose in ADA adjudication and that the ADA, in its current form, fails to provide courts with the language necessary to enforce its broad mandate to protect disabled people from everyday discrimination.[186]

B. Congress Should Formally Regulate Digital Accessibility

Because the nexus standard has overstayed its welcome and should therefore be retired, an opportunity awaits Congress to amend the ADA.[187] Both Congress and the Department of Justice (DOJ) have revisited the ADA since its enactment in 1990, yet neither has succeeded in executing digital accessibil-

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[182] *See* Zehentner, *supra* note 41, at 702 (identifying the increase of digital commerce as an accelerant for predatory Title III litigation). Without the nexus standard, plaintiffs could also plead that Title III covers websites, but few courts have explicitly held that the Act unambiguously applies to nonphysical places, so plaintiffs might struggle to prove jurisdiction in these districts. *See, e.g.*, Reid, *supra* note 29, at 599 (noting that only the First, Second, and Seventh Circuits have found it reasonable for Title III to govern websites).

[183] *See, e.g.*, Mark Pulliam, *The ADA Litigation Monster*, CITY J. (2017), https://www.city-journal.org/html/ada-litigation-monster-15128.html [https://perma.cc/54DG-KT6J] (noting the "judicial backlash" to the excessive volume of Title III litigation in certain states, with some judges calling these "mass-produced ADA lawsuits" a "sham" or "scheme"); LAZAR ET AL., *supra* note 153, at 91 (noting that private settlements exacerbate the ADA's opacity).

[184] *See* Moberly, *supra* note 42, at 981–82 (explaining that neither Congress nor the Department of Justice has provided explicit guidance on the ADA and websites, with the statutory language strongly suggesting that Congress did not intend for the Act to govern websites).

[185] *See* Mason Marks, Opinion, *Websites Need to Become 'Places of Public Accommodation' Under the Americans with Disabilities Act*, THE HILL (June 8, 2020), https://thehill.com/opinion/technology/501680-websites-need-to-become-places-of-public-accommodation [https://perma.cc/KXE9-MTSV] (noting that the ADA needs to be amended to cover websites because Congress intended the ADA only to cover physical places); 42 U.S.C. § 12181(7) (enumerating extensive, yet exhaustive, examples of public accommodations, all of which are understood to be physical places).

[186] *See* Smith & Inazu, *supra* note 18, at 768 (decrying the nexus standard as contrived and outdated); 42 U.S.C. § 12181(7) (defining "public accommodation," but lacking any reference to nonphysical places, particularly failing to include websites or the Internet). Unfortunately, the ADA's lack of guidance on websites causes it to fail in its mission to furnish transparent and complete direction for the eradication of everyday discrimination against disabled people. 42 U.S.C. § 12101(b)(1), (4).

[187] Smith & Inazu, *supra* note 18, at 767; *see* Marks, *supra* note 185 (proclaiming that Congress should address website accessibility, decades after its enactment and well into an online-driven world).

ity changes.[188] For example, Congress amended the Act in 2008, but declined to address websites or other nonphysical places when modifying Title III.[189] The DOJ, on the other hand, issued an Advanced Notice of Proposed Rulemaking (ANPRM) on website accessibility in 2010, proposing regulations that would clarify entities' responsibilities for designing ADA-compliant websites, but Attorney General Jeff Sessions withdrew the rulemaking in 2017 before it could be implemented.[190] Further, although the DOJ published a guidance in March 2022 that stated the Department's support for applying Title III to web-based goods and services, the guidance is not binding.[191] Rather than creating an enforceable standard, the guidance directs readers to private tutorials and standards for making websites accessible.[192]

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[188] *See generally* H.R. REP. NO. 110-730 (2008) (explaining the purpose of the 2008 amendments, which included an updated definition of "disability" and clarifications of ambiguous terms like "substantially" and "major"); *Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 106th Cong. (2000) (discussing the connections of Title III to digital spaces and recommending additional amendments to make the Act more protective of the rights of disabled people in digital environments); Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460, 43464 (July 26, 2010) (proposing regulatory guidance to mandate Internet and website compliance with Title III of the ADA).

[189] *See* H.R. REP. NO. 110-730, at 7 (focusing on reestablishing the ADA's congressional intent, but nowhere acknowledging the Internet, websites, or digital access as a component of this restoration).

[190] *See* Nondiscrimination on the Basis of Disability, 75 Fed. Reg. at 43462 (seeking to prohibit discrimination against disabled Americans in digital spaces); *see also* Reid, *supra* note 29, at 600–01 (explaining that the DOJ has generally advocated for Title III coverage of websites, but that the agency nevertheless withdrew its rulemaking after years without progress).

[191] U.S. Dep't of Just., *Guidance on Web Accessibility and the ADA*, ADA (Mar. 18, 2022) [hereinafter *DOJ Guidance*], https://beta.ada.gov/resources/web-guidance/#how-to-make-web-content-accessible-to-people-with-disabilities [https://perma.cc/KYX4-KPFC]; *see* U.S. Dep't of Just., Just. Manual § 1-19.000 (2022) (stating that DOJ guidance statements, while useful, are not binding).

[192] *See DOJ Guidance*, *supra* note 191 (outlining existing website accessibility guidelines, including resources to aid state and local government website compliance under Title III and public accommodation compliance under Title III). The Web Content Accessibility Guidelines (WCAG), maintained by the World Wide Web Consortium's Web Accessibility Initiative (W3C WAI), is of particular value for public accommodations. *Id.*; *see* Shawn Lawton Henry, *WCAG 2 Overview*, W3C (Sept. 6, 2022), https://www.w3.org/WAI/standards-guidelines/wcag/ [https://perma.cc/N2CU-T6GS] (introducing private standards for developing accessible websites). WCAG is often considered the "benchmark standard" for designing accessible websites, helping developers generate robust content that enables users with disabilities to perceive, operate, and understand website navigation and information. *See Introduction to Understanding WCAG*, W3C, https://www.w3.org/WAI/WCAG21/Understanding/intro#understanding-the-four-principles-of-accessibility [https://perma.cc/9XM2-5CH2] (explaining the key principles for designing accessible websites); Minh Vu, Kristina Launey & John Egan, *The Law on Website and Mobile Accessibility Continues to Grow at a Glacial Pace Even as Lawsuit Numbers Reach All-Time Highs*, 48 LAW PRAC. 44, 46 (2022) (stating that WCAG is the leading convention for accessible website development). W3C routinely updates WCAG with new recommendations that build on previous guidelines and identify new criteria to help developers successfully implement accessibility features. *See, e.g.*, *W3C Accessibility Guidelines (WCAG) 3.0*, W3C (Dec. 7, 2021), https://www.w3.org/TR/wcag-3.0/ [https://perma.cc/MDC5-B2EM] (stating that WCAG 3.0, in addition to providing new guidance, also integrates criteria from previous WCAG iterations). Not all websites can or need to satisfy every accessibility measure W3C recommends, therefore W3C

Congress must revisit digital accessibility under Title III and implement meaningful, timely improvements for disabled Americans.[193] COVID-19 has demonstrated how necessary digital access is for disabled and nondisabled Americans alike, and in the pandemic's wake Congress is well-positioned to codify nondiscrimination in digital spaces.[194] In 2020, two congressmen proposed an ADA amendment specifically addressing digital discrimination, focusing on the need to provide equal access to "consumer facing websites and mobile applications."[195] Although Congress did not pass the Act, it was reintroduced in 2021 and continues to propose improvements such as a formal web accessibility design standard.[196]

Despite its attempt to extinguish digital discrimination, some of the proposal's biggest critics are disability advocates who oppose, for example, the idea that the ADA does not already cover websites or the proposal's "notice and cure" provision, which limits the right to private action.[197] Nevertheless, because the courts continue to vary in their Title III interpretations, resulting in unpredictable outcomes, some formal regulation regarding digital places is appropriate and necessary to protect both disabled people and the businesses

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also identifies conformance levels ranging from the lowest level of compliance (A) to optimal compliance (AAA); the middle level (AA) is considered sufficient for many websites. *See Web Content Accessibility Guidelines (WCAG) 2 Level A Conformance*, W3C (July 13, 2020), https://www.w3.org/WAI/WCAG2A-Conformance [https://perma.cc/9EAU-YNNK] (listing three levels of WCAG accessibility compliance and identifying Level AA as one "[m]any organizations strive to meet"). Although compliance with WCAG is voluntary, in some website accessibility cases, courts require defendants to comply with WCAG as injunctive relief. *See, e.g.*, Thurston v. Midvale Corp., 252 Cal. Rptr. 3d 292, 310 (Ct. App. 2019) (affirming the trial court's order requiring the defendant's conformance to WCAG 2.0).

[193] *See, e.g.*, Online Accessibility Act, H.R. 8478, 116th Cong. § 3 (2020) (proposing a new ADA title specifically addressing discrimination in "consumer facing websites and mobile applications").

[194] *See* Alexiou, *supra* note 174 (noting that the practice of quickly running an errand to a physical shop has become burdened by COVID-19 safety considerations, causing many people—disabled and nondisabled—to favor digital shopping).

[195] H.R. 8478 § 3; *see* Allen Smith, *Bill to Establish Web Accessibility Guidelines Fails to Pass*, SHRM (Jan. 8, 2021), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/online-accessibility-act.aspx [https://perma.cc/E27Q-QRMQ] (explaining that Reps. Ted Budd and Lou Correa co-sponsored the Online Accessibility Act).

[196] Online Accessibility Act, H.R. 1100, 117th Cong. (2021); *see* Smith, *supra* note 195 (noting that the proposal failed to pass in the 116th Congress); Kristina M. Launey, *Renewed Attempt at ADA Web Accessibility Legislation*, SEYFARTH SHAW ADA TITLE III: NEWS & INSIGHTS (Mar. 31, 2021), https://www.adatitleiii.com/2021/03/renewed-attempt-at-ada-web-accessibility-legislation/ [https://perma.cc/B7TH-XFWB] (stating that Reps. Budd and Correa, along with Rep. Richard Hudson, renewed their proposal of the Online Accessibility Act).

[197] Launey, *supra* note 196; *see also* Lainey Feingold, *In 2021 the Proposed Online Accessibility Act in U.S. Congress Is [STILL] Bad for Digital Inclusion*, LAW OFF. OF LAINEY FEINGOLD (Apr. 3, 2021), https://www.lflegal.com/2020/10/ada-backlash/ [https://perma.cc/FZ8B-369C] (outlining numerous problems with the proposed Online Accessibility Act from a disability rights perspective, including (1) the proposal's redundancy because "[t]he ADA already includes websites and mobile applications," and (2) the proposal's slow-moving administrative requirements like "notice and cure" procedures).

who serve them.[198] Further, other areas of law have already successfully adapted to technological advancements, like tax law, data privacy, and copyright law.[199] These adaptations demonstrate the capacity of existing legislation to accommodate changing times; it would be wise for Congress to follow suit with the ADA, especially as legislative history suggests Congress originally intended for the Act to provide lasting support in digital spaces.[200] At a minimum, Congress should identify a class of digital spaces (including websites and/or mobile applications, perhaps those that are most frequently accessed) and add this class to its definition of "place of public accommodation" to begin resolving the circuit split and provide broader protection while experts evaluate how to regulate digital spaces more explicitly.[201]

It is clear, of course, that digital accessibility compliance is neither simple nor cheap for businesses, nor is it resolved with a one-time fix or feature, never again to require attention or maintenance.[202] Nonetheless, legislators can usher the ADA into modernity by initiating conversations on digital accessibility that solicit viewpoints from a broad range of businesses and the people with disabilities who patronize them.[203] Guaranteeing physical access is necessary, albeit not sufficient, to provide disabled people with an equal and fair lifestyle; although it will take time, formal regulation of digital space is the appropriate

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[198] *Compare* Robles v. Domino's Pizza, LLC, 913 F.3d 898, 905 (9th Cir.) (holding that Title III governs the defendant's website and mobile app because they provide access "to the goods and services" of the defendant's physical location), *cert. denied*, 140 S. Ct. 122 (2019), *with* Gil v. Winn-Dixie Stores, Inc., 993 F.3d 1266, 1280 (11th Cir.) (holding that Title III did not apply to the defendant's website because it did not totally impede the plaintiff's access to the defendant's physical location), *vacated as moot*, 21 F.4th 775 (11th Cir. 2021). *See* Vu et al., *supra* note 192, at 49 (explaining that varying court opinions generate confusion and inquiries from companies seeking guidance on how to comply).

[199] *See* Smith & Inazu, *supra* note 18, at 769–72 (explaining legal responses to digital evolution, including sales tax changes related to the concept of "presence" in a digital context, data privacy regulations reaching Internet-based businesses, and copyright law adjusting to new, non-material forms of intellectual property).

[200] *See* Jeffrey Scott Ranen, Note, *Was Blind but Now I See: The Argument for ADA Applicability to the Internet*, 22 B.C. THIRD WORLD L.J. 389, 407 (2002) (arguing that the legislative history of the ADA suggests Congress intended the Act to apply to the Internet).

[201] 42 U.S.C. § 12181(7); *see, e.g.*, *Gil*, 993 F.3d at 1276–77 (explaining that the Act's definition for "public accommodation[]" cannot include websites because of its exclusive use of physical places). *But see* Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New Eng., 37 F.3d 12, 19 (1st Cir. 1994) (holding that because Congress included "travel service" among its examples defining "public accommodation," it could not be limited to physical places as travel services are available by telephone or correspondence).

[202] *See, e.g.*, *Gil*, 993 F.3d at 1273 n.6 (stating that, although disputable, the defendant claimed compliance costs would exceed $200,000); *see also* Katie Deighton, *Evinced, a Web Accessibility Startup, Raises $17 Million*, WALL ST. J. (Feb. 3, 2021), https://www.wsj.com/articles/evinced-a-web-accessibility-startup-raises-17-million-11612353609 [https://perma.cc/MK2R-8K2A] (describing the investment required to implement compliance solutions, many of which lack scalability).

[203] *See* Deighton, *supra* note 202 (noting that it is imperative to involve individuals with disabilities in accessibility efforts to reach satisfying outcomes).

way to protect Americans with disabilities fully and meaningfully in our increasingly phygital world.[204]

CONCLUSION

In 2020, the world halted as COVID-19 rapidly spread across the globe. People were compelled to stay in their homes and many feared venturing into society to perform everyday tasks like grocery shopping, exercising, or going to school. As a result, many businesses were forced to shutter their physical storefronts, moving temporarily or permanently online or shifting to phygital operations. Although some of these phygital services existed before the pandemic, they thrived in the past two years, becoming popular with consumers, and showing continuing promise as the pandemic subsides.

Despite the widespread availability of these digital and phygital resources, they are often inaccessible to disabled people who rely on assistive technology to use such resources. Some disabled individuals have found relief by pleading a nexus standard under the ADA, but this outdated standard does not fully protect against discrimination in our increasingly complex phygital world. The nexus standard thus fails to fulfill the promise of the ADA to end discrimination against disabled Americans and should therefore be retired.

With the end of the nexus standard, Congress should revisit Title III and digital accessibility to support people with disabilities who deserve equal access to public accommodations. As technology advances and mingles with many aspects of daily life, equitable participation requires unmitigated access to digital spaces, not merely for convenience, but by necessity. As we reach the end of the pandemic, businesses eagerly embrace and improve upon phygital approaches to improve Americans' access to goods and services. Congress should likewise embrace phygital reality and improve the ADA by statutorily protecting the rights of disabled Americans in digital spaces.

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[204] *See* Pavlicko, *supra* note 19, at 978 (concluding that the nexus standard keeps ADA arguments focused on physical places, but that because COVID-19 has increased dependency on digital commerce, circumstances now also require the ADA to govern websites and other digital resources).