

WEBSITES AS FACILITIES UNDER ADA TITLE III

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ABSTRACT

Title III of the Americans with Disabilities Act requires public accommodations—private entities that offer goods or services to the public—to be accessible to individuals with disabilities. There is an ongoing debate about whether Title III applies to websites that offer services to the public, but this debate may be resolved in the coming years by litigation or Department of Justice regulations. Assuming for the sake of argument that Title III will eventually be applied to websites, the next inquiry is what that application should look like. The regulatory definition of “facilities” should be amended to include nonphysical places of public accommodations. This change would open the door to a multilayered approach to accessible websites, wherein existing websites are subject to relatively lax requirements but new and altered websites are subject to stricter requirements.

INTRODUCTION

When Congress passed the Americans with Disabilities Act (ADA) in 1990,¹ the internet was in its infancy.² Even so, Congress intended the ADA to address not only physical barriers to access but also communication barriers.³ Congress also intended that the ADA “keep pace with the rapidly advancing technology of the times.”⁴ As the internet has

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¹ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. 12101 et seq. (2012)).

² Or rather, in utero: the World Wide Web, the URL-based system which we all use to browse the internet, was not available until August 6, 1991. Jon Brodtkin, *First Website Ever Goes Back Online on the Open Web’s 20th Birthday*, ARS TECHNICA (Apr. 30, 2013, 12:59 AM EDT), <http://arstechnica.com/information-technology/2013/04/first-website-ever-goes-back-online-on-the-open-webs-20th-birthday>.

³ 42 U.S.C. § 12101(a)(3), (5) (2012).

⁴ H.R. REP. NO. 101-485(II), at 108 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 391.

become pervasive, courts, policymakers, and commentators have wrestled with whether, and to what degree, the ADA can be applied to websites. For government websites, the issue is settled: they must be made accessible to people with disabilities.⁵ For privately operated websites, however, the debate rages on.

To date, most cases and scholarship have dealt with the threshold issue—whether the ADA’s coverage of a “place of public accommodation”⁶ applies to websites at all.⁷ As discussed below,⁸ this issue may be settled by upcoming Department of Justice (DOJ) rulemaking.⁹ Assuming the ADA does cover websites, a more difficult issue arises: Under what circumstances are the burdens of making websites accessible too high for the ADA to require accommodation?

The answer depends on how websites fit into the structure of ADA Title III, which covers privately operated public accommodations. This Issue Brief argues that many websites are best thought of as “facilities” because they offer goods and services just like physical facilities.¹⁰ The current DOJ regulations under Title III define “facility” to include only physical property,¹¹ but this definition should be changed to include websites. Treating websites as facilities opens up a set of ADA obligations that would otherwise be inapplicable, allowing different standards to govern websites for existing, altered, and new facilities. Thus, website operators would be subject to minimal obligations for their existing websites, while being simultaneously required to keep accessibility in mind for alterations and new websites.

Part I of this Issue Brief gives a brief history of the ADA and website accessibility, including the contemporary understanding of the ADA’s application to technology, the application of Title II of the ADA

⁵ Federal government websites must be accessible under 29 U.S.C. § 794d (2012). The websites of state and local governments must be accessible under Title II of the ADA, which applies to the “services, programs, or activities of a public entity.” 42 U.S.C. § 12132. *See also id.* § 12131(1)(A) (defining “public entity” to include “any State or local government”); Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43,460, 43,464 (July 26, 2010) [hereinafter ANPRM] (“There is no doubt that the Web sites of state and local government entities are covered by title II of the ADA.”).

⁶ 42 U.S.C. § 12182(a).

⁷ For a concise discussion of the current state of the case law, see *National Federation of the Blind v. Scribd, Inc.*, 97 F. Supp. 3d 565, 568–71 (D. Vt. 2015).

⁸ *See infra* Part I.

⁹ ANPRM, *supra* note 5, at 43,460.

¹⁰ *See infra* Part II.B.

¹¹ 28 C.F.R. § 36.104 (2016).

to state and local government websites, and the current debate over Title III's application to private websites. Part II analyzes Title III's various requirements and exceptions, and it argues that websites that are places of public accommodation should generally be considered "facilities" under the ADA. This designation is critical to defining the contours of website accessibility, because facilities are subject to a layered set of obligations that are relatively light for existing facilities but more demanding for new and altered facilities. Part III explores the application of Title III's facilities standards to website accessibility and suggests an approach that recognizes the relative ease with which web developers can make their websites accessible to people with disabilities.

I. THE HISTORY OF THE ADA AND WEBSITE ACCESSIBILITY

The ADA is an intentionally broad and flexible statute. The first of its several overarching purposes¹² is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,"¹³ an undeniably far-reaching goal.

This sweeping approach is apparent in the structure of the ADA. The ADA applies to employment,¹⁴ public services by state and local governments,¹⁵ and public accommodations.¹⁶ In all three contexts, the ADA defines "disability" to include any "physical or mental impairment that substantially limits one or more major life activities."¹⁷ "[M]ajor life activities" are defined broadly—including a wide range of general activities, such as "learning," "reading," and "communicating."¹⁸ Finally, the ADA "shall be construed in favor of broad coverage."¹⁹

Public accommodations—the focus of this Issue Brief—are similarly broadly defined. To qualify as a place of public accommodation, a private entity must affect commerce and fall into one of twelve broad categories.²⁰ The categories of public accommodation essentially cover all privately owned public places that offer goods or services. For instance, one category covers "a bakery, grocery store, clothing store, hardware

¹² 42 U.S.C. § 12101(b) (2012).

¹³ *Id.* § 12101(b)(1).

¹⁴ *Id.* §§ 12111–12117.

¹⁵ *Id.* §§ 12131–12165.

¹⁶ *Id.* §§ 12181–12189.

¹⁷ *Id.* § 12102(1)(A).

¹⁸ *Id.* § 12102(2). Learning, reading, and communicating are just three of eighteen such activities listed, but they are some of the activities most relevant to the use of websites.

¹⁹ *Id.* § 12102(4)(A).

²⁰ *Id.* § 12181(7).

store, shopping center, *or other* sales or rental establishment.”²¹ The “or other” extension is part of each one of the twelve categories of public accommodations, further broadening their respective scopes to include similar establishments.²²

The broad scope of the ADA as applied to public accommodations, and their use of technology, is especially apparent from a report in which the House Committee on Education and Labor spent considerable space discussing the interaction of the ADA and technology.²³ The report describes the ADA as “future driven”²⁴ and explains that the statute, and the regulations it authorizes, was intended to be flexible enough to “facilitate the application of new technologies.”²⁵

With these principles in mind, this Part outlines the debate over whether websites can be considered “places of public accommodation” under the ADA. Part I.A examines the circuit split on this question. Part I.B turns to the pending DOJ rules on the issue.

A. The Split: Are Websites “Places of Public Accommodation”?

A Title III claim includes three elements: (1) the plaintiff must be “disabled,” (2) the defendant must be “a private entity that owns, leases, or operates a place of public accommodation,” and (3) the plaintiff must have been “denied public accommodations by the defendant because of her disability.”²⁶ The federal circuit courts are split on whether a website—a nonphysical place, if a place at all—is a “place of public accommodation” that satisfies the second element. There are essentially three approaches: (1) places of public accommodation need not be physical structures; (2) *only* physical structures are places of public accommodation; and (3) for a nonphysical place to be a place of public

²¹ *Id.* (emphasis added).

²² The Supreme Court has referred to them as “extensive categories” which should be “construed liberally to afford people with disabilities equal access to the wide variety of establishments available to the nondisabled.” *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 676–77 (2001) (internal quotation marks omitted).

²³ H.R. REP. NO. 101-485(II) (1990), *reprinted in* 1990 U.S.C.C.A.N. 303.

²⁴ *Id.* at 122.

²⁵ *Id.* at 119.

²⁶ *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 730 (9th Cir. 2007) (citing 42 U.S.C. § 12182(a)–(b) (2012)). This formulation appears to have originated in the Northern District of California. *Dunlap v. Ass’n of Bay Area Gov’ts*, 996 F. Supp. 962, 965 (N.D. Cal. 1998). It is by no means a Ninth Circuit test alone, however—*Molski*’s formulation has been cited by the Second and Eleventh Circuits as well. *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1333 (11th Cir. 2013); *Camarillo v. Carrols Corp.*, 518 F.3d 153, 156 (2d Cir. 2008).

accommodation, it must have a sufficient “nexus” to a physical structure that is a public accommodation.

The First and Seventh Circuits have taken the first approach, holding that nonphysical facilities can be public accommodations.²⁷ As Judge Posner wrote, “[A] store, hotel, restaurant, dentist’s office, travel agency, theater, Web site, or other facility (whether in physical space or in electronic space) that is open to the public cannot exclude disabled persons from . . . using the facility in the same way that the nondisabled do.”²⁸

In contrast, the Third and Sixth Circuits have taken the second approach, holding that “places of public accommodation” are unambiguously limited to physical places.²⁹ Although these circuits have not explicitly held that websites are excluded from Title III, this conclusion would be compelled by their holdings that a “place” of public accommodation must be a physical place.

The Second, Ninth, and Eleventh Circuits have tried to navigate a middle ground by using a “nexus” test. The Ninth Circuit held that a nonphysical space could be a place of public accommodation if it had “some connection between the good or service complained of and an actual physical place,” and the Second and Eleventh Circuits have reached similar conclusions.³⁰

²⁷ The First Circuit moved first on this issue, holding that the provision of insurance benefits—a service without a physical storefront—was covered by Title III. *Carparts Dist. Ctr., Inc. v. Automotive Wholesaler’s Ass’n of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994). District courts have applied this explicitly to websites. *See, e.g., Nat’l Ass’n of the Deaf v. Netflix*, 869 F. Supp. 2d 196, 200 (D. Mass. 2012).

²⁸ *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999). Judge Posner reiterated this holding two years later. *Morgan v. Joint Admin. Bd.*, 268 F.3d 456, 459 (7th Cir. 2001).

²⁹ *Ford v. Schering–Plough Corp.*, 145 F.3d 601, 613–14 (3d Cir. 1998); *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1014 (6th Cir. 1997) (en banc).

³⁰ *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114–15 (9th Cir. 2000). The Second Circuit has reached the same conclusion. *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 32–33 (2d Cir. 1999). The Eleventh Circuit has indicated agreement as well, but has declined to decide whether websites require a nexus or can be public accommodations in their own right. *Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324, 1335 (11th Cir. 2004); *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279, 1283, 1284 n.8 (11th Cir. 2002).

B. The DOJ Rulemaking

In 2010, the DOJ issued an Advance Notice of Proposed Rulemaking (ANPRM) announcing its intent apply Title III to websites.³¹ The ANPRM is just the first step in the rulemaking process, allowing the DOJ to collect public comments on what the rules should require before issuing a proposed rule.³²

Although the primary goal of the ANPRM was to invite public comment, the DOJ did express a few positions that illuminate its intentions. First, the DOJ indicated that it intends to apply Title III to websites that are public accommodations regardless of whether there is a nexus to a physical place.³³ Second, the DOJ announced an intention to apply particular compliance standards to covered websites, while inviting comment on exactly what those standards should be.³⁴ Third, the DOJ did not want to extend Title III to all web content, indicating that it intended to make an exception for content posted by third-party users.³⁵

The administrative rulemaking process is long, and this particular rulemaking has been quite protracted. As of this writing, the DOJ intends to issue a Notice of Proposed Rulemaking in 2018, eight years after the ANPRM.³⁶ This may be further pushed back because the DOJ intends to model its Title III rules after its yet-to-be-proposed Title II rules, which will govern state and local government websites.³⁷ It is also possible that the rulemaking will be abandoned entirely under the new president and attorney general.

If the DOJ eventually promulgates final rules on website accessibility under Title III, the rules will likely require at least some

³¹ ANPRM, *supra* note 5, at 43,460.

³² *See id.* at 43,464.

³³ *Id.*

³⁴ *Id.* at 43,465. The DOJ indicated that it intended to adopt the Web Content Accessibility Guidelines (WCAG) 2.0, level AA. For a discussion of these standards, see *infra* Part III.

³⁵ *Id.* at 43,465–66.

³⁶ Minh N. Vu & Kristina Launey, *Justice Department Delays Web Accessibility Regulations For at Least Three More Years, Leaving Businesses in Turmoil*, ADATITLEIII.COM (Nov. 23, 2015), <http://www.adataitleiii.com/2015/11/justice-department-delays-web-accessibility-regulations-for-at-least-three-more-years-leaving-businesses-in-turmoil>.

³⁷ The comment period closed in fall 2016 for a Supplemental Advance Notice of Proposed Rulemaking, which will hopefully be followed by a Notice of Proposed Rulemaking, which in turn precedes a final rule. *See* Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities, 81 Fed. Reg. 28,658, 28,658 (May 9, 2016) (setting an August 8, 2016 deadline for submitting comments).

online-only public accommodations to be accessible to individuals with disabilities, and they will set some standards for compliance. Ultimately, the promulgation of these rules or the related litigation may answer the question of which, if any, websites are “places of public accommodation,” but that only solves the first part of the puzzle. What remains to be seen, if Title III does indeed apply to websites, is *how* it can be applied and what that means for the owners of websites that are places of public accommodation. Parts II and III of this Issue Brief propose an approach that the DOJ should take to answer these questions.

II. APPLYING TITLE III TO WEBSITES

Title III provides that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of . . . a place of public accommodation.”³⁸ The statute goes on to define “discrimination” to include five types of conduct, each of which contains an exception.³⁹ These exceptions articulate, for each type of discriminatory conduct, a circumstance in which compliance is excused because the burden is too high.⁴⁰ Part II.A outlines the various types of discrimination and their corresponding exceptions under Title III. Part II.B analyzes the application of each of these standards to websites.

A. Types of Discrimination Under Title III

1. Eligibility Criteria

The first category of discrimination covers eligibility criteria that limit access, which are prohibited unless “necessary” to providing the public accommodation.⁴¹ Eligibility criteria that are “exclusive or segregative” are prohibited.⁴² Even facially neutral eligibility requirements constitute illegal discrimination if they unnecessarily screen out individuals with disabilities.⁴³

“Necessary” eligibility criteria are rare. Eligibility criteria that address safety concerns may be necessary, but they must be based on actual risk, such as requiring “all participants in a recreational rafting

³⁸ 42 U.S.C. § 12182(a) (2012).

³⁹ *Id.* § 12182(b)(2)(A)(i)–(v). The fourth and fifth provisions are discussed together, in Parts II.A.4 and II.B.4 below, because they both apply only to facilities.

⁴⁰ *Id.* § 12182(b)(2)(A).

⁴¹ *Id.* § 12182(b)(2)(A)(i).

⁴² Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35,544, 35,564 (July 26, 1991) (codified at 28 C.F.R. pt. 36 (2016)).

⁴³ *Id.*

expedition be able to meet a necessary level of swimming proficiency.”⁴⁴ That requirement would be “necessary” because the rafting expedition carries a real risk of patrons falling into the water, which poses a risk of drowning, and the eligibility criterion of being able to swim is necessary to address that risk.

2. Reasonable Modifications

The second category of discrimination under Title III involves the failure to make reasonable modifications, unless “making such modifications would fundamentally alter” the public accommodation.⁴⁵ For instance, a museum would not be required to modify its policies to allow an individual with low or no vision to touch the artwork, but only if touching the artwork would do damage to it, because damage to artwork would fundamentally alter the nature of the museum.⁴⁶ In other words, the museum could no longer offer the same services if patrons were allowed to touch the artwork. This provision is also the reason that a place of public accommodation generally cannot refuse to allow individuals to bring service animals into the facility.⁴⁷

Determining whether an accommodation fundamentally alters a good or service is an “individualized inquiry.”⁴⁸ Because the inquiry is so contextualized, the provision of goods will often be subject to different expectations than the provision of services. For instance, the regulations indicate that a shop will not always be required to modify its inventory to include accessible versions of goods unless it is easy to do so.⁴⁹

⁴⁴ *Id.*

⁴⁵ 42 U.S.C. § 12182(b)(2)(A)(ii).

⁴⁶ Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. at 35,565.

⁴⁷ See 28 C.F.R. § 36.302(c) (2016) (requiring places of public accommodation to allow service animals under most circumstances).

⁴⁸ *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 688 (2001). In *PGA Tour*, the Supreme Court held that PGA Tour was required to allow an individual with a disability to use a golf cart because it allowed him to participate in the golf tournament, even though other participants were required to walk. *Id.* at 683, 690. This did not fundamentally alter the nature of the tournament because it did not give him an advantage; it merely allowed him to have enough stamina to participate. *Id.* at 690.

⁴⁹ 28 C.F.R. § 36.307. A public accommodation does not have to “alter its inventory to include accessible or special goods,” *id.* § 36.307(a), such as closed-captioned video tapes, *id.* § 36.307(c), unless the public accommodation generally makes special orders and “the accessible or special goods can be obtained from a supplier with whom the public accommodation customarily does business,” *id.* § 36.307(b).

3. Auxiliary Aids

The third category of discrimination concerns auxiliary aids and services which public accommodations are required to provide unless doing so would fundamentally alter the good or service or would result in an undue burden.⁵⁰ Note that this provision contains two exceptions: it excuses public accommodations from furnishing auxiliary aids if doing so would fundamentally alter the nature of the service *or* result in an undue burden.⁵¹

“Auxiliary aids and services” are defined in both the statute and the regulations,⁵² and they are in four categories: (1) aids and services for making aural material accessible to individuals with hearing impairments, (2) aids and services for making visual material accessible to individuals with vision impairments, (3) “acquisition or modification of equipment or devices,” and (4) other similar services and actions.⁵³ Such aids and services include furnishing closed captioning⁵⁴ and screen readers.⁵⁵

Additionally, the auxiliary aids and services provision is limited to communication. A public accommodation must furnish such aids and services “where necessary to ensure effective communication with individuals with disabilities.”⁵⁶ Because of this focus on communication, the provision only requires auxiliary aids and services where necessary to ensure communication of aural and visual materials.⁵⁷

The exceptions for this provision are also fact specific. The “fundamentally alter” standard has already been discussed above.⁵⁸ Similarly, the “undue burden” standard is highly contextual, “to be applied on a case-by-case basis.”⁵⁹ “Undue burden” is defined in the regulations

⁵⁰ 42 U.S.C. § 12182(b)(2)(A)(iii).

⁵¹ *Id.*

⁵² *Id.* § 12103(1); 28 C.F.R. § 36.303(b). The regulations contain several more examples, but the structure of the definition remains the same.

⁵³ 42 U.S.C. § 12103(1)(A)–(D); 28 C.F.R. § 36.303(b)(1)–(4).

⁵⁴ 28 C.F.R. § 36.303(b)(1).

⁵⁵ *Id.* § 36.303(b)(2).

⁵⁶ *Id.* § 36.303(c)(1).

⁵⁷ Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35,544, 35,566 (July 26, 1991) (codified at 28 C.F.R. pt. 36 (2016)). Despite that limitation, this provision is remarkable in its flexibility: “A public accommodation can choose among various alternatives as long as the result is effective communication.” *Id.*; *see also* 28 C.F.R. § 36.303(g) (codifying this availability of alternatives).

⁵⁸ *See supra* Part II.A.2.

⁵⁹ Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. at 35,567.

as “significant difficulty or expense.”⁶⁰ The regulations list five factors to be considered when assessing whether an action is an undue burden, which generally focus on the costs of providing the auxiliary aid or service and the resources of the place of public accommodation.⁶¹ Yet case law applying these factors is extremely sparse, and most courts seem to decide whether an undue burden exists based on a general sense of fairness.⁶²

4. *Barriers to Access in Facilities*

The final category of discrimination involves accessibility barriers to facilities.⁶³ Multiple provisions set forth different standards for existing facilities,⁶⁴ alterations to facilities,⁶⁵ and new facilities.⁶⁶

A public accommodation must remove barriers to access in existing facilities if it is readily achievable to do so.⁶⁷ If not, it must use alternative methods to make the goods and services available, if *that* is readily achievable.⁶⁸ The DOJ regulations contain a nonexhaustive list of twenty-one examples of barrier removals that would be required if readily achievable,⁶⁹ such as “installing ramps” for wheelchairs.⁷⁰ Examples of alternative means include—but are not limited to—having an employee retrieve items from shelves, curbside service, or home delivery.⁷¹ The regulations define “readily achievable” as “easily accomplishable and able to be carried out without much difficulty or expense.”⁷² The readily

⁶⁰ 28 C.F.R. § 36.104.

⁶¹ *See id.* (listing the factors).

⁶² *See, e.g.,* Rendon v. Valleycrest Prods., Ltd., 294 F.3d 1279, 1282 (11th Cir. 2002) (stating that the court did not need to decide whether there was an undue burden); Roberts v. KinderCare Learning Centers, Inc., 86 F.3d 844, 846 (8th Cir. 1996) (considering the factors, but not going through them individually); Sandison v. Michigan High School Athletic Ass’n, Inc., 64 F.3d 1026, 1035 (6th Cir. 1995) (stating that a proposed accommodation was “plainly an undue burden” without mentioning the factors).

⁶³ 42 U.S.C. §§ 12182(b)(2)(A)(iv)–(v), 12183(1)(a)–(b) (2012).

⁶⁴ *Id.* § 12182(b)(2)(A)(iv)–(v).

⁶⁵ *Id.* § 12183(1)(b).

⁶⁶ *Id.* § 12183(1)(a).

⁶⁷ *Id.* § 12182(b)(2)(A)(iv).

⁶⁸ *Id.* § 12182(b)(2)(A)(v).

⁶⁹ 28 C.F.R. § 36.304(b) (2016).

⁷⁰ *Id.* § 36.304(b)(1).

⁷¹ *Id.* § 36.305(b). In the case of a movie theater with a mix of accessible and inaccessible auditoriums, the theater must rotate the films shown in the accessible auditoriums so that individuals with disabilities are able to see all films. *Id.* § 36.305(c).

⁷² 42 U.S.C. § 12181(9). This carries the same five factors as the undue burden test. *Id.*; *see supra* note 61 and accompanying text.

achievable test is clearly meant to be a lower standard than the undue burden test.⁷³

The regulations make clear that the facility rules currently only apply to physical structures. “Facilities” are broadly defined but are exclusively physical places.⁷⁴ The DOJ interprets “communication barriers” to be limited to physical barriers to communication,⁷⁵ such as Braille signage and alarms with visual components.⁷⁶

Notably, the “readily achievable” standard applies only to existing facilities. New facilities must be accessible unless making them so is “structurally impracticable,”⁷⁷ a standard that will be met “only in rare and unusual circumstances.”⁷⁸ For instance, if a building will only be structurally sound if built on stilts, and that precludes certain accessibility features, those features are “structurally impracticable.”⁷⁹

Similarly, alterations to facilities, when made, must be accessible “to the maximum extent feasible,”⁸⁰ a standard which only applies when “the nature of an existing facility makes it virtually impossible to comply” with accessibility standards.⁸¹ Thus, cost is largely irrelevant to feasibility,⁸² but the nature of the existing structure is—presumably, if the size or layout of the building precludes widening a doorway to make it

⁷³ See Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35,544, 35,569 (July 26, 1991) (codified at 28 C.F.R. pt. 36 (2016)).

⁷⁴ See 28 C.F.R. § 36.104 (“Facility means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.”).

⁷⁵ Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. at 35,568.

⁷⁶ 28 C.F.R. § 36.304(c)(2).

⁷⁷ 42 U.S.C. § 12183(a)(1).

⁷⁸ Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. at 35,577.

⁷⁹ *Id.* (“A situation in which a building must be built on stilts because of its location in marshlands or over water is an example of one of the few situations in which the exception for structural impracticability would apply.”).

⁸⁰ 42 U.S.C. § 12183(a)(2).

⁸¹ 28 C.F.R. § 36.402(c).

⁸² See Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. at 35,581 (“Costs are to be considered only when an alteration to an area containing a primary function triggers an additional requirement to make the path of travel to the altered area accessible.”).

wheelchair accessible, such an alteration would be “virtually impossible.”⁸³

Not all alterations trigger this standard, however. Covered alterations are those which “affect[] or could affect the usability” of the facility.⁸⁴ “Normal maintenance,” such as painting, that does not affect usability does not trigger accessibility obligations.⁸⁵ Although this limitation does exclude some minor changes to the facility, it does not appear to take much to “affect the usability” of the facility. According to the regulations, even renovating⁸⁶ an area of the facility without changing the layout would improve its usability.⁸⁷

Finally, in addition to the regulations discussed above, the DOJ has also adopted extensive guidelines⁸⁸ and technical standards.⁸⁹ These standards, together with the regulations, are collectively known as the “2010 ADA Standards for Accessible Design.”⁹⁰

B. Applying Title III to Websites

Because the current regulations focus on examples of accessibility and discrimination in physical places, it is not immediately clear how the various standards would apply to websites. Assuming, as this Issue Brief does, that the ADA will eventually be applied to websites, it is necessary to determine how the existing regulations may apply.⁹¹ Although any of the standards—eligibility criteria,⁹² reasonable modifications,⁹³ and

⁸³ *Roberts v. Royal Atl. Corp.*, 542 F.3d 363, 372 (2d Cir. 2008).

⁸⁴ 42 U.S.C. § 12183(a)(2).

⁸⁵ 28 C.F.R. § 36.402(b)(1).

⁸⁶ “[R]enovation” is explicitly listed as an example of a covered alteration. *Id.*

⁸⁷ *See* Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. at 35,581 (“The Department remains convinced that the Act requires the concept of ‘usability’ to be read broadly to include any change that affects the usability of the facility . . .”).

⁸⁸ 36 C.F.R. § 1191, App. B.

⁸⁹ *Id.* § 1191, App. D.

⁹⁰ *Id.* § 1191.1(a). The standards are incredibly detailed, but because they deal with physical structures the details are not especially relevant to this Issue Brief.

⁹¹ Title III’s definitions of discrimination, discussed in Part II.A above, are couched in broad language. If, as this Issue Brief assumes, the current ADA can cover some private websites, at least some of the statutory definitions of discrimination, and their accompanying exceptions, must apply.

⁹² 42 U.S.C. § 12182(b)(2)(A)(i) (2012). Such eligibility criteria are only permissible if they are “necessary.” *Id.*

⁹³ *Id.* § 12182(b)(2)(A)(ii). Reasonable modifications must be made unless doing so would “fundamentally alter the nature” of the public accommodation. *Id.*

auxiliary aids⁹⁴—might apply in certain circumstances, this Section argues that websites are best thought of as facilities.⁹⁵

1. Eligibility Criteria

First, websites may impose requirements for use that function as “eligibility criteria that screen out or tend to screen out an individual with a disability.”⁹⁶ An example of this is a CAPTCHA tool.⁹⁷ A CAPTCHA is a web tool for verifying that a user is human, which helps to protect against automated spam.⁹⁸ CAPTCHAs generally ask the user to type a small piece of obscured text, on the theory that humans can recognize the letters but computer programs cannot.⁹⁹ Like the automated hotline in *Rendon*,¹⁰⁰ these tools have the effect of screening out users with low or no vision. Any user that relies on screen readers to use the web would be unable to get past the CAPTCHA.¹⁰¹

To combat this problem, some CAPTCHAs have a sound function.¹⁰² But even aural CAPTCHAs can be problematic. Deaf-blind users, who may be using the internet through a text-to-braille screen reader,¹⁰³ are still screened out. Screening like this may have once been “necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered” on the website.¹⁰⁴ But this is no longer true now that there are alternatives such as Google’s “No CAPTCHA reCAPTCHA,” which attempts to eliminate the need for any

⁹⁴ *Id.* § 12182(b)(2)(A)(iii). Auxiliary aids must be furnished unless doing so would “fundamentally alter the nature” of the public accommodation or “result in an undue burden.” *Id.*

⁹⁵ *See id.* § 12182(b)(2)(A)(iv)–(v), 12183(a)(1)–(2). Barriers to access in existing facilities must be removed if doing so is readily achievable, *id.* § 12182(b)(2)(A)(iv), and if such removal is not readily achievable, the goods or services must be made available through alternative methods if *that* is readily achievable. *Id.* § 12182(b)(2)(A)(v). New facilities must be made accessible unless doing so is “structurally impracticable.” *Id.* § 12183(a)(1). Alterations to existing facilities, when made, must be made accessible “to the maximum extent feasible.” *Id.* § 12183(a)(2).

⁹⁶ *Id.* § 12182(b)(2)(A)(i).

⁹⁷ *See* Carnegie Mellon Univ., CAPTCHA: Telling Humans and Computers Apart Automatically, CAPTCHA, <http://www.captcha.net> (last visited Jan. 30, 2017).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *See Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279, 1286 (11th Cir. 2002).

¹⁰¹ Carnegie Mellon Univ., *supra* note 97.

¹⁰² *Id.* In fact, the creators of CAPTCHA “strongly recommend” that all CAPTCHAs have a sound function. *Id.*

¹⁰³ *Visual Disabilities: Blindness*, WEBAIM, <http://webaim.org/articles/visual/blind> (last updated Aug. 28, 2013).

¹⁰⁴ *See* 42 U.S.C. § 12182(b)(2)(A)(i) (2012).

text in the CAPTCHA at all by asking the user whether she is a robot.¹⁰⁵ Where the benefits of CAPTCHAs are “necessary,” they should be implemented in this way, which would minimize the screening-out of individuals with disabilities.

2. Reasonable Modifications

Second, website operators can fail “to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities.”¹⁰⁶ An example of a reasonable modification to a website might be the placement of hyperlinks in text. When links are offset from the text they refer to—such as when the title of an external article or another page is followed by a hyperlinked “(click here)” —a screen reader user generating a list of links, or a blind or keyboard-only user navigating by tabbing through links, will merely read “click here” instead of the title, leaving the user in the dark about where the link will take them.¹⁰⁷ Users may be less likely to use these links if they cannot discern where the link will take them, diminishing the usefulness of the web page.¹⁰⁸ Hyperlinking the text describing the link would certainly be a “reasonable accommodation” that would not “fundamentally alter” the website.¹⁰⁹

3. Auxiliary Aids

Third, website operators may fail to furnish auxiliary aids and services.¹¹⁰ Under the “nexus” test,¹¹¹ a website itself is the auxiliary aid which allows individuals with disabilities to use a public accommodation.¹¹² However, if websites themselves are places of public accommodation, the website is not auxiliary at all, meaning that the

¹⁰⁵ Vinay Shet, *Are You a Robot? Introducing “No CAPTCHA ReCAPTCHA,”* GOOGLE: ONLINE SECURITY BLOG (Dec. 3, 2014), <https://googleonlinesecurity.blogspot.com/2014/12/are-you-robot-introducing-no-captcha.html>.

¹⁰⁶ 42 U.S.C. § 12182(b)(2)(A)(ii).

¹⁰⁷ *Visual Disabilities: Blindness*, *supra* note 103.

¹⁰⁸ See Jakob Nielsen, *Using Link Titles to Help Users Predict Where They Are Going*, NIELSON NORMAN GROUP (Jan. 11, 1998), <http://www.nngroup.com/articles/using-link-titles-to-help-users-predict-where-they-are-going>. Nielsen also discusses the value of adding title text to links, which allows users, including those using screen readers, to receive descriptive information about the link without interrupting the text itself. *Id.*

¹⁰⁹ See 42 U.S.C. § 12182(b)(2)(A)(ii).

¹¹⁰ See *id.*

¹¹¹ See *supra* note 30 and accompanying text.

¹¹² See, e.g., *Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 956 (N.D. Cal. 2006) (suggesting, without deciding, that Target.com may be an auxiliary aid or service).

auxiliary aids or services would be tools that aid individuals with disabilities in accessing the website.¹¹³

Auxiliary aids could, in theory, be separate from the website, such as providing screen-reader software¹¹⁴ or providing the website's information over the phone.¹¹⁵ These aids would be burdensome, however, even if they do not constitute an "undue burden."¹¹⁶ Because of the potential expense of providing such assistance, website operators would understandably want to avoid these services where possible. Avoiding such obligations may not always be possible, of course—the auxiliary aid must be provided if it is necessary and if it does not result in a fundamental alteration or undue burden.¹¹⁷

It may be easier to build the auxiliary aids and services into the website itself. For instance, closed captioning, which is specifically listed as an auxiliary aid in the regulations,¹¹⁸ could be provided together with video. Captioning is potentially burdensome,¹¹⁹ but tools such as speech recognition software are continually making it easier to implement.¹²⁰

Another example is alternative text ("alt text") that corresponds to an image.¹²¹ When the image has alt text that describes information conveyed by the image, that alt text can be read by a screen reader, allowing the user to understand a part of the web page that they would otherwise miss.¹²² Adding alt text would certainly not "fundamentally alter

¹¹³ 42 U.S.C. § 12182(b)(2)(A)(iii).

¹¹⁴ 28 C.F.R. § 36.303(b)(2) (2016).

¹¹⁵ *Target*, 452 F. Supp. 2d at 956.

¹¹⁶ 42 U.S.C. § 12182(b)(2)(A)(iii).

¹¹⁷ *Id.*

¹¹⁸ 28 C.F.R. § 36.303(b)(1).

¹¹⁹ See *Captions (Prerecorded)*, W3C: UNDERSTANDING WCAG 2.0, <http://www.w3.org/TR/UNDERSTANDING-WCAG20/media-equiv-captions.html> (last visited Jan. 30, 2017).

¹²⁰ For instance, YouTube utilizes "automatic speech recognition" to provide automated captions for some user videos. *YouTube Tools to Translate Your Content*, YOUTUBE HELP, https://support.google.com/youtube/answer/4792576?hl=en&ref_topic=3014331 (last visited Jan. 30, 2017).

¹²¹ Images can have "title" text and "alt" text. Title text is text that appears in a box when you hover your cursor over the image. Alt text, however, does not appear to most users unless the image fails to load. Roger Johansson, *The Alt and Title Attributes*, 456 BEREASTREET. (Dec. 8, 2004), http://www.456bereastreet.com/archive/200412/the_alt_and_title_attributes.

¹²² *H37: Using alt Attributes on img Elements*, W3C: TECHNIQUES FOR WCAG2.0, <http://www.w3.org/TR/2015/NOTE-WCAG20-TECHS-20150226/H37> (last visited Jan. 30, 2017).

the nature” of the website,¹²³ because it would change nothing about its functionality or appearance. Nor would it be an undue burden,¹²⁴ at least in most cases; adding a single line of code to describe the image would be easy and inexpensive.¹²⁵

4. *Websites as Facilities*

Although the above obligations may apply to websites in some circumstances, websites are best understood as facilities. Websites are easily analogized to physical places, and websites can be used in many of the ways that physical places of public accommodation can be used. A website can be a “place of exhibition or entertainment,”¹²⁶ a “place of public gathering,”¹²⁷ a “sales or rental establishment,”¹²⁸ a “service establishment,”¹²⁹ a “place of public display or collection,”¹³⁰ a “place of recreation,”¹³¹ a “place of education,”¹³² or a “social service center establishment.”¹³³ In each case, the website serves as a stand-in for the physical facility; the only significant difference between physical facilities and online facilities is that online facilities can offer goods and services to more people, more conveniently. In particular, individuals with disabilities

¹²³ 42 U.S.C. § 12182(b)(2)(A)(iii) (2012).

¹²⁴ *See id.*

¹²⁵ This is especially so because the person uploading the image may not have to write code at all. For instance, an online news source would likely have a form for journalists to upload their stories and images, and it would be easy to include a field on that form for the alt text. In fact, the alt text for journalistic photos may be very similar or identical to the caption which is generally already provided.

¹²⁶ 42 U.S.C. § 12181(7)(C). Netflix is a perfect example. NETFLIX, <https://www.netflix.com> (last visited Jan. 30, 2017).

¹²⁷ *Id.* § 12181(7)(D). Facebook and other social networks, for example. *E.g.*, FACEBOOK, <https://www.facebook.com> (last visited Jan. 30, 2017).

¹²⁸ *Id.* § 12181(7)(E). Amazon, for example. AMAZON, <https://www.amazon.com> (last visited Jan. 30, 2017).

¹²⁹ *Id.* § 12181(7)(F). Expedia, for example, would be a “travel service.” EXPEDIA, <https://www.expedia.com> (last visited Jan. 30, 2017).

¹³⁰ *Id.* § 12181(7)(H). Scribd, for instance, is an online library. SCRIBD, <https://www.scribd.com> (last visited Jan. 30, 2017).

¹³¹ *Id.* § 12181(7)(I). A website offering a game would be an example of a place of recreation.

¹³² *Id.* § 12181(7)(J). Coursera, for example, offers access to online courses. COURSEERA, <https://www.coursera.org> (last visited Jan. 30, 2017).

¹³³ *Id.* § 12181(7)(K). Because the statute lists food banks, homeless shelters, and adoption agencies, one can imagine similar services offered via websites. For instance, the Charities Aid Foundation of America offers a database of charities around the world, each with a “donate now” button. *Global Database*, CAF AMERICA, <http://www.cafamerica.org/give-now/global-database> (last visited Jan. 30, 2017).

can use websites to access services that they would otherwise have difficulty getting to.

This interpretation of “facility” is consistent with the statutory text of the ADA. Title III does define “commercial facilities” but only as “facilities” that are nonresidential and affect commerce.¹³⁴ Similarly, “public accommodations” are private entities that affect commerce and fall into one of twelve categories.¹³⁵ Thus, commercial facilities and places of public accommodation are, if not synonymous, nearly identical in meaning. If websites can be places of public accommodation, there is no statutory language to suggest they should not also be facilities.

Admittedly, the DOJ’s Title III rules currently define “facility” as physical property.¹³⁶ However, the same section defines a place of public accommodation as a facility.¹³⁷ Therefore, if places of public accommodation include websites, then either the definition of facility must change or the definition of a place of public accommodation must cease to be limited to facilities. It makes little sense to remove “facilities” from the definition of places of public accommodation, because the definitions of “commercial facility” and “place of public accommodation” are very similar¹³⁸ and because the provisions about different types of facilities¹³⁹ are clearly an important part of the ADA’s coverage of public accommodations. Thus, if some websites are public accommodations, the current definition of “facility” must be changed to cover websites.¹⁴⁰

¹³⁴ 42 U.S.C. § 12181(2).

¹³⁵ *See id.* § 12182(7).

¹³⁶ 28 C.F.R. § 36.104 (2016) (“Facility means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.”).

¹³⁷ *Id.* Unlike the statutory definition, the regulations list the twelve types of public accommodation under the definition of “place of public accommodation”—which must be a facility—and define “public accommodation” as a “private entity that owns, leases (or leases to), or operates a place of public accommodation.” *Id.* This distinction was meant to clarify that the regulations only impose obligations on public accommodations insofar as they are operating *places* of public accommodation or commercial facilities. Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35,544, 35,546–47 (July 26, 1991) (codified at 28 C.F.R. pt. 36 (2016)).

¹³⁸ *See supra* notes 134–135 and accompanying text.

¹³⁹ 42 U.S.C. §§ 12182(b)(2)(A)(iv)–(v), 12183; 28 C.F.R. §§ 36.304–.305, 36.401–.402; *see also supra* Part II.A.4.

¹⁴⁰ The redefinition would likely include more than merely websites. The current definition lists several examples of physical property that are facilities. *See* 28 C.F.R. § 36.104 (“Facility means all or any portion of buildings, structures, sites,

This change would allow websites to use a multilayered framework of accessibility obligations similar to those that apply to physical facilities. For existing online facilities, “communication barriers that are structural in nature”¹⁴¹ can be structural features of the website that prevent aural or visual communication.¹⁴² For instance, a website that does not specify a default human language may not be read correctly by a screen reader because the screen reader cannot determine which set of pronunciation rules to use.¹⁴³ The lack of a default language is a communication barrier because it prevents individuals with disabilities from reading the web page, and it is structural in nature because it is built into the architecture of the web page.

Sometimes, the removal of these barriers will be readily achievable¹⁴⁴ through simple changes in code. In the case of a web page with no default language, this is frequently as simple as adding a single short line of code to the page.¹⁴⁵

On the other hand, sometimes the removal of these barriers is not readily achievable.¹⁴⁶ In those cases, it may be readily achievable to make

complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.”). Similarly, websites are only one example of online places of public accommodation. For instance, in the copyright context, the Ninth Circuit has called peer-to-peer file sharing systems “facilities.” *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1022 (9th Cir. 2001). Such systems work over the internet, but generally not via a website. *See id.* at 1011 (explaining that Napster, the peer-to-peer system at issue, allowed files to be transferred over the internet via a software client). The precise boundaries of the definition, however, are outside the scope of this Issue Brief, which is focused specifically on websites.

¹⁴¹ 42 U.S.C. § 12182(b)(2)(A)(iv).

¹⁴² The current regulations were only intended to apply to communication barriers “that are an integral part of the physical structure of a facility.” Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. at 35,544, 35,568. However, if the definition of “facility” is expanded to include websites, it follows that the scope of communication barriers in facilities would expand as well.

¹⁴³ *Language of Page*, W3C: UNDERSTANDING WCAG 2.0, <http://www.w3.org/TR/UNDERSTANDING-WCAG20/meaning-doc-lang-id.html>.

¹⁴⁴ 42 U.S.C. § 12182(b)(2)(A)(iv).

¹⁴⁵ *H57: Using Language Attributes on the HTML Element*, W3C: TECHNIQUES FOR WCAG 2.0, <http://www.w3.org/TR/2015/NOTE-WCAG20-TECHS-20150226/H57> (last visited Jan. 30, 2017) (demonstrating that, to specify in HTML that the default language is French, the web developer merely needs to add “<html lang=“fr”>”).

¹⁴⁶ *See* 42 U.S.C. § 12182(b)(2)(A)(iv).

the goods and services available through alternative methods.¹⁴⁷ For instance, JavaScript potentially presents numerous accessibility issues.¹⁴⁸ Pop-up windows enabled by JavaScript create difficulties for individuals with disabilities, and it is difficult to implement them in an accessible way: “If they are used, thorough user testing of your implementation is vital to ensure accessibility.”¹⁴⁹ User testing is potentially not readily achievable, because it may require significant “difficulty or expense.”¹⁵⁰

The multilayered approach to websites makes sense largely because, as with physical facilities, it is much more burdensome to make an existing website accessible than it is to make a new website accessible. Changing a website’s code involves a substantial amount of work or money,¹⁵¹ but when a website is already being created or altered, making the website accessible requires relatively little additional effort.¹⁵²

The regulations for facilities of public accommodations already make this distinction. New websites would need to be “readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable” to comply with regulatory standards.¹⁵³ Similarly, alterations to a web facility “or part thereof . . . in a manner that affects or could affect the usability of the facility or part thereof” must be made readily accessible “to the maximum extent feasible.”¹⁵⁴ Although cost and other burdens are important considerations in determining whether an existing website must be modified, they are largely irrelevant to the requirements for websites that are already being altered, and they are almost completely irrelevant for new websites.

¹⁴⁷ *Id.* § 12182(b)(2)(A)(v).

¹⁴⁸ See *Accessible JavaScript*, WEBAIM, <http://webaim.org/techniques/javascript/#accessibility> (last updated Oct. 24, 2013) (“Unfortunately, there is no easy fix that can be applied to solve all accessibility problems associated with JavaScript.”).

¹⁴⁹ *Accessible JavaScript: Other Issues*, WEBAIM, <http://webaim.org/techniques/javascript/other#popups> (last updated Oct. 24, 2013).

¹⁵⁰ 42 U.S.C. § 12181(9).

¹⁵¹ Such as in the JavaScript example above. See *supra* notes 146–150 and accompanying text.

¹⁵² See *Roberts v. Royal Atlantic Corp.*, 542 F.3d 363, 369 (2d Cir. 2008) (“The more a place is altered, the easier and cheaper it becomes, in both absolute and relative terms, to integrate incidentally features that facilitate ADA access.”); *Introduction to Web Accessibility*, WEBAIM, <http://webaim.org/intro> (last updated Mar. 15, 2016) (“Sometimes web developers fear that it is more expensive and time-consuming to create accessible web sites than it is to create inaccessible ones. This fear is largely untrue.”).

¹⁵³ 42 U.S.C. § 12183(a)(1).

¹⁵⁴ *Id.* § 12183(a)(2).

Thus, treating websites as facilities allows for a layered approach to website accessibility, where existing websites are subject to a variety of limited obligations¹⁵⁵ and new and altered websites are held to much more stringent standards.¹⁵⁶ Of course, implementing a system for websites that is similar to the system in place for physical facilities will require something similar to the 2010 ADA Standards for Accessible Design.¹⁵⁷ Part III considers how specific accessibility standards can be applied to websites under Title III.

III. IMPLEMENTING WEBSITE ACCESSIBILITY RULES

The similarities between websites and other places of public accommodation have thus far provided valuable insight into how the ADA should cover online-only public accommodations. Redefining “facilities” to include websites also opens up the possibility of specific technical guidelines to cover websites in much the same way that the 2010 Standards cover physical facilities.¹⁵⁸ This Part turns to implementation, considering what standards should apply to online places of public accommodation.

Regulations under Section 508 of the Rehabilitation Act¹⁵⁹ already require federal websites to be accessible.¹⁶⁰ These regulations set out sixteen technical standards for websites¹⁶¹ and several more general, technology-neutral performance standards,¹⁶² which together reflect the need for simultaneous predictability and flexibility.¹⁶³ The performance

¹⁵⁵ See *id.* § 12182(b)(2)(A). Websites that are facilities of public accommodations would be subject to the facility-specific provisions, *id.* § 12182(b)(2)(A)(iv)–(v), as well as the general provisions that apply to all public accommodations, *id.* § 12182(b)(2)(A)(i)–(iii).

¹⁵⁶ See *id.* § 12183.

¹⁵⁷ See *supra* notes 88–90 and accompanying text.

¹⁵⁸ *Id.*

¹⁵⁹ 29 U.S.C. § 794d (2012).

¹⁶⁰ 36 C.F.R. §§ 1194.1, 1194.22 (2016).

¹⁶¹ *Id.* § 1194.22(a)–(p). Although this Issue Brief is focused on websites in particular, the Section 508 regulations also include technical standards for software applications, *id.* § 1194.21, telecommunications products such as phones, *id.* § 1194.23, video and multimedia products, *id.* § 1194.24, self-contained products, *id.* § 1194.25, and computers, *id.* § 1194.26.

¹⁶² *Id.* § 1194.31.

¹⁶³ See Electronic and Information Technology Accessibility Standards, 65 Fed. Reg. 80,500, 80,501 (Dec. 21, 2000) (codified at 36 C.F.R. pt. 1194 (2016)) (explaining that both sets of standards were included “because performance standards provide the regulated parties the flexibility to achieve the regulatory objective in a more cost-effective way” but regulations also must “be as descriptive as possible because procurement officials and others need to know when compliance with section 508 has been achieved”).

standards are very general, requiring covered technologies to be accessible in “at least one mode of operation” to individuals with disabilities related to vision,¹⁶⁴ hearing,¹⁶⁵ speech,¹⁶⁶ and motor control.¹⁶⁷ The technical standards for websites are much more specific, using language based on the Web Content Accessibility Guidelines (WCAG) 1.0.¹⁶⁸

The Section 508 regulations, however, are far from perfect. The performance standards, for example, are expressly limited to the four types of disabilities mentioned above: vision, hearing, speech, and motor control.¹⁶⁹ Such standards may be useful when applied to those disabilities, but individuals with other disabilities are entirely excluded.¹⁷⁰ Because the technical standards are much more specific, the performance standards need to be flexible enough to apply general principles to all disabilities.

The technical standards are imperfect as well, largely because of their reliance on WCAG 1.0. One of the major criticisms of WCAG 1.0 was that its standards were largely untestable.¹⁷¹ Because the majority of the technical standards relied on language from WCAG 1.0 guidelines,¹⁷² the technical standards suffer from the same problem. Additionally, WCAG 1.0 guidelines “quickly grew out of date” after being published in 1999,¹⁷³ and failed to account for the emerging multimedia nature of the

¹⁶⁴ 36 C.F.R. § 1194.31(a)–(b).

¹⁶⁵ *Id.* § 1194.31(c)–(d).

¹⁶⁶ *Id.* § 1194.31(e).

¹⁶⁷ *Id.* § 1194.31(f).

¹⁶⁸ See Electronic and Information Technology Accessibility Standards, 65 Fed. Reg. at 80,510 (explaining that the regulations do not incorporate the WCAG 1.0 guidelines but are largely based on WCAG 1.0 language).

¹⁶⁹ 36 C.F.R. § 1194.31.

¹⁷⁰ For example, cognitive disabilities are covered by the ADA, 42 U.S.C. § 12102(2) (2012), but they are left out of this list. Cognitive disabilities, although difficult to define, may sometimes be straightforward to accommodate. See *Cognitive Disabilities: Design Considerations*, WEBAIM, <http://webaim.org/articles/cognitive/design> (last updated Aug. 9, 2013) (“Lengthy interactive processes, such as those required to purchase items online, should be kept as simple and brief as possible.”).

¹⁷¹ Simon Harper & Yeliz Yesilada, *Web Accessibility and Guidelines*, in WEB ACCESSIBILITY: A FOUNDATION FOR RESEARCH 71 (Simon Harper & Yeliz Yesilada eds., 2008).

¹⁷² See Electronic and Information Technology Accessibility Standards, 65 Fed. Reg. at 80,510 (explaining that the regulations do not incorporate the WCAG 1.0 guidelines but are largely based on WCAG 1.0 language).

¹⁷³ Joe Clark, *To Hell with WCAG 2*, A LIST APART (May 23, 2006), <http://alistapart.com/article/tohellwithwcag2>.

web.¹⁷⁴ By encoding standards that are out of date and untestable, the technical standards fail to provide predictable criteria to ensure compliance that actually benefits individuals with disabilities.

The WCAG 2.0 standards attempt to remedy these issues.¹⁷⁵ The WCAG 2.0 are structured in four “layers of guidance” that progress from general and technology-neutral to highly specific and technical.¹⁷⁶ First, the most general layer consists of four principles which apply to all content and all disabilities.¹⁷⁷ Second, twelve guidelines—at least one for each principle—“provide the basic goals that authors should work toward in order to make content more accessible to users with different disabilities.”¹⁷⁸ Third, each guideline contains multiple “success criteria” which set specific, testable criteria for determining compliance with each guideline.¹⁷⁹ These criteria are each labeled with a “conformance level”—A, AA, or AAA, with AAA being the most burdensome but also yielding the most accessible website. Finally, each success criterion links to a page of general and technology-specific techniques for achieving it.¹⁸⁰

The DOJ should adopt the principles, guidelines, and success criteria of the WCAG 2.0 because they are both predictable and flexible.¹⁸¹ The broad principles are general enough to cover all web content and all disabilities, avoiding the problem faced by the Section 508 performance standards.¹⁸² The guidelines are more specific and can function similarly to section titles and purpose statements in statutes and regulations. This

¹⁷⁴ See Joe Clark, *Flash MX: Clarifying the Concept*, A LIST APART (Apr. 26, 2002), <http://alistapart.com/article/flashmxclarifying>.

¹⁷⁵ *Web Content Accessibility Guidelines (WCAG) 2.0*, W3C, <http://www.w3.org/TR/WCAG20> (last visited Jan. 30, 2017).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Indeed, the DOJ asked whether it should adopt the WCAG 2.0 AA standards in the ANPRM. ANPRM, *supra* note 5, at 43,465. Additionally, the DOJ has favored the WCAG 2.0 AA standards in multiple settlements. See, e.g., Settlement Agreement Between the United States of America and Ahold U.S.A., Inc. and Peapod, LLC, DOJ No. 202-63-169 (Nov. 10, 2014), at 5, <http://www.justice.gov/file/163956/download> (requiring Peapod to make its website and mobile applications conform to the WCAG 2.0 AA); Settlement Agreement Between the United States of America and EdX, Inc., DOJ No. 202-36-255 (Apr. 1, 2015), at 6, http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/04/02/edx_settlement_agreement.pdf (requiring EdX, an online education provider, to make its website and mobile applications conform to the WCAG 2.0 AA).

¹⁸² 36 C.F.R. § 1194.31 (2016); see *supra* notes 169–170 and accompanying text.

would be an interpretive aid that could guide both compliance and enforcement. Thus, the flexible principles and guidelines would apply broadly to protect individuals with disabilities, while simultaneously providing substantial guidance to developers and operators of websites.

The success criteria provide increased predictability. These criteria are fairly specific, referring to particular types of content.¹⁸³ They are organized in a way similar to statutes and regulations; for example, “2.3.1” refers to the first success criterion of the third guideline of the second principle.¹⁸⁴ Additionally, they are phrased similarly to statutes and regulations, which may make it easier to incorporate them into predictable legal standards. This way, operators of websites, or the web developers they hire, would know exactly what they are required to do.

Of course, no set of standards can be absolutely perfect, and WCAG 2.0 is no exception. One commentator points to several parts of WCAG 2.0 which need to be updated or clarified.¹⁸⁵ For instance, the lowest level of conformance has no contrast requirements, meaning that “[w]hite text on a white background is Level A conformant.”¹⁸⁶ Another commentator suggests that “the web is too fast-moving for web guidelines to *ever* be complete.”¹⁸⁷ But WCAG 2.0 and ADA regulations can both be updated. The DOJ and the Web Accessibility Initiative—the organization that publishes the WCAG—should work together to update and improve the standards when necessary.

However, not every aspect of the WCAG 2.0 should be adopted by the DOJ as binding law. First, the most burdensome level of conformance, AAA, is likely infeasible to adopt because it can be very difficult to implement.¹⁸⁸ Second, the specific techniques for conformance, by the WCAG 2.0’s own terms, are meant to be “informative,” not mandatory.¹⁸⁹ These highly specific documents, although certainly useful to a developer who seeks to make a website compliant, are not feasible to

¹⁸³ See, e.g., *Web Content Accessibility Guidelines (WCAG) 2.0*, *supra* note 175 (“Captions are provided for all prerecorded audio content in synchronized media, except when the media is a media alternative for text and is clearly labeled as such.”).

¹⁸⁴ *Id.*

¹⁸⁵ Jared Smith, *WCAG Next*, WEBAIM BLOG (Jan. 31, 2012), <http://webaim.org/blog/wcag-next>.

¹⁸⁶ *Id.*

¹⁸⁷ *The Future of WCAG – Maximizing Its Strengths Not Its Weaknesses*, HASSELL INCLUSION (Jan. 7, 2013), <http://www.hassellinclusion.com/2013/01/wcag-future>.

¹⁸⁸ See ANPRM, *supra* note 5, at 43,465 (explaining that level AAA is very burdensome and seeking comment on whether to adopt level AA).

¹⁸⁹ *Id.*

make mandatory. There are approximately two hundred general techniques, and hundreds of technology-specific techniques as well.¹⁹⁰ Adopting the general techniques would be unnecessarily burdensome,¹⁹¹ especially because the techniques only describe how to accomplish what is already codified by the guidelines and success criteria. Adopting the technology-specific guidelines would be worse, running counter to the government's policy, in other contexts, of being technology neutral.¹⁹²

Technology neutrality is especially important in this context. As the technology used in websites advances, new accessibility problems may emerge. For example, Microsoft Silverlight was first released in 2007.¹⁹³ Since then, the WCAG 2.0 techniques have been updated to include thirty-five techniques for implementing Silverlight in conformity with the WCAG 2.0.¹⁹⁴ Had the specific techniques been encoded into law before that point, the Silverlight techniques would have been left out, and web developers could have assumed that the regulations did not apply to Silverlight. In contrast, adopting technology-neutral guidelines and success criteria allows the regulations to apply to all existing technologies while simultaneously putting all parties on notice of the accessibility features that will be expected of future technologies.

Finally, the regulations should also allow the law to embrace new technologies that expand access, especially in the context of automation. If accessibility features that would have been infeasible to manually implement can be automated, accessibility increases while the burdens on website operators decrease. For example, consider automatic transcripts for live audio-only content. Currently, the WCAG 2.0 deem it very burdensome—"Level AAA"—to require a transcript for live audio.¹⁹⁵ However, as speech recognition and automatic transcription technology improves, it will become increasingly easy to implement transcription in any context. Following the WCAG 2.0 would allow the DOJ to easily

¹⁹⁰ *Techniques for WCAG 2.0*, W3C, <http://www.w3.org/TR/WCAG20-TECHS> (last updated Oct. 7, 2016).

¹⁹¹ See, e.g., Clark, *supra* note 173 ("Since the Understanding document is more than double the size of what it purports to explain, this itself may indicate a problem with WCAG 2.").

¹⁹² See, e.g., Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for Chief Information Officers and Senior Procurement Executives (2011), https://www.whitehouse.gov/sites/default/files/omb/assets/egov_docs/memotociotechnologyneutrality.pdf (describing the federal government's policy of making technology acquisitions in a technology-neutral way).

¹⁹³ *Microsoft Silverlight Release History*, MICROSOFT, <https://www.microsoft.com/getsilverlight/locale/en-us/html/Microsoft%20Silverlight%20Release%20History.htm> (last updated Oct. 11, 2016).

¹⁹⁴ *Techniques for WCAG 2.0*, *supra* note 190.

¹⁹⁵ *Web Content Accessibility Guidelines (WCAG) 2.0*, *supra* note 175.

adopt new compliance obligations as certain accessibility features become easier to implement.

CONCLUSION

If the DOJ moves forward in updating its regulations to include websites as places of public accommodation, it should also consider incorporating layered standards into the obligations imposed on operators of websites. Although it is harder to retrofit accessibility onto old websites, adding new content in an accessible way is fairly straightforward, especially when guided by flexible, predictable standards like those set out in WCAG 2.0. This is precisely why the Title III “facility” framework is so useful; it allows somewhat less accessibility in existing, unchanging facilities but requires new or updated facilities to be inclusive. If the DOJ is going to interpret “place of public accommodation” to include websites, it should also redefine “facility” to include nonphysical facilities such as websites to assist in implementing standards such as the WCAG 2.0.