

Website Inaccessibility:  
The New Wave of ADA Title III Litigation

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The Americans with Disabilities Act (ADA)—enacted in 1990 and amended in 2008—was the first comprehensive federal civil rights law protecting individuals with disabilities.<sup>1</sup> Title I of the ADA prohibits discrimination in employment and is enforced by the Equal Employment Opportunity Commission (EEOC).<sup>2</sup> Title II “applies to state and local government entities, and protects qualified individuals with disabilities from discrimination on the basis of disability in services, programs, and activities provided by state and local government entities.”<sup>3</sup>

Title III prohibits discrimination on the basis of disability by places of public accommodation (places that are privately owned, leased, or operated, and that affect commerce) that fall into one of twelve categories listed in the statute. Title III also “requires newly constructed or altered places of public accommodation—as well as commercial facilities (privately owned, nonresidential facilities such as factories, warehouses, or office buildings)—to comply with the ADA Standards.”<sup>4</sup> Further, Title III covers “examinations and courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes.”<sup>5</sup> The United States Department of Justice (DOJ) enforces Title III (and portions of Title II) of the ADA.

The ADA defines “disability” as: “(A) a physical or mental impairment that substantially limits one or more major life activities of [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.”<sup>6</sup> The statute also sets out an expansive definition of “Major Life Activities” as well as rules of construction to interpret broadly the phrase “substantially limited.”<sup>7</sup> Central to the ADA is the requirement that entities subject to Title I provide reasonable accommodations to qualified disabled individuals unless doing so would cause an “undue hardship.”<sup>8</sup>

Title III contains similar provisions that require public accommodations to make reasonable modifications to facilities,

1 See 42 U.S. Code § 12101, *et seq.* The focus of this article is on whether websites are covered under Title III of the ADA. It does not address state or local disability laws that may be applicable to website accessibility nor address in substance possible defenses to website accessibility claims under Title III.

2 See 42 U.S. Code §§ 12111-12117. For the EEOC’s regulations implementing Title I of the ADA, see 29 C.F.R. Part 1630.

3 See 42 U.S. Code §§ 12131-12165.

4 See 42 U.S. Code §§ 12181-12189.

5 ADA Title III Technical Assistance Manual, <https://www.ada.gov/taman3.html>.

6 42 U.S. Code § 12102(1).

7 42 U.S. Code §§ 12102(2), (4).

8 42 U.S. Code §§ 12111(8)-(10).

policies, and procedures, and take other actions to enable disabled individuals to have equal access to the goods and services they offer in an integrated setting, provided that such modifications or actions do not “fundamentally alter the nature” of the goods or services or result in “undue burden.”<sup>9</sup> Moreover, a covered entity’s failure to remove architectural barriers or communication barriers that are structural in nature may constitute discrimination under Title III where removal is readily achievable.<sup>10</sup>

#### I. ARE WEBSITES COVERED UNDER TITLE III?

In 1991, the DOJ enacted regulations to implement Titles II and III of the ADA, which were revised in September 2010.<sup>11</sup> To qualify as a public accommodation under DOJ Title III regulations, an entity must fall within at least one of twelve categories:<sup>12</sup>

1. Places of lodging (e.g., inns, hotels, motels) (except for owner-occupied establishments renting fewer than six rooms);
2. Establishments serving food or drink (e.g., restaurants and bars);
3. Places of exhibition or entertainment (e.g., motion picture houses, theaters, concert halls, stadiums);
4. Places of public gathering (e.g., auditoriums, convention centers, lecture halls);
5. Sales or rental establishments (e.g., bakeries, grocery stores, hardware stores, shopping centers);
6. Service establishments (e.g., laundromats, dry cleaners, banks, barbershops, beauty shops, travel services, shoe repair services, funeral parlors, gas stations, offices of accountants or lawyers, pharmacies, insurance offices, professional offices of health care providers, hospitals);
7. Public transportation terminals, depots, or stations (not including facilities relating to air transportation);
8. Places of public display or collection (e.g., museums, libraries, galleries);
9. Places of recreation (e.g., parks, zoos, amusement parks);
10. Places of education (e.g., nursery schools, elementary, secondary, undergraduate, or postgraduate private schools);

9 42 U.S. Code § 12182(a)-(b). ADA Title III Technical Assistance Manual, at III-3.0000-3.4300, <https://www.ada.gov/taman3.html>.

10 42 U.S. Code § 12182(b)(2). In the event barrier removal is not readily achievable, a failure to provide alternative methods of providing the same goods or services when such methods are readily achievable constitutes discrimination under Title III. *Id.*

11 See 28 C.F.R. §§ 36.102-36.104. The original and revised regulations contain “ADA Standards for Accessible Design,” which establish requirements for new construction and alterations to existing buildings.

12 ADA Title III Technical Assistance Manual, <https://www.ada.gov/taman3.html>. “The 12 categories are an exhaustive list. However, within each category the examples given are just illustrations” and “would include many facilities other than those specifically listed . . .” *Id.*

11. Social service center establishments (e.g., day care centers, senior citizen centers, homeless shelters, food banks, adoption agencies); and
12. Places of exercise or recreation (e.g., gymnasiums, health spas, bowling alleys, golf courses).

The ADA was enacted prior to widespread use of the internet by individuals and businesses. Therefore, Title III and DOJ regulations do not specifically address the internet or provide guidelines for website compliance.

#### A. DOJ’s Past Position on Website Coverage Under Title III

In 1996, the Assistant Attorney General for Civil Rights, Deval Patrick, authored a letter in response to an inquiry from Sen. Tom Harkin. Patrick’s letter stated that covered entities under the ADA must make their websites accessible to provide effective communication.<sup>13</sup> Thereafter, the DOJ actively pursued enforcement of website compliance with Title III through litigation which resulted in consent decrees, the filing of amicus briefs, and statements of interest.<sup>14</sup>

On July 26, 2010, the DOJ issued advance notice of proposed rulemaking to establish accessibility standards for website compliance.<sup>15</sup> However, on December 26, 2017, the DOJ placed that rulemaking on the 2017 Inactive Actions list with no further information, although it stated it would “continue to assess whether specific technical standards are necessary and appropriate to assist covered entities with complying with the ADA.”<sup>16</sup>

In 2017, the DOJ appeared to change its view on whether websites are covered under the ADA in an amicus brief filed with the U.S. Supreme Court opposing certiorari in *Magee v. Coca-Cola Refreshment USA*, where the Fifth Circuit had held that a vending machine was not a place of public accommodation.<sup>17</sup> In its amicus brief, the DOJ argued that “the court of appeals correctly held that the beverage vending machines at issue are not ‘place[s] of public accommodation’ under Title III of the ADA.”<sup>18</sup> The DOJ further argued that “questions concerning Title III’s application to nonphysical establishments—including websites or digital services—may someday warrant this Court’s attention . . . this

13 Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations (Advance Notice of Proposed Rulemaking), at Section III.B(iii), *available at* [https://www.ada.gov/anprm2010/web%20anprm\\_2010.htm](https://www.ada.gov/anprm2010/web%20anprm_2010.htm) (citing Letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Division, Department of Justice, to Tom Harkin, U.S. Senator (Sept. 9, 1996), *available at* <https://www.justice.gov/crt/foia/file/666366/download>).

14 See *id.* (listing and describing cases).

15 *Id.*

16 Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions, 28 C.F.R. Parts 35 and 36 (2017), <https://www.govinfo.gov/content/pkg/FR-2017-12-26/pdf/2017-27510.pdf>.

17 833 F.3d 530 (5th Cir. 2016), cert. denied, \_\_\_ U.S. \_\_\_ (Oct. 2, 2017) (No. 16-668).

18 Brief for the United States as Amicus Curiae at 11, *Magee*, 833 F.3d 530 (No. 16-668), *available at* <http://www.scotusblog.com/wp-content/uploads/2017/07/16-668-DOJ-cert-ac.pdf> (citing 42 U.S.C. 12182(a)).

case is not a suitable vehicle for addressing those emerging issues, however, since petitioner encountered respondent's machines in person, not by telephone or over the Internet."<sup>19</sup>

### B. DOJ's Current Position on Website Coverage Under Title III

On September 4, 2018, Sen. Chuck Grassley wrote a letter to then-Attorney General Jeff Sessions, encouraging the DOJ to clarify whether the ADA applies to websites given the increase in lawsuits filed over alleged website inaccessibility.<sup>20</sup> Earlier, on June 20, 2018, over 100 members of Congress had sent a letter to Sessions complaining about the lack of clarity for website compliance under the ADA in light of actual and threatened legal action by plaintiffs' attorneys across the country.<sup>21</sup>

On September 25, 2018, Assistant Attorney General Stephen E. Boyd responded to the June 20 letter confirming DOJ's earlier position that the ADA applies to the websites of public accommodations. He stated that the DOJ's "interpretation is consistent with the ADA's Title III requirement that the goods, services, privileges, or activities provided by places of public accommodation be equally accessible to people with disabilities."<sup>22</sup> Boyd also stated that, "absent the adoption of specific technical requirements for websites through rulemaking, public accommodations have flexibility in how to comply with the ADA's general requirements of nondiscrimination and effective communication" and that "noncompliance with a voluntary technical standard for website accessibility does not necessarily indicate noncompliance with the ADA."<sup>23</sup>

## II. EXISTING WEBSITE ACCESSIBILITY GUIDELINES

While the DOJ has not promulgated regulations setting forth guidelines for website accessibility under Title III, it has pointed out that:

[T]he Web Accessibility Initiative (WAI) of the World Wide Web Consortium (W3C) has created recognized voluntary international guidelines for Web accessibility. These guidelines, set out in the Web Content Accessibility Guidelines (WCAG), detail how to make Web content accessible to individuals with disabilities. . . .

The WCAG 2.0 contains 12 guidelines addressing Web accessibility. Each guideline contains testable criteria

for objectively determining if Web content satisfies the guideline. In order for a Web page to conform to the WCAG 2.0, the Web page must satisfy the criteria for all 12 guidelines under one of three conformance levels: A, AA, or AAA.<sup>24</sup>

W3C provides online resources and tools such as tutorials and support materials to assist organizations in making their websites accessible to disabled individuals.<sup>25</sup>

Federal agencies are subject to the Electronic and Information Technology Standards found in Section 508 of the Rehabilitation Act of 1973.<sup>26</sup> These standards, known colloquially as section 508 standards, are published by the U.S. Access Board.<sup>27</sup>

## III. ILLUSTRATIVE TITLE III WEBSITE ACCESSIBILITY CASES

As referenced in the letters of Sen. Grassley and members of Congress to the Attorney General, the number of ADA Title III website accessibility lawsuits (as well as Title III lawsuits overall) has been increasing for the past two years. According to a recent legal blog post, plaintiffs filed at least 2,258 website accessibility lawsuits in 2018, a 177% increase from 814 such lawsuits in 2017.<sup>28</sup> Only 262 website accessibility lawsuits were filed in 2015 and 2016 combined.<sup>29</sup> New York (with 630) and Florida (with 342) led the country in website accessibility cases in the first half of 2018.<sup>30</sup>

### A. Circuit Split Identified by Recent Decision

The state of the law on Title III website accessibility cases is evolving, and marked differences are developing among the circuit courts of appeal and even among district courts within the same circuit. The division among the circuits on the issue of whether websites are a "public accommodation" was noted by the district court in *Gil v. Winn Dixie Stores, Inc.*:

Courts are split on whether the ADA limits places of public accommodation to physical spaces. Courts in the First, Second, and Seventh Circuits have found that the ADA can apply to a website independent of any connection between

<sup>19</sup> *Id.* at 22.

<sup>20</sup> Letter from Hon. Chuck Grassley, United States Senator, et al., to Hon. Jeff Sessions, United States Attorney General (Sept. 4, 2018), available at <https://www.judiciary.senate.gov/imo/media/doc/2018-10-04%20Grassley,%20Rounds,%20Tillis,%20Crapo,%20Cornyn,%20Ernst%20to%20Justice%20Dept.%20-%20ADA%20Website%20Accessibility.pdf>.

<sup>21</sup> Letter from Hon. Ted Budd, Member of Congress, et al., to Hon. Jeff Sessions, United States Attorney General (June 20, 2018), available at <https://www.adatitleiii.com/wp-content/uploads/sites/121/2018/06/ADA-Final-003.pdf>.

<sup>22</sup> Letter from Hon. Stephen E. Boyd, Assistant Attorney General, to Hon. Ted Budd, Member of Congress (Sept. 25, 2018), available at <https://www.adatitleiii.com/wp-content/uploads/sites/121/2018/10/DOJ-letter-to-congress.pdf>.

<sup>23</sup> *Id.*

<sup>24</sup> Nondiscrimination on the Basis of Disability ANPRM, *supra* note 13, at Section IV.A. See WCAG 2.0 Guidelines, <http://www.w3.org/TR/WCAG20/>.

<sup>25</sup> *How: Make Your Website and Web Tools Accessible*, Accessibility, W3C, <http://www.w3.org/standards/webdesign/accessibility#doit>.

<sup>26</sup> 29 U.S.C. 794d.

<sup>27</sup> 29 U.S.C. 794d(a)(3).

<sup>28</sup> Minh N. Vu, Kristina M. Launey, & Susan Ryan, *Number Of Federal Website Accessibility Lawsuits Nearly Triple, Exceeding 2250 In 2018*, ADA Title III, Seyfarth Shaw (Jan. 31, 2019), <https://www.adatitleiii.com/2019/01/number-of-federal-website-accessibility-lawsuits-nearly-triple-exceeding-2250-in-2018/>.

<sup>29</sup> Kristina M. Launey & Melissa Aristizabal, *Website Accessibility Lawsuit Filings Still Going Strong*, ADA Title III, Seyfarth Shaw (Aug. 22, 2017), <https://www.adatitleiii.com/2017/08/website-accessibility-lawsuit-filings-still-going-strong/>.

<sup>30</sup> Minh N. Vu, Kristina M. Launey, Susan Ryan & Kevin Fritz, *Website Access and Other ADA Title III Lawsuits Hit Record Numbers*, ADA Title III, Seyfarth Shaw (July 17, 2018), <https://www.adatitleiii.com/2018/07/website-access-and-other-ada-title-iii-lawsuits-hit-record-numbers/>.

the website and a physical place. Courts in these circuits have typically looked at Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges and advantages available indiscriminately to other members of the public, and at the legislative history of the ADA, which indicates that Congress intended the ADA to adapt to changes in technology.

On the other hand, courts in the Third, Sixth, and Ninth Circuits have concluded that places of public accommodation must be physical places, and that goods and services provided by a public accommodation must have a sufficient nexus to a physical place in order to be covered by the ADA. Courts in these circuits have concluded that a public accommodation must be a physical place because the 12 enumerated categories of public accommodations in the statute are all physical places.<sup>31</sup>

The district court in *Gil* noted that its own court of appeals, the Eleventh Circuit, had “not addressed whether websites are public accommodations for purposes of the ADA,” but had held that the ADA covers both tangible and intangible barriers to a disabled person's ability to access public accommodations to goods and services.<sup>32</sup>

#### *B. Eleventh Circuit Provides Expansive Interpretation*

More recently, in *Haynes v. Dunkin' Donuts LLC*, the Eleventh Circuit clarified its position on the ADA's application to websites in reversing a Florida district court's grant of a motion to dismiss a Title III website accessibility lawsuit.<sup>33</sup> Plaintiff Dennis Haynes is blind and uses screen reading software (a program called JAWS) to navigate the internet.<sup>34</sup> He claimed that Dunkin' violated his rights under Title III because its website is incompatible with screen reading software.<sup>35</sup> Dunkin' argued that, while its stores are a place of accommodation, its website is not “a place of public accommodation nor a good, service, facility, privilege, or advantage” of its physical stores covered by the ADA.<sup>36</sup>

The Eleventh Circuit, in resolving the appeal in Haynes' favor, noted that the ADA prohibits discrimination as to both tangible and “intangible barriers.”<sup>37</sup> It further noted that Haynes

had shown a plausible claim for relief under Title III with the following complaint allegations:

The inaccessibility of Dunkin' Donuts' website has similarly denied blind people the ability to enjoy the goods, services, privileges, and advantages of Dunkin' Donuts' shops. Among other things, he alleges that Dunkin' Donuts' website allows customers to locate physical Dunkin' Donuts store locations and purchase gift cards online. Haynes also alleges that Dunkin' Donuts' website “provides access to” and “information about . . . the goods, services, facilities, privileges, advantages or accommodations of” Dunkin' Donuts' shops. Because the website isn't compatible with screen reader software, Haynes alleges that neither he, nor any blind person, can use those features.<sup>38</sup>

The Eleventh Circuit ended its analysis by stating:

[I]t appears that the website is a service that facilitates the use of Dunkin' Donuts' shops, which are places of public accommodation . . . and the ADA is clear that whatever goods and services Dunkin' Donuts offers as a part of its place of public accommodation, it cannot discriminate against people on the basis of a disability, even if those goods and services are intangible.<sup>39</sup>

#### *C. Where Does the Sixth Circuit Stand?*

The Sixth Circuit has not directly weighed in on whether a website can be a public accommodation under the ADA, but several district courts have interpreted Sixth Circuit precedent in addressing website accessibility lawsuits. Recently, in *Brintley v. Aeroquip Credit Union*, a district court in Michigan denied Aeroquip Credit Union's motion to dismiss the plaintiff's website accessibility claim under Title III and Michigan law.<sup>40</sup>

Plaintiff Karla Brintley, who is permanently blind, alleged that she was unable to effectively access Aeroquip's website with her screen reader, which “hindered her from effectively browsing for locations, amenities, and services and deterred her from visiting Defendant's branches.”<sup>41</sup> In its motion to dismiss, Aeroquip argued that Brintley lacked standing to assert a claim, since she was not eligible to join the credit union, and that she had failed to state a claim.<sup>42</sup> The district court rejected Aeroquip's standing argument, finding that “eligibility for membership in the credit union [wa]s not a prerequisite for standing” based on the Supreme Court's decision in *PGA Tour, Inc. v. Martin*,<sup>43</sup> which noted that Title III does not contain a “clients or customers limitation.”<sup>44</sup> The district court further found that “the barriers Plaintiff encountered when she tried to access Defendant's website constitute a concrete

31 242 F. Supp. 3d 1315, 1318-19 (S.D. Fla. 2017) (citing *Morgan v. Joint Admin. Bd., Retirement Plan of the Pillsbury, Co., and others*, 268 F.3d 456, 459 (7th Cir. 2001); *Nat'l Fed'n of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565, 576 (D. Vt. 2015); *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 200-02 (D. Mass. 2012), *Earll v. eBay, Inc.*, 599 Fed. Appx. 695, 696 (9th Cir. 2015); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612-14 (3d Cir. 1998); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010-11 (6th Cir. 1997); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000)).

32 *Id.* at 1319.

33 2018 WL 3634720 (11th Cir. 2018).

34 *Id.* at \*1.

35 *Id.*

36 *Id.*

37 *Id.* at \*2.

38 *Id.*

39 *Id.* (citing 42 U.S.C. § 12182(a)).

40 321 F. Supp. 3d 785 (E.D. Mich. 2018).

41 *Id.* at 788.

42 *Id.*

43 532 U.S. 661, 679 (2001).

44 *Aeroquip Credit Union*, 321 F. Supp. 3d at 790.

and particularized injury for purposes of establishing Article III standing.<sup>45</sup>

After dispensing with the standing issue, the district court considered whether Brintley had stated a claim for relief under the ADA. First, the court noted that a credit union is a place of public accommodation, but recognized the split of authority on whether Title III applies to websites connected to a place of public accommodation.<sup>46</sup> Upon a review of Sixth Circuit Title III case law,<sup>47</sup> the district court noted that the Sixth Circuit has held that Title III only applies to “physical places” of public accommodation, but it rejected Aeroquip’s argument that those holdings “precluded relief under Title III for all claims concerning websites.”<sup>48</sup> The district court stated that the Sixth Circuit “expressed no opinion as to whether a plaintiff must physically enter a public accommodation to bring suit under Title III as opposed to merely accessing, by some other means, a service or good provided by a public accommodation.”<sup>49</sup> It pointed out that other courts had characterized the Sixth Circuit’s approach to Title III as a “nexus theory,” where Title III is violated “if the discriminatory conduct [the inaccessible website] has a ‘nexus’ to the goods and services of a physical location.”<sup>50</sup>

Relying on the reasoning of the district court in *Castillo v. Jo-Ann Stores, LLC*,<sup>51</sup> the court found that “the Complaint sufficiently alleges a nexus between Defendant’s website and its brick-and-mortar locations,” further noting that the “website provides goods and services including a store locator, descriptions of amenities, and information about the services Defendant offers.”<sup>52</sup> The court found that the access barriers to Aeroquip’s website “deterred Plaintiff from visiting Defendant’s physical locations.”<sup>53</sup> The court concluded by rejecting Aeroquip’s argument that Brintley’s request for injunctive relief violated due process because neither the DOJ regulations nor Title III provide website accessibility guidelines.<sup>54</sup>

By contrast, in separate recent cases filed by a different plaintiff in the Northern District of Ohio against different credit union defendants, the district court never reached the website

coverage issue. Instead, it granted the defendants’ motions to dismiss on standing grounds since the plaintiff was not eligible for membership in the credit unions and failed to allege intent to use their services.<sup>55</sup>

#### *D. Plaintiffs Prevail at Trial and Obtain Favorable Summary Judgment Ruling*

Recently, a plaintiff prevailed in the first ADA Title III website accessibility case to go to trial. Following a non-jury trial, the court in *Gil v. Winn-Dixie Stores, Inc.* ruled that the plaintiff had standing to seek injunctive relief and found that the defendant violated Title III of the ADA by failing to maintain a website that was accessible to visually impaired customers. The court ordered the defendant to make modifications to the website so it would be accessible to visually impaired customers. In its ruling, the court stated that it:

[N]eed not decide whether Winn–Dixie’s website is a public accommodation in and of itself, because the factual findings demonstrate that the website is heavily integrated with Winn–Dixie’s physical store locations and operates as a gateway to the physical store locations. Although Winn–Dixie argues that Gil has not been denied access to Winn–Dixie’s physical store locations as a result of the inaccessibility of the website, the ADA does not merely require physical access to a place of public accommodation. Rather, the ADA requires that disabled individuals be provided “full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation . . .” 42 U.S.C. § 12182(a). The services offered on Winn–Dixie’s website, such as the online pharmacy management system, the ability to access digital coupons that link automatically to a customer’s rewards card, and the ability to find store locations, are undoubtedly services, privileges, advantages, and accommodations offered by Winn–Dixie’s physical store locations. These services, privileges, advantages, and accommodations are especially important for visually impaired individuals since it is difficult, if not impossible, for such individuals to use paper coupons found in newspapers or in the grocery stores, to locate the physical stores by other means, and to physically go to a pharmacy location in order to fill prescriptions.

The factual findings demonstrate that Winn–Dixie’s website is inaccessible to visually impaired individuals who must use screen reader software. Therefore, Winn–Dixie has violated the ADA because the inaccessibility of its website has denied Gil the full and equal enjoyment of

45 *Id.*

46 *Id.* at 791.

47 *Stoutenborough v. Nat’l Football League, Inc.*, 59 F.3d 580 (6th Cir. 1995); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006 (6th Cir. 1997).

48 *Aeroquip Credit Union*, 321 F. Supp. 3d at 792.

49 *Id.* (quoting *Parker*, 121 F.3d 1006, 1011 n.3).

50 *Id.* (quoting *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 388 (E.D.N.Y. 2017)).

51 286 F. Supp. 3d 870, 876-77 (N.D. Ohio 2018).

52 *Aeroquip Credit Union*, 321 F. Supp. 3d at 793.

53 *Id.*

54 *Id.* at 794. Brintley brought Title III website accessibility claims against another credit union with the same presiding district judge who likewise denied the defendant’s motion to dismiss for the same reasons. See *Brintley v. Belle River Community Credit Union*, 2018 WL 3497142 (E.D. Mich. 2018). *But see* *Griffin v. Department of Labor Federal Credit Union*, 912 F.3d 649, 657 (4th Cir. 2019) (affirming district court’s order dismissing plaintiff’s ADA Title III claim for lack of

standing where plaintiff was not eligible to be a member of the defendant credit union and had no plans to become a member).

55 See *Mitchell v. Dover-Phila Federal Credit Union*, 2018 WL 3109591 (N.D. Ohio 2018) and *Mitchell v. Toledo Metro Credit Union*, 2018 WL 5435416 (N.D. Ohio 2018). For the Sixth Circuit’s most recent ADA Title III standing case involving a physical place of public accommodation, see *Gaylor v. Hamilton Crossing CMBS*, 582 Fed. Appx. 576 (6th Cir. 2014) (reversing the district court’s grant of a motion to dismiss for lack of subject matter jurisdiction, finding the complaint allegations satisfied the requirement for Article III standing).

the goods, services, facilities, privileges, advantages, or accommodations that Winn–Dixie offers to its sighted customers.<sup>56</sup>

In *Gomez v. General Nutrition Corporation*, the Southern District of Florida granted the plaintiff's motion for summary judgment as to liability. The court found that the defendant's "website is a place of public accommodation within the meaning of the ADA" since it "facilitates the use of the physical stores by providing a store locator."<sup>57</sup> The court further found that the website permitted products to be "purchased remotely" as "a service of the physical stores," provided information about "promotions and deals," and "operates as a gateway to the physical stores."<sup>58</sup> In short, the court found that the "inaccessibility of the website amounts to a denial of that service to blind individuals" and violates the ADA.<sup>59</sup>

#### IV. APPLICABILITY TO WEBSITES OF ONLINE-ONLY BUSINESSES

Several district courts have found the websites of online-only businesses to be public accommodations under Title III. For example, in *National Federation of the Blind v. Scribd Inc.*, a blind plaintiff alleged that a digital subscription service library violated Title III of the ADA because its website and mobile applications were inaccessible to the blind.<sup>60</sup> The district court, after finding the ADA ambiguous on the issue of whether a website qualified as a public accommodation, determined that the ADA's legislative history compelled a finding that a public accommodation is not limited to a physical space and denied the defendant's motion to dismiss.<sup>61</sup>

Later, in *Access Now, Inc. v. Blue Apron, LLC*, a district court in New Hampshire denied the defendant's motion to dismiss, relying on First Circuit precedent "that 'public accommodations' are not limited to actual, physical places."<sup>62</sup> The district court found the plaintiff's complaint sufficiently pled a violation of Title III:

<sup>56</sup> 257 F. Supp. 3d 1340, 1348 (S.D. Fla. 2017).

<sup>57</sup> 323 F. Supp. 3d 1368, 1376 (S.D. Fla. 2018).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> 97 F. Supp. 3d 565 (D. Vt. 2015).

<sup>61</sup> *Id.* at 573-77. The court emphasized:

The fact that the ADA does not include web-based services as a specific example of a public accommodation is irrelevant because such services did not exist when the ADA was passed and because Congress intended the ADA to adapt to changes in technology. Notably, Congress did not intend to limit the ADA to the specific examples listed and the catchall categories must be construed liberally to effectuate congressional intent.

*Id.* at 571 (citing Nat'l Ass'n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d at 200-01 (D. Mass. 2012)). However, it also cited a number of contrary court decisions rejecting the argument that websites qualify as public accommodations. *Id.* at 569-70.

<sup>62</sup> 2017 WL 5186354, at \*3 (D.N.H. 2017) (quoting *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994)).

Applying the reasoning of *Carparts* to this case, the court cannot conclude, at the Rule 12(b)(6) stage, that the plaintiff's complaint falls short of pleading that Blue Apron's website is a "public accommodation" under Title III of the ADA. Though true that websites are not specifically mentioned in the twelve enumerated categories of "public accommodations," the plaintiffs "must show only that the web site falls within a general category listed under the ADA." Here, as Access Now argues, Blue Apron may amount to an online "grocery store," which is listed under Title III's definition of "public accommodation," 42 U.S.C. § 12181(7)(E), or at the very least may fall within the general "other sales" or "other service establishment" categories, *id.* § 12181(7)(E)–(F). This suffices at the 12(b)(6) stage to prevent dismissal.<sup>63</sup>

However, the district court acknowledged that courts in some other circuits require that a public accommodation be a physical space or have a nexus with a physical space.<sup>64</sup>

#### V. FEDERAL LEGISLATION

In an effort to curb the surge in disability access cases under the ADA, the U.S. House of Representatives passed H.R. 620 in the 115th Congress in 2017. The bill would prohibit civil actions based on the failure to remove an architectural barrier to access into an existing public accommodation unless prior notice of the barrier is given to the owner/operator and the owner/operator fails to provide written notice of steps to be taken to improve the barrier or fails to remove or make substantial progress removing the barrier following the written description.<sup>65</sup> However, the bill has not advanced in the U.S. Senate.

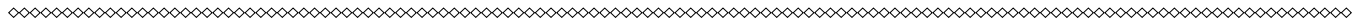
#### VI. CONCLUSION

While case law on website accessibility under Title III is still developing, courts applying the "nexus theory" have found violations where a public accommodation's inaccessible website is closely integrated with its physical store location. This was evidenced in the *Gil* and *Gomez* rulings out of the Southern District of Florida and the Eleventh Circuit's recent decision in *Haynes*. Some courts, as evidenced by the rulings in *Scribd Inc. and Blue Apron, LLC*, have found that the websites of online-only businesses may qualify as public accommodations. It is unlikely that DOJ will issue regulations or provide other official guidance in the near term, given its most recent actions on the issue, so it is

<sup>63</sup> *Blue Apron, LLC*, 2017 WL 5186354, at \*4.

<sup>64</sup> *Id.* (citing *Magee*, 833 F.3d at 534 (concluding that vending machines are not places of public accommodation because the ADA definition of public accommodation only includes actual physical spaces open to the public); *Earll*, 599 Fed. Appx. at 696 ("We have previously interpreted the term 'place of public accommodation' to require 'some connection between the good or service complained of and an actual physical place.'") (quoting *Weyer*, 198 F.3d at 1114); *Ford*, 145 F.3d at 612-14 (rejecting the reasoning in *Carparts* and holding that "public accommodation" does not refer to non-physical access); *Parker*, 121 F.3d at 1013-14 ("The clear connotation of the words in § 12181(7) is that a public accommodation is a physical place.")).

<sup>65</sup> ADA Education and Reform Act of 2017, H.R. 620, 115th Cong. (2017), available at <https://www.congress.gov/bill/115th-congress/house-bill/620>.



reasonable to expect a continued increase in website accessibility cases under Title III.

