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The Future of the Americans with Disabilities Act: Website Accessibility Litigation After COVID-19

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THE FUTURE OF THE AMERICANS WITH DISABILITIES ACT: WEBSITE ACCESSIBILITY LITIGATION AFTER COVID-19

RANDY PAVLICKO*

ABSTRACT

The Americans with Disabilities Act (“ADA”) was enacted in 1990 to eliminate discrimination against individuals with disabilities. Over time, as society has become more reliant on the internet, the issue of whether the ADA’s scope extends beyond physical places to online technology has emerged. A circuit split developed on this issue, and courts have discussed three interpretations of the ADA’s scope: (1) the ADA applies to physical places only; (2) the ADA applies to a website or mobile app that has a sufficient nexus to a physical place; or (3) the ADA broadly applies beyond physical places to online technology. In 2019, the Supreme Court turned down an opportunity to settle this circuit split through a case presenting the issue of whether the ADA applies to websites and mobile apps. This was before the COVID-19 pandemic forced our society to utilize online technology more than ever before.

During the COVID-19 pandemic, schools switched to online learning, employees worked remotely, restaurants depended on takeout services through online ordering and consumers utilized online shopping to avoid crowded stores. These online activities and many others, however, may be inaccessible to millions of individuals with disabilities. If the ADA does not apply to online technology, businesses would not be required to design websites and mobile apps that are effectively accessible to individuals with disabilities. These individuals could therefore experience several disadvantages in an internet-dependent society. In 2021, do arguments for a narrow application of the ADA, which limits its scope to physical places only, seem persuasive? This Note discusses why ADA protections should apply beyond physical places, specifically to websites and mobile apps, and why this approach should be adopted nationwide. Without a uniform interpretation of the ADA’s scope, uncertainty surrounding website accessibility litigation will continue as the utilization of online technology continues to increase. This Note also discusses other important aspects of ADA website accessibility litigation, such as establishing standing to sue and asserting statutory defenses against alleged discrimination.

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I. INTRODUCTION

An increased dependency on the internet has reshaped society. Many individuals rely on the internet to perform daily tasks related to education, employment, entertainment and many other matters. This trend began long before 2021, but with the rise of the COVID-19 pandemic in 2020, reliance on the internet and online technology has skyrocketed. COVID-19, which has infected over 33,000,000 Americans as of June 2021, has completely altered life in the United States and across the world.¹ COVID-19 forced several aspects of society to abruptly shut down. Students transitioned to online learning, consumers turned almost exclusively to online shopping and many restaurants either closed or transitioned to takeout or online ordering to stay afloat. Our society amplified internet-dependence, perhaps on a permanent level, during the onset of the COVID-19 pandemic. However, several online activities that are heavily relied upon during a pandemic may be inaccessible to millions of individuals with disabilities.²

¹ *COVID Data Tracker*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days [<https://perma.cc/7NBM-J9UA>].

² See Benjamin S. Briggs & Cynthia Sass, *Websites and Mobile Applications: Do They Comply with Title III of the Americans with Disabilities Act?*, 90 FLA. BAR J., 40, 40 (2016) (discussing how vision, hearing, mental, and mobility impairments impact the use of web

The Americans with Disabilities Act (“ADA”) was enacted in 1990 to eliminate discrimination against individuals with disabilities in the workplace, in the use of public services, and in the enjoyment of places of public accommodation.³ Over time, as society has become more dependent on the internet, the question of whether the ADA applies to new forms of technology or whether it remains limited to physical places has emerged.⁴ The U.S. appellate courts, however, are split as to whether the provisions of the ADA, mainly those involving places of public accommodation⁵ under Title III, apply to online technology such as websites and mobile apps.⁶

Courts have discussed three approaches to determining the scope of “places of public accommodation” under Title III and whether the definition includes websites and mobile apps.⁷ One approach limits places of public accommodation to physical places, which would therefore exclude websites and mobile apps.⁸ Another is a “nexus” approach that requires a website or mobile app to have a sufficient nexus to a physical place to be considered a place of public accommodation.⁹ The final approach does not limit places of public accommodation to physical places, which would

technologies); *see also* Christopher Mullen, Note, *Places of Public Accommodation: Americans with Disabilities and the Battle for Internet Accessibility*, 11 DREXEL L. REV. 745, 748–51 (2019) (discussing types of disabilities and stating that “56.7 million people in the United States registered as having a disability”); *see also* Lauren Stuy, *No Regulations and Inconsistent Standards: How Website Accessibility Lawsuits Under Title III Unduly Burden Private Businesses*, 69 CASE W. RESV. L. REV. 1079, 1079–82 (2019) (discussing the history of the ADA, how individuals with visual or hearing disabilities have experienced challenges with using websites and mobile apps of businesses and current developments in website accessibility lawsuits).

³ 42 U.S.C. § 12101(b)(2) (stating that the ADA would set forth “clear, strong, consistent, enforceable standards addressing discrimination”); *Introduction to the ADA*, ADA.GOV, https://www.ada.gov/ada_intro.htm [<https://perma.cc/JYN7-GXJX>].

⁴ *See, e.g.,* *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898 (9th Cir. 2019).

⁵ A place of public accommodation is “a facility operated by a private entity whose operations affect commerce,” and fall within one of twelve specified categories. 28 C.F.R. § 36.104 (2020); *see also* Mullen, *supra* note 2, at 754 (further elaborating on the categories of places of public accommodation).

⁶ *See* Mullen, *supra* note 2, at 753–64 (discussing the ADA and examining the current circuit split on the application of Title III of the ADA to websites and mobile applications).

⁷ *See id.* at 756–64 (explaining a narrow interpretation of a place of public accommodation under Title III); *see also* Ryan C. Brunner, *Websites as Facilities Under ADA Title III*, 15 DUKE L. & TECH. REV. 171, 175 (2017) (explaining that the First and Seventh Circuits do not limit places of public accommodation to physical structures; that the Third and Sixth Circuits limit places of public accommodation under Title III to physical structures; and that the Second, Ninth and Eleventh Circuits apply the nexus-based approach when analyzing places of public accommodation); *Petition for Writ of Certiorari at 14–15, Domino’s Pizza, LLC v. Robles*, 140 S. Ct. 122 (2019) (No. 18-1539), 2019 WL 2484566, at *14–15 (discussing the circuit split over whether Title III of the ADA applies to websites and mobile applications).

⁸ *See* Brunner, *supra* note 7, at 175.

⁹ *Id.*

therefore include websites and mobile apps.¹⁰ Given present-day society's prolific reliance on the internet in 2021, does limiting the reach of the ADA exclusively to physical places seem reasonable? Since 1990, society has adapted to rely on the internet and online technology. The ADA should finally adapt to online technology as well. Accordingly, an approach that expands the ADA beyond physical places to online technology should now be adopted nationwide.

The Supreme Court turned down the opportunity to settle this circuit split when it was recently discussed in the *Robles v. Domino's Pizza, LLC* case in the Ninth Circuit.¹¹ There, the Ninth Circuit confronted the issue of whether ADA Title III provisions applied to the website and mobile app of a national pizza chain.¹² The court determined that Title III protections did apply when a visually impaired individual was unable to order from the Domino's mobile app.¹³ Since many private¹⁴ and public entities¹⁵ provide services through websites and mobile apps, particularly after the COVID-19 pandemic, this ruling will likely impact the future of the ADA and website accessibility litigation for several businesses and individuals. New litigation to determine the ADA's application will emerge, and it will also include other important issues common to ADA litigation, such as who has standing to sue and who can assert statutory defenses against alleged discrimination.¹⁶

Part II of this Note discusses the background of the ADA and its intended purpose. Part III discusses the current conflict regarding the application of the ADA to websites

¹⁰ *Id.*

¹¹ *Robles v. Domino's Pizza, LLC*, 913 F.3d 898 (9th Cir. 2019); see Robert Barnes, *Do Protections for People with Disabilities Apply Online? Domino's Asks High Court.*, WASH. POST (July 20, 2019, 4:45 PM), https://www.washingtonpost.com/politics/courts_law/do-protections-for-people-with-disabilities-apply-online-dominos-asks-high-court/2019/07/20/984c685e-a7fd-11e9-a3a6-ab670962db05_story.html [<https://perma.cc/SW8T-K9PV>] (discussing the history of the ADA, the *Robles v. Domino's Pizza, LLC* case, and the Domino's petition for writ of certiorari to the Supreme Court).

¹² *Robles*, 913 F.3d at 902.

¹³ *Id.* at 905 (“[T]he ADA mandates that places of public accommodation, like Domino's, provide auxiliary aids and services to make visual materials available to individuals who are blind.”).

¹⁴ See, e.g., *id.* at 904–05 (discussing the accessibility of the website and mobile application of Domino's Pizza, LLC, which is a private entity); see also 42 U.S.C. § 12181(6)–(7).

¹⁵ See, e.g., *Price v. City of Ocala*, 375 F. Supp. 3d 1264, 1268–77 (M.D. Fla. 2019) (discussing the accessibility of the City of Ocala website, which is a public entity); see 42 U.S.C. § 12131(1).

¹⁶ See, e.g., *Price*, 375 F. Supp. 3d at 1268–77 (discussing whether plaintiff had the requisite standing to bring a claim under Title II of the ADA against the City of Ocala, Florida); see *Robles*, 913 F.3d at 906–11; *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1326–40 (11th Cir. 2013) (discussing factors used in analyzing standing in an ADA accessibility case); see also Amy P. Lally, *Online Experiences*, in BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 149:12 (4th ed. 2019); Rafael Langer-Osuna & Laura Lawless, *Supreme Court Hits Escape Button, Refuses to Clarify Website Accessibility Standard*, 70 LAB. L.J. 235 (2019).

and mobile apps and provides recent developments in the law. Part IV discusses the impact of COVID-19 on website accessibility issues, the possible impact of a Ninth Circuit decision on other titles within the ADA and common issues in website accessibility lawsuits going forward.

II. THE ADA

A. *The History and Purpose of the ADA*

The ADA was enacted in 1990 to prohibit discrimination against individuals with disabilities.¹⁷ The ADA defines disability as “a physical or mental impairment that substantially limits one or more major life activities.”¹⁸ Some of those major life activities are seeing, hearing, speaking, learning, communicating, and walking.¹⁹ While enacting this legislation, Congress declared that “physical or mental disabilities in no way diminish a person’s right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination.”²⁰

The Department of Justice (“DOJ”) regulates Title II and Title III of the ADA.²¹ Since its enactment, the ADA was amended by the ADA Amendments Act of 2008,²² and further revisions in 2010 included the ADA Standards for Accessible Design.²³ The DOJ promulgated a proposed rule in 2010 to mandate the ADA’s application to

¹⁷ See *Introduction to the ADA*, *supra* note 3 (“The ADA is one of America’s most comprehensive pieces of civil rights legislation that prohibits discrimination and guarantees that people with disabilities have the same opportunities as everyone else to participate in the mainstream of American life . . .”).

¹⁸ *Id.*

¹⁹ 42 U.S.C. § 12102(2). The major life activity frequently discussed in this Note is vision impairment. Many new ADA cases involve individuals that use screen reading software for websites and mobile apps. See generally *Robles*, 913 F.3d at 898.

²⁰ 42 U.S.C. § 12101(a)(3) (explaining that an individual with a disability may experience discrimination in several aspects of society such as employment, the enjoyment of public accommodations, participation in recreational activities and various others); *id.* § 12101(a)(8) (explaining that congress further determined that ongoing discrimination in these aspects of society “denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous”).

²¹ See *The Current ADA Regulations*, ADA.GOV, https://www.ada.gov/2010_regs.htm [<https://perma.cc/3W9C-RBWR>] (explaining where to locate regulations: in 28 CFR parts 35 and 36).

²² *Final Rule Implementing the ADA Amendments Act of 2008*, ADA.GOV, <https://www.ada.gov/regs2016/adaaa.html> [<https://perma.cc/364Y-J53U>] (“The ADA Amendments . . . made a number of significant changes to the meaning and interpretation of the ADA definition of ‘disability’ to ensure that definition would be broadly construed and applied without extensive analysis.”).

²³ See *The Current ADA Regulations*, *supra* note 21 (explaining the revisions made to the ADA since enactment).

websites and mobile apps.²⁴ However, no regulations on this issue were finalized, and in 2017, the new administration moved the proposed regulations to a list of inactive regulatory actions.²⁵ Consequently, website and mobile app compliance has been a significant issue for ADA-related litigation ever since.²⁶

B. *The Provisions of the ADA*

The ADA prohibits discrimination in the areas of employment in Title I, the use of public entity services in Title II, and the services of private entities or “places of public accommodation” in Title III.²⁷ The provisions in Title I of the ADA, which protect individuals with disabilities in the workplace, apply to certain covered entities²⁸ and prohibit “discriminat[ion] against a qualified individual²⁹ on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”³⁰ In Title I, discrimination by an employer³¹ is described as “limiting, segregating, or classifying a job applicant or

²⁴ *Robles*, 913 F.3d at 906, 910 (“[The] DOJ is aware of the issue—it issued the ANPRM in 2010 . . . and withdrew it in 2017.” (citation omitted)); *see also* Mullen, *supra* note 2, at 765–68 (explaining that the proposed rule applied Title III to a company’s website but did not implement the nexus approach that some circuits currently recognize); Mullen, *supra* note 2, at 765–66 (explaining that the proposed rule would use the Website Content Accessibility Guidelines as a guide to make websites and mobile apps accessible to individuals with disabilities); Mullen, *supra* note 2, at 766–67 (discussing WCAG 2.0, the successor to WCAG, and explaining that “Web accessibility” means “that people with disabilities ‘can perceive, understand, navigate, and interact with the Web,’ as well as ‘contribute to the Web’” (quoting Web Accessibility Initiative, *Introduction to Web Accessibility*, W3C, <https://www.w3.org/WAI/fundamentals/accessibility-intro/> [<https://perma.cc/M5JG-C2QL>])).

²⁵ *Robles*, 913 F.3d at 910 (discussing the DOJ withdrawal of the ANPRM and the primary jurisdiction argument raised by Domino’s Pizza, LLC); Mullen, *supra* note 2, at 765–67 (discussing the withdrawal of the proposed rule and the implications of the withdrawal on website accessibility litigation under Title III of the ADA).

²⁶ *Price v. City of Ocala*, 375 F. Supp. 3d 1264 (M.D. Fla. 2019); *see, e.g., Robles*, 913 F.3d at 898; *Price v. Escalante – Black Diamond Golf Club LLC*, No. 5:19-cv-22-Oc-30PRL, 2019 U.S. Dist. LEXIS 76288, at *1 (M.D. Fla. Apr. 29, 2019).

²⁷ 42 U.S.C. § 12112 (discussing discrimination in the employment context); *id.* § 12132 (discussing discrimination by public entities); *id.* § 12182(2) (discussing discrimination by “place[s] of public accommodation” under Title III).

²⁸ *Id.* § 12111(2) (defining a covered entity as “an employer, employment agency, labor organization, or joint labor-management committee”).

²⁹ *Id.* § 12111(8) (defining a qualified individual as “an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires”).

³⁰ *Id.* § 12112(a).

³¹ *Id.* § 12111(5) (defining an employer covered by Title II as “a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of

employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee.”³²

Title II of the ADA prohibits discrimination by a public governmental entity towards an individual with a disability.³³ The provisions in Title II provide that “no qualified individual with a disability³⁴ shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity,³⁵ or be subjected to discrimination by any such entity.”³⁶ Similar to employers and private entities, public entities may provide internet-based services to the public, especially in the aftermath of COVID-19.³⁷

Title III of the ADA applies to discriminatory acts of private entities considered places of public accommodation.³⁸ According to Title III, “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.”³⁹ Discriminatory acts include screening out individuals with disabilities, failure to reasonably modify policies for accommodation and failure to remove architectural and communication barriers that exclude individuals with disabilities.⁴⁰ Further, a place of public accommodation discriminates by failing to

20 or more calendar weeks in the current or preceding calendar year, and any agent of such person”).

³² *Id.* § 12112(b)(1). Since the ADA was enacted in 1990, the job application and hiring procedures for modern companies and applicants has drastically changed. Employers and recruiters can now advertise jobs on websites and social networking apps, and they can conduct interviews online.

³³ *Id.* § 12131–32; *see, e.g.*, *Price v. City of Ocala*, 375 F. Supp. 3d 1264 (M.D. Fla. (2019) (discussing a lawsuit against the City of Ocala, Florida, a public entity, under Title II of the ADA).

³⁴ 42 U.S.C. § 12131(2) (defining a qualified individual with a disability as “an individual with a disability who, with or without reasonable modifications to rules, policies, or practices... meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity”).

³⁵ *Id.* § 12131(1) (defining a public entity as “(A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government”).

³⁶ *Id.* § 12132.

³⁷ *See, e.g.*, *Price*, 375 F. Supp. 3d at 1264 (showing how a court analyzed a website accessibility claim under Title II involving the City of Ocala, Florida’s website); *see, e.g.*, *Gil v. City of Pensacola*, 396 F. Supp. 3d 1059 (N.D. Fla. 2019) (discussing a website accessibility claim against the City of Pensacola, Florida’s website).

³⁸ 42 U.S.C. § 12181(6) (explaining that a “private entity” under Title III “means any entity other than a public entity”); *id.* § 12182(a) (explaining discrimination by private entities considered a “place of public accommodation” under Title III).

³⁹ *Id.* § 12182(a).

⁴⁰ *Id.* § 12182(b)(2)(A).

provide individuals with auxiliary aids and services for effective communication.⁴¹ However, an entity may be exempt from providing auxiliary aids or services where it can show that such accommodations would “fundamentally alter” the goods or services it offers or if compliance with the ADA places an “undue burden” on the offering entity.⁴²

III. APPLICATION OF THE ADA TO WEBSITES AND MOBILE APPS

A. *The Second and Ninth Circuit Approach*

ADA compliance for businesses has changed significantly since its enactment in 1990. For example, a store or public entity that exclusively operated out of a physical location needed to ensure its facilities were accessible to all.⁴³ Today, during the COVID-19 pandemic, that same store or public entity may have, and substantially rely on, a significant online presence.⁴⁴ However, courts currently disagree on the interpretation of what a “place of public accommodation” is and whether it includes websites and mobile apps.⁴⁵ Title III of the ADA defines a “place of public accommodation” and includes the following examples:

(A) an inn, hotel, motel, or other place of lodging . . . ; (B) a restaurant, bar, or other establishment serving food or drink; (C) a motion picture house, theater, concert hall, stadium . . . ; (D) an auditorium, convention center, lecture hall . . . ; (E) a bakery, grocery store, clothing store, hardware store, shopping center . . . ; (F) a laundromat, dry-cleaner, bank, barber shop . . . office of an accountant or lawyer . . . or other service establishment . . .⁴⁶

Because websites and mobile apps are not listed in the text of the statute, which was likely enacted without widespread use of the internet in mind, courts are now left

⁴¹ See *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898, 904–05 (9th Cir. 2019) (“[The] DOJ defines ‘auxiliary aids and services’ to include ‘accessible electronic and information technology’ or ‘other effective methods of making visually delivered materials available to individuals who are blind or have low vision.’ . . . [T]he ADA mandates that places of public accommodation, like Domino’s, provide auxiliary aids and services to make visual materials available to individuals who are blind.” (citation omitted) (quoting 28 C.F.R. § 36.303(b)(2))).

⁴² 42 U.S.C. § 12182(b)(2)(A)(ii)–(iii).

⁴³ See *id.* § 12182; *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323 (11th Cir. 2013) (individual with a disability sued a supermarket alleging architectural barriers within the premises); see, e.g., *Shotz v. Cates*, 256 F.3d 1077, 1079 (11th Cir. 2001) (two individuals sued a local courthouse alleging physical barriers inside the premises).

⁴⁴ See, e.g., *About Pizza*, DOMINO’S PIZZA, <https://www.dominos.com/en/about-pizza/> [<https://perma.cc/KU8Z-T8CN?type=image>] (explaining that Domino’s began in 1960 as a single restaurant and evolved over time into online delivery services, which began in 2007).

⁴⁵ 42 U.S.C. § 12182(a) (providing provisions for discrimination by places of public accommodation under Title III of the ADA); Mullen, *supra* note 2, at 754–64 (examining the circuit split regarding the interpretation of a “place of public accommodation” and its application to websites and mobile apps).

⁴⁶ 42 U.S.C. § 12181(7).

to decide whether websites and mobile apps should be considered a “place of public accommodation” under Title III.⁴⁷

This question was recently confronted by the Ninth Circuit.⁴⁸ In *Robles v. Domino’s Pizza, LLC*, the plaintiff, a blind individual who uses screen reading software on phones and computers, attempted to order from the Domino’s mobile app on multiple occasions but was unsuccessful.⁴⁹ The plaintiff alleged violations of the ADA against Domino’s for failing to provide a website and mobile app compatible with screen reader software.⁵⁰ The Ninth Circuit held that the ADA applied to the website and mobile app, reasoning that “the statute applies to the services of a place of public accommodation, not services *in* a place of public accommodation.”⁵¹ The court based its decision on this statutory interpretation and stated that the “nexus between Domino’s website and app and physical restaurants – which Domino’s does not contest – is critical to our analysis.”⁵²

This approach, referred to as a “nexus” approach, evaluates the connection between the product or service offered through a company’s website or mobile app to a company’s physical location (the place of public accommodation), and if a sufficient connection exists, the website or mobile app must comply with the ADA.⁵³ The Second Circuit has followed the Ninth Circuit approach and required a nexus between a physical place of business and a website when analyzing potential website accessibility discrimination cases as well.⁵⁴

⁴⁷ See Stuy, *supra* note 2, at 1083–85 (pointing out that websites are not listed in any of the categories provided in the ADA or any of its subsequent amendments); see also Mullen, *supra* note 2, at 754–55 (discussing the provisions of Title III and the definition of a “place of public accommodation” and a “facility”).

⁴⁸ See generally Barnes, *supra* note 11 (discussing the *Robles* case and background information pertaining to website accessibility ADA lawsuits); *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898 (9th Cir. 2019).

⁴⁹ *Robles*, 913 F.3d at 902 (explaining that the plaintiff was unable to complete the order process “on at least two occasions”).

⁵⁰ See *id.* (explaining that the screen reader “software...vocalizes visual information on websites”); see also *Screen Readers*, AM. FOUND. FOR THE BLIND, <https://www.afb.org/blindness-and-low-vision/using-technology/assistive-technology-products/screen-readers> [<https://perma.cc/UJ8X-YCZJ>] (“Screen readers are software programs that allow blind or visually impaired users to read the text that is displayed on the computer screen with a speech synthesizer or braille display. [Users can command screen readers to] read or spell a word, read a line or full screen of text, find a string of text on the screen, announce the location of the computer’s cursor”); *Screen Readers*, *supra* (discussing various types of screen readers and explaining that screen reader software can cost up to \$1,200.00).

⁵¹ *Robles*, 913 F.3d at 905.

⁵² *Id.*

⁵³ See *id.* (explaining how the inaccessible website and app impeded the customer’s connection to the physical location of Domino’s stores); see also Mullen, *supra* note 2, at 758–61 (discussing the nexus approach analyzed by the Ninth Circuit in the *Robles* case).

⁵⁴ See *Palozzi v. Allstate Life Ins.*, 198 F.3d 28, 33 (2d Cir. 1999), *amended on denial of reh’g*, 204 F.3d 392 (2d Cir. 2000) (explaining that Title III is not limited to granting a disabled

B. The Third, Sixth, and Eleventh Circuit Approach

Other circuits have taken a narrow approach to whether the ADA applies to websites and mobile apps.⁵⁵ The Third, Sixth and Eleventh Circuit approach currently limits the application of Title III to physical places.⁵⁶ This approach was used by the Sixth Circuit in *Parker v. Metropolitan Life Ins.*, where the court limited a place of public accommodation to a physical place because every example provided in the statute was a physical place.⁵⁷ The court used the canon of *noscitur a sociis*⁵⁸ to interpret the meaning of a place of public accommodation in relation to the examples listed in Title III, which include the following: “travel service, shoe repair service, office of an accountant or lawyer, insurance office, and professional office.”⁵⁹ Under its textual interpretation, the court determined that a long-term disability plan, which was at issue in this case, was inconsistent with other examples of places of public accommodation under Title III that were limited to physical structures.⁶⁰ However, other circuits’ interpretations expand the reach of the ADA beyond physical structures or places.⁶¹

individual physical access to a public accommodation). In *Pallozzi*, the plaintiffs claimed they were refused a life insurance policy based on having mental disabilities, which violated Title III of the ADA. *Id.* at 30. The court held that Title III applies to the sale of insurance policies even if they are not sold *in* a physical place of public accommodation, and the court reasoned in part that many of the entities listed in the statute sell goods and services outside of the physical premises. *Id.* at 33.

⁵⁵ See Mullen, *supra* note 2, at 754–64 (examining cases from different circuits to illustrate the split on the interpretation of a place of public accommodation).

⁵⁶ *Id.* at 756–58 (discussing a narrow interpretation of a place of public accommodation, limited to physical structures including shops, parks, or gymnasiums).

⁵⁷ See *Parker v. Metro. Life Ins.*, 121 F.3d 1006, 1010–11 (6th Cir. 1997). In *Parker*, the alleged discrimination involved an employee benefit plan offered by an employer. *Id.* at 1008. The court determined that the plan was not offered by a place of public accommodation because it was not accessed from the insurance company office, which is a physical place. *Id.* at 1010. This case was decided in 1997 before widespread use of websites and mobile applications. *Id.* at 1006. Another key difference between *Parker* and several modern ADA cases is this case involves an allegedly discriminatory employee benefit plan as compared to the website or mobile app of a restaurant or merchant. *Id.*; see also *Price v. Escalante – Black Diamond Golf Club LLC*, No. 5:19-cv-22-Oc-30PRL, 2019 U.S. Dist. LEXIS 76288, at *1 (M.D. Fla. Apr. 29, 2019) (Title III ADA case involving a website of a golf course); *Robles*, 913 F.3d at 898 (Title III ADA case involving a website and mobile app of a restaurant).

⁵⁸ *Parker*, 121 F.3d at 1014 (“The meaning of a word is or may be known for the accompanying words . . . the meaning of questionable or doubtful words or phrases in a statute may be ascertained by reference to the meaning of other words . . . associated with it.”).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See Mullen, *supra* note 2, at 758–64.

C. *The First and Seventh Circuit Approach*

The First and Seventh Circuits have interpreted the provisions of the ADA to apply broadly beyond a physical structure or place.⁶² This interpretation was used by the First Circuit in *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England*, in which the court concluded that places of public accommodation are not limited to physical structures, and the court further noted that private entities listed in the statute do not require physical structures to offer their services.⁶³ The court explained that businesses listed under Title III, including travel services, offices of accountants or lawyers, insurance offices, healthcare services, and other service establishments, conduct business over telephone and other means; thus, an individual need not enter a physical location to obtain services.⁶⁴ The decision in the First Circuit did not end the analysis at the textual interpretation; instead, the court considered the legislative history and purpose of the ADA⁶⁵ to support its application of the ADA beyond physical structures.⁶⁶

D. *A Potential Legislative Solution*

The Ninth Circuit's recent application of the ADA to websites and mobile apps may further amplify a recent increase in ADA litigation.⁶⁷ *Robles* was appealed to the

⁶² *Id.* at 761–64 (discussing a broad interpretation of the statute to include services, internet-only platforms, and other websites).

⁶³ *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England*, 37 F.3d 12, 19 (1st Cir. 1994). In *Carparts*, the alleged discrimination involved provisions in a health benefit plan. *Id.* at 14–15. This ADA case occurred in 1994 before *Parker*, which is another ADA case involving a benefit plan. *Id.*

⁶⁴ *Id.* at 19 (“It would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not.”). This statement would similarly apply to individuals today that obtain services via websites and mobile apps. *See Barnes*, *supra* note 11 (discussing various methods of ordering from Domino's Pizza including by phone, website, and mobile application).

⁶⁵ *Carparts Distrib. Ctr., Inc.*, 37 F.3d at 19 (explaining that the ADA “bring[s] individuals with disabilities into the economic and social mainstream of American life . . . in a clear, balanced, and reasonable manner.” (citing H.R. REP. NO. 101-485, pt. 2, at 99 (1990))).

⁶⁶ *Id.* (“Our interpretation is also consistent with the legislative history of the ADA. The purpose of the ADA is to . . . ‘address the major areas of discrimination faced . . . by people with disabilities.’” (quoting 42 U.S.C. § 12101(b)(1))).

⁶⁷ *See Stuy*, *supra* note 2, at 1081 (noting that website accessibility lawsuits increased by 177% from 2017 to 2018).

Supreme Court to resolve this ongoing circuit split.⁶⁸ However, that petition was denied and uncertainty surrounding website accessibility litigation remains.⁶⁹

The usage of an entity's websites and mobile apps is not limited to geographical confines within certain appellate circuits. For example, Domino's is a national pizza chain that operates across all appellate circuits and not just the Ninth Circuit. It would be impractical for a company to design their websites and mobile apps to work differently across circuits; therefore, the rule adopted in one circuit may impact businesses across the country.⁷⁰ This issue therefore should be taken up by the Supreme Court or addressed through legislative action to achieve a uniform approach nationwide.

Since the *Robles* decision, some members of Congress have taken on settling the issue of whether the ADA applies to websites and mobile apps and how businesses should comply.⁷¹ The Online Accessibility Act, which is a proposed amendment to the ADA that has not passed as of May, 2021, aims to officially broaden the ADA's application to websites and mobile apps and establish compliance standards for private entities nationwide.⁷² The proposed legislation would add a new title to the ADA, Title VI, that would apply to "consumer facing websites⁷³ and mobile applications⁷⁴ owned or operated by a private entity."⁷⁵ The proposed Title VI would prohibit denying individuals with disabilities "full and equal benefits" of using consumer facing websites and mobile applications.⁷⁶ Further, the proposed legislation provides compliance standards for developing consumer facing websites and mobile

⁶⁸ Petition for Writ of Certiorari, *supra* note 7, at 30; see Barnes, *supra* note 11 (discussing the status of the *Robles* case and the petition for writ of certiorari).

⁶⁹ *Domino's Pizza, LLC v. Robles*, 140 S. Ct. 122 (2019) (mem.) (denying Domino's Pizza, LLC's petition for writ of certiorari).

⁷⁰ See Barnes, *supra* note 11 (noting that "Virtually every national business and non-profit offers its goods and services at physical locations within the Ninth Circuit . . . so its rule will apply nationwide no matter what."); Petition for Writ of Certiorari, *supra* note 7, at 4–6 (discussing the increased litigation involving Title III of the ADA and explaining that "[n]o company or non-profit can design its website for the Ninth Circuit alone – so the ruling below effectively sets a nationwide mandate").

⁷¹ See Online Accessibility Act, H.R. 8478, 116th Cong. (2020); Michelle McGeogh et al., *Proposed 'Online Accessibility Act' Aims to Resolve Uncertainty Surrounding ADA Website Litigation*, JD SUPRA (Oct. 8, 2020), <https://www.jdsupra.com/legalnews/proposed-online-accessibility-act-aims-43483/> [<https://perma.cc/RR4S-BLCF>].

⁷² See H.R. 8478.

⁷³ *Id.* § 604(1).

⁷⁴ *Id.* § 604(2) (defining mobile applications as "a consumer facing software application that can be executed on a mobile platform, or a web-based software application that is tailored to a mobile platform but is executed on a server").

⁷⁵ *Id.*

⁷⁶ *Id.*

applications.⁷⁷ To be compliant, a private entity must design a consumer facing website or mobile application in conformance with “Web Content Accessibility Guidelines 2.0 Level A and Level AA” standards or provide “alternative means of access” for users with disabilities.⁷⁸ Adopting proposed legislation like this would resolve uncertainty over the application of the three different approaches to the scope of the ADA that developed over time through the ongoing circuit split. But, until then, individuals with disabilities, entities with websites and mobile apps and the courts will have to deal with uncertainty and the implications of the Ninth Circuit’s holding in *Robles*.

IV. WEBSITE ACCESSIBILITY LITIGATION AFTER *ROBLES* AND COVID-19

A. *Website Accessibility Litigation After COVID-19*

The Ninth Circuit’s decision in *Robles*, alone, was likely to have a significant impact on website accessibility issues nationwide. But, societal changes stemming from the COVID-19 pandemic could change the way future courts analyze the application of the ADA to websites and mobile apps as well. The need for social distancing to limit the spread of COVID-19 forced individuals and businesses to rapidly adapt to a new way of living. In today’s online society, do arguments for the narrow Third, Sixth and Eleventh Circuit approach to Title III, or any approach that limits “places of public accommodation” to physical structures, seem persuasive?

During the COVID-19 pandemic, many private businesses significantly altered the way they operate to comply with public health orders and ultimately survive. This includes many types of businesses listed as places of public accommodation under Title III of the ADA. Some businesses previously discussed by the Sixth Circuit included travel services, offices of accountants or lawyers and other professional offices.⁷⁹ In addition to these businesses, the text of Title III includes restaurants, grocery stores, theaters and shopping centers.⁸⁰ These businesses in 2021, however, do not look like or operate like they did in the 1990’s when the ADA was enacted. In 2021, many places of public accommodation, such as professional services businesses, restaurants, grocery stores and retailers, have adapted to an online society. It is now time for the ADA to adapt to these changes as well. Accordingly, ADA protections should apply beyond physical places, specifically to websites and mobile apps, and this approach should be adopted nationwide.

Places of public accommodation should no longer be limited to physical places because many businesses, including those in the original text of Title III, no longer use or need physical locations to operate. For example, several professional services businesses, such as accountants and lawyers, transitioned primarily to working remotely during the COVID-19 pandemic. Further, to avoid the spread of infection and overcrowding hospitals, many medical professionals have utilized telehealth services to conduct appointments over phone or video services. Most restaurants closed indoor dining operations for months and moved to takeout and delivery

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See *Parker v. Metro. Life Ins.*, 121 F.3d 1006, 1011 (6th Cir. 1997).

⁸⁰ *Id.* at 1010.

facilitated specifically through online ordering and food delivery apps. Stores and shopping centers not deemed essential businesses closed their doors and transitioned exclusively to online shopping as well. All of these businesses share a common connection during the COVID-19 pandemic: Without websites and mobile apps, these businesses would not be able to effectively connect with customers and likely could not survive. It follows that if these businesses did not make their online services accessible to individuals with disabilities, those individuals would experience major disadvantages and potential harm during a pandemic.

Limiting places of public accommodation to physical places in an online society would ignore the intended purposes of the ADA as well. In 1994, the First Circuit noted that the intent of Title III “is to bring individuals with disabilities into the economic and social mainstream of American life” with equal access.⁸¹ Today, the economic and social mainstream of American life includes working remotely, ordering food and groceries on mobile apps and ordering most other items through online retailers. If these businesses did not have to design their websites and mobile apps to be accessible to individuals with disabilities, millions of individuals would not truly experience the current economic and social mainstream of society. During a pandemic, not only would individuals with disabilities be significantly disadvantaged by this, but they could also face heightened risks of harm.

For example, during the COVID-19 pandemic, a grocery store located in the Sixth Circuit may have delivery or curbside pickup options available to customers through their website or mobile app where customers can view and order items without potential risks of entering a crowded store. But, if businesses in this jurisdiction are not required to design websites and mobile apps to be accessible to screen reading software, a blind individual may not be able to utilize some of these convenient services. They might then be disadvantaged compared to others who can effectively utilize online services, which are widely considered safe, convenient alternatives to traditional shopping during a pandemic. A similar situation could arise with restaurants that transitioned exclusively to takeout, specifically, through online or mobile ordering. Without accessible websites or food delivery apps, a blind individual could miss out on the advantages of these services during a pandemic. Accordingly, the impact of COVID-19 on society and, specifically, on how businesses reach customers has exposed potential disadvantages to individuals with disabilities when websites and mobile apps are not considered places of public accommodation subject to the protections of the ADA.

B. Website Accessibility Litigation Under Title II

Although the application of Title III was at issue in *Robles*, this decision, along with the impact of the COVID-19 pandemic, may have similar implications on Title II of the ADA as well.⁸² Similar to Title III cases involving private businesses, applying ADA provisions to websites and mobile apps impacts public entities under

⁸¹ *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New England*, 37 F.3d 12, 19 (1st Cir. 1994).

⁸² See *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898 (9th Cir. 2019); *Price v. City of Ocala*, 375 F. Supp. 3d 1264, 1268–69 (M.D. Fla. 2019) (comparing ADA litigation under Title II to litigation under Title III).

Title II.⁸³ A public entity's compliance with Title II once focused on constructing and operating facilities in a way that did not discriminate against individuals with disabilities.⁸⁴ For example, an individual with a disability might allege discrimination at a local courthouse or other government building because of architectural barriers within its facilities.⁸⁵ Now, the local government likely provides "services, programs, or activities" all through its website, especially after the COVID-19 pandemic.⁸⁶ Before 2020, it might have been hard to imagine that court proceedings would be conducted online or over conference calls. Now, the United States Supreme Court has conducted oral arguments in critical cases remotely during the COVID-19 pandemic.⁸⁷ Similar to private entities in Title III cases, if public entities did not have to design online services to comply with the ADA, individuals with disabilities could once again experience disadvantages in an online society.

A governmental entity's website was at the center of a recent lawsuit in *Price v. City of Ocala*. There, a blind individual claimed he was unable to access portions of a website with a screen reader.⁸⁸ The City of Ocala operates an interactive website with several links.⁸⁹ Visitors to the website can view upcoming city events, learn procedures for obtaining licenses and services and pay certain bills.⁹⁰ Similar to the *Robles* decision, the court in *Price* applied the provisions of the ADA to a website; but, the court also discussed an important issue that arises when doing so.⁹¹ Does the plaintiff even have standing to sue in an ADA case involving websites and mobile apps? Historically, ADA cases have addressed situations where plaintiffs seek out non-compliant businesses to find potential lawsuits, regardless of whether they intend

⁸³ See generally *Robles*, 913 F.3d at 898; *Price*, 375 F. Supp. 3d at 1264.

⁸⁴ See *Shotz v. Cates*, 256 F.3d 1077, 1079 (11th Cir. 2001) (the complaint alleged that the plaintiffs were "confronted by the many architectural barriers contained within the Courthouse" upon entry).

⁸⁵ See *id.* at 1078–79 (alleging insufficient ramps for wheelchair access and insufficient space in bathroom stalls).

⁸⁶ See, e.g., *Price*, 375 F. Supp. 3d at 1269–73 (noting that the City of Ocala provides services to the public through its website).

⁸⁷ Melissa Quinn, *Supreme Court to Kick off New Term Remotely with Telephone Arguments*, CBS NEWS (Sept. 16, 2020, 3:03 PM), <https://www.cbsnews.com/news/supreme-court-remote-telephone-arguments-october/> [<https://perma.cc/ABK3-YFHV>].

⁸⁸ *Price*, 375 F. Supp. 3d at 1267.

⁸⁹ *Ocala*, CITY OF OCALA, <https://www.ocalafl.org> [<https://perma.cc/T4BM-P9YT>]. The City of Ocala's website now has a phone number listed at the top of the screen for individuals who experience trouble viewing the content of the website and a link to an ADA Compliance and Accessibility page. *Id.*

⁹⁰ *Id.*

⁹¹ *Price*, 375 F. Supp. 3d at 1267–77.

to return to those businesses or use their services in the future.⁹² In some cases, a single plaintiff initiates several lawsuits against various types of businesses.⁹³ For example, the plaintiff in *Robles* went on to file at least fourteen different lawsuits against entities related to their websites and mobile apps.⁹⁴ However, one potential roadblock to successfully bringing these ADA lawsuits is establishing standing to sue.

C. Standing in ADA Lawsuits Involving Websites and Mobile Apps

An increase in website related ADA lawsuits has been referred to as a “surf-by” movement where plaintiffs can “surf” the web to discover websites that do not comply with the ADA.⁹⁵ This is similar to the “drive-by” movement, where plaintiffs travel to physical locations to test for architectural barriers within a place of public accommodation’s facilities.⁹⁶ For example, in *Molski v. Evergreen Dynasty Corp.*, the court addressed the plaintiff’s filing of several lawsuits with similar allegations, and some involved multiple businesses he visited during the same day.⁹⁷ The complaints consistently alleged that barriers to entry at the businesses caused “essentially identical injuries” during visits, which can be a common occurrence in “drive-by” cases.⁹⁸ Although “surf-by” lawsuits and “drive-by” lawsuits involve different places of public accommodation and different forms of discrimination, both can be costly for businesses.⁹⁹

Courts that apply ADA provisions to websites and mobile apps will now have to determine whether plaintiffs have the necessary standing to bring website accessibility lawsuits. In *Price v. City of Ocala*, when analyzing standing to sue under Title II, the court noted that “there is a dearth of case law addressing standing in a case like this: a Title II ADA case in which the alleged violation involves a website.”¹⁰⁰ Acknowledging that most cases involving website accessibility are brought under Title III of the ADA, the court noted that those cases are “inapposite” to those brought under Title II.¹⁰¹ Further, certain factors used to analyze standing in Title III cases are

⁹² See Stuy, *supra* note 2, at 1085–86; see Phoebe Joseph, *An Argument for Sanctions Against Serial ADA Plaintiffs*, 29 U. FLA. J.L. & PUB. POL’Y 193, 193–99 (2019).

⁹³ See Petition for Writ of Certiorari, *supra* note 7, at 4 (explaining that over 2,250 website accessibility lawsuits were filed in the year 2018, and that plaintiffs in these ADA lawsuits are “often repeat litigants”).

⁹⁴ *Id.* at 12.

⁹⁵ Stuy, *supra* note 2, at 1085–86.

⁹⁶ *Id.* See generally Joseph, *supra* note 92.

⁹⁷ *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1050–52 (9th Cir. 2007).

⁹⁸ *Id.* at 1051, 1059–62.

⁹⁹ *Id.*; Stuy, *supra* note 2, at 1085–86; Joseph, *supra* note 92, at 193–97.

¹⁰⁰ *Price v. City of Ocala*, 375 F. Supp. 3d 1264, 1267 (M.D. Fla. 2019) (noting that most website accessibility litigation involves places of public accommodation under Title III).

¹⁰¹ *Id.* at 1270–71 (“[A] primary difference between Title II and III claims is that Title III . . . require[s] . . . a ‘place of public accommodation,’ while Title II claims have no such

inapplicable to Title II cases partly because any required connection to a physical place does not apply to Title II.¹⁰² Since there is no requirement that discrimination be connected to a physical location or store, considering a uniform approach for analyzing standing in Title III and Title II cases may be problematic.¹⁰³ While addressing the “explosion of cases – under both Title II and Title III” the *Price* court recognized that “[c]ourts have struggled to apply traditional principles of standing to these websites cases and have disagreed about what features a website must have to comply with the ADA.”¹⁰⁴ Accordingly, as more courts have considered the application of the ADA to websites and mobile apps, a prevalent issue has been determining how plaintiffs establish standing to sue.¹⁰⁵

In ADA cases that address standing, some courts analyze and apply the “*Houston* factors.”¹⁰⁶ In *Houston v. Marod Supermarkets, Inc.*, the plaintiff alleged that a supermarket contained architectural barriers that did not comply with Title III of the ADA.¹⁰⁷ The defendant argued that the plaintiff’s “litigation history” and lack of intent to return to the location were not credible enough to establish the requisite standing to sue.¹⁰⁸ However, the *Houston* court disagreed.¹⁰⁹ In reaching this outcome, the court first discussed general principles of Article III standing.¹¹⁰ Further, because damages under the ADA are limited to injunctive relief, the court also stated that the plaintiff needed to “show[] ‘a real and immediate – as opposed to merely conjectural or

requirement. . . . Title II broadly applies to ‘services, programs, or activities of a public entity.’”).

¹⁰² *See id.* at 1273 (“[R]equiring a nexus between a governmental website and an impediment to accessing a physical, brick-and-mortar location makes no sense under Title II.”).

¹⁰³ *See id.* at 1272–73 (identifying issues with using a “one-size-fits-all approach” to analyze standing under both Titles III and II and discussing whether a person would need a connection to a governmental entity, such as being a citizen, in Title II cases).

¹⁰⁴ *Id.* at 1270.

¹⁰⁵ *See, e.g., id.*; *Price v. Escalante – Black Diamond Golf Club LLC*, No. 5:19-cv-22-Oc-30PRL, 2019 U.S. Dist. LEXIS 76288, at *1 (M.D. Fla. Apr. 29, 2019) (Title III website accessibility case that analyzed standing).

¹⁰⁶ *See, e.g., Price*, 375 F. Supp. 3d at 1272–74 (discussing the *Houston* factors applied by some courts when analyzing the issue of standing).

¹⁰⁷ *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1325–26 (11th Cir. 2013) (plaintiff alleged that the supermarket lacked sufficient parking spaces, contained deficient paths within the supermarket and maintained restrooms that did not comply with the provisions of Title III).

¹⁰⁸ *Id.* at 1326 (stating that defendant “attached . . . a list of 271 cases in which Houston or an advocacy group he represents was a party, all filed in the Southern and Middle Districts of Florida,” and that many of the previous lawsuits filed were dismissed and noting that other active lawsuits asserted an intent to return to many locations throughout the state).

¹⁰⁹ *Id.* at 1340–41.

¹¹⁰ *Id.* at 1328 (discussing the aspects of standing: an injury-in-fact, a causal connection between the injury and the defendant’s actions and a showing that the alleged injury will be favorably redressed in court).

hypothetical – threat of *future injury*’.”¹¹¹ This aspect of standing was further discussed in *Price v. City of Ocala*, where that court stated “[t]o satisfy the future injury requirement, a plaintiff must espouse more than a ‘some day’ intention” to return to the business.¹¹² Further, they need to “sho[w] ‘an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical’.”¹¹³

In *Price*, the court examined the *Houston* factors, which include: “(1) the proximity of the defendant’s business to the plaintiff’s residence; (2) the plaintiff’s past patronage of the defendant’s business; (3) the definiteness of the plaintiff’s plan to return; and (4) the frequency of the plaintiff’s travel near defendant’s business.”¹¹⁴ These factors, however, were originally applied to a significantly different scenario than a case like *Robles* and *Price* because the alleged discrimination in *Houston* involved architectural barriers in a physical location and not discrimination involving websites and mobile apps.¹¹⁵

Courts have grappled with adapting traditional standing principles to ADA litigation over website accessibility.¹¹⁶ In *Price v. Escalante – Black Diamond Golf Club LLC*, a Florida court considered whether a blind plaintiff had standing to sue a golf course over an inaccessible website.¹¹⁷ After acknowledging the uncertainty in this area of the law, the court went on to apply the *Houston* factors for the “future injury” requirement of a standing analysis and noted that two additional factors were needed for ADA cases involving websites.¹¹⁸ The two additional factors to analyze were: “(1) the type of information that is inaccessible, and (2) the relation between the inaccessibility and . . . alleged future harm.”¹¹⁹

There, the court concluded that the first additional factor in the standing analysis weighed against the plaintiff because the only information allegedly inaccessible was a members’ newsletter document posted on the website from 2017, which created no immediate risk of future harm to the plaintiff.¹²⁰ Further, the second additional factor

¹¹¹ *Id.* at 1329.

¹¹² *Price v. City of Ocala*, 375 F. Supp. 3d 1264, 1268 (M.D. Fla. 2019).

¹¹³ *Id.*

¹¹⁴ *Id.* at 1268–75 (discussing the factors and adapting them to fit ADA website accessibility cases); *Price v. Escalante – Black Diamond Golf Club LLC*, No. 5:19-cv-22-Oc-30PRL, 2019 U.S. Dist. LEXIS 76288, at *1 (M.D. Fla. Apr. 29, 2019) (applying the *Houston* factors).

¹¹⁵ *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1325–26 (11th Cir. 2013); *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898 (9th Cir. 2019); *Price*, 375 F. Supp. 3d. at 1264.

¹¹⁶ *See Price*, 375 F. Supp. 3d. at 1270–71 (noting a “complete lack of rules and regulations being promulgated by the Department of Justice despite being aware of this issue for years”); *see, e.g., Price*, 2019 U.S. Dist. LEXIS 76288, at *1–2.

¹¹⁷ *Price*, 2019 U.S. Dist. LEXIS 76288, at *1–2.

¹¹⁸ *Id.* at *9.

¹¹⁹ *Id.* at *17.

¹²⁰ *Id.*

weighed against the plaintiff because he did not identify any other portions of the website besides the newsletter document that related to the alleged harm.¹²¹ Based on these findings, the court determined that the accessibility issues of the website did not “hinder[] Price’s full use and enjoyment of Black Diamond’s facilities.”¹²² The additional factors used in this analysis may provide guidance for courts to consider for standing issues in Title III website accessibility cases going forward.

Website accessibility lawsuits brought under Title II, however, may require a different standing analysis to determine which plaintiffs can bring these lawsuits.¹²³ The court in *Price v. City of Ocala* distinguished between the requisite standing needed in Title III cases compared to standing in Title II cases.¹²⁴ The court determined that the *Houston* factors are inapplicable to analyzing the “future injury” standing requirement in Title II cases because no nexus is needed between a public entity’s website and a physical location.¹²⁵ Instead, the court considered general standing principles and balanced other relevant factors.¹²⁶

The first relevant factor considered was the connection plaintiff had to the governmental entity.¹²⁷ The next factor was the information allegedly inaccessible on the website, which is relevant to finding any immediate risk of future harm to the plaintiff.¹²⁸ Finally, the court considered how the inaccessible website injured the plaintiff and noted that issues involving certain services, such as application services or bill payment services on the website, would support finding a sufficient injury.¹²⁹ Other courts may follow a similar analysis to those used in these cases for website cases under Title II and Title III going forward.¹³⁰

Although the *Robles* decision addressed the question of whether the ADA applied to websites and mobile apps, it did not analyze standing to sue under Title III.¹³¹ In *Robles*, the issue in question was whether the inaccessible website and mobile app deprived the plaintiff of “the full and equal enjoyment of the goods, services, facilities,

¹²¹ *Id.* at *17–18.

¹²² *Id.* at *20–21.

¹²³ *See, e.g., Price v. City of Ocala*, 375 F. Supp. 3d 1264, 1270–73 (M.D. Fla. 2019) (discussing standing considerations for Title II and Title III ADA cases).

¹²⁴ *Id.* at 1272–73.

¹²⁵ *Id.*

¹²⁶ *Id.* at 1272–77.

¹²⁷ *Id.* at 1274.

¹²⁸ *Id.* at 1274–77.

¹²⁹ *Id.*

¹³⁰ *See Price v. Escalante – Black Diamond Golf Club LLC*, No. 5:19-cv-22-Oc-30PRL, 2019 U.S. Dist. LEXIS 76288 (M.D. Fla. Apr. 29, 2019).

¹³¹ *See Robles v. Domino’s Pizza, LLC*, 913 F.3d 898, 904 (9th Cir. 2019).

privileges, advantages, or accommodations” of Domino’s.¹³² What could a standing analysis in website accessibility cases look like after *Robles* and COVID-19? In 2021, websites and mobile apps provide several advantages to users. For example, ordering groceries online for pickup or delivery could be a safe, convenient alternative to browsing a crowded store. When accessibility aids work on those websites and mobile apps, individuals with disabilities could independently navigate websites and mobile apps to find specific groceries they need delivered. In addition, some individuals could argue that websites and mobile apps are more convenient to use than ordering over telephone.¹³³ A visually impaired person that could not independently navigate the website must depend on a store telephone operator’s assistance to shop.¹³⁴ The telephone ordering process may then take significantly longer to complete, and an online ordering and payment system may be more convenient for both the store and the individual.¹³⁵ These factors support an argument for “equal enjoyment” issues and may be considered “advantages” for customers that are able to fully utilize the website.¹³⁶

After a plaintiff shows a deprivation of equal enjoyment, a threat of future harm must be shown that includes more than a mere “some day” intention of a plaintiff to return to the store or its online services.¹³⁷ This could be analyzed through the *Houston* factors and the additional factors discussed in the *Price* cases.¹³⁸ The plaintiff could meet the “proximity” factor if the particular store is the nearest store to the plaintiff or one of several stores nearby. They could establish the “past patronage” and “definite plans to return” factors if they use the store regularly, it is the only store in their neighborhood, or other stores they use in the neighborhood have shut down due to the pandemic. Further, the plaintiff’s travel frequency may be reduced because of caution or by government order. When limited to local travel only, the particular store may be the only option nearby for a plaintiff; thus, they could meet the “frequency of nearby

¹³² *Id.*; see 42 U.S.C. § 12182(a).

¹³³ The appellate briefs of both parties in *Robles* discussed the telephone hotline that Domino’s added to its website after the lawsuit began. Brief of Appellee at 53–57, *Robles*, 913 F.3d 898 (No. 17-55504), 2017 WL 6611908, at *53–57; Brief of Appellant at 46–51, *Robles*, 913 F.3d 898 (No. 17-55504), 2017 WL 4869092, at *46–51.

¹³⁴ Brief of Appellant, *supra* note 133, at 48–51 (explaining that the telephone hotline is not an effective substitute for an inaccessible website); Brief of Appellee, *supra* note 133, at 54–57 (discussing the telephone hotline and whether it establishes effective communication that satisfies ADA accessibility requirements).

¹³⁵ See Brief of Appellant, *supra* note 133, at 48–51; Brief of Appellee, *supra* note 133, at 54–57.

¹³⁶ See Brief of Appellant, *supra* note 133, at 48–51; Brief of Appellee, *supra* note 133, at 54–57; see also 42 U.S.C. § 12182(a).

¹³⁷ *Price v. City of Ocala*, 375 F. Supp. 3d 1264, 1268 (M.D. Fla. 2019).

¹³⁸ *Id.* at 1275–77; *Price v. Escalante – Black Diamond Golf Club LLC*, No. 5:19-cv-22-Oc-30PRL, 2019 U.S. Dist. LEXIS 76288, at *15–19 (M.D. Fla. Apr. 29, 2019).

travel” factor as well. For website accessibility cases, this standing analysis would not end with the application of the *Houston* factors.¹³⁹

Additional factors, like those addressed in the *Price* cases, may be considered.¹⁴⁰ This point of the standing analysis begins with the type of information that is inaccessible.¹⁴¹ Certain website features are essential to the ordering process.¹⁴² A person would likely search for products, product descriptions, ingredients, pricing information and several other ordering features. They would then need to establish a connection between the inaccessible information and the future harm caused from not having access to it.¹⁴³ When unable to access menus and product information, the individual would not know the product options available to order. Not having access to this information on a website or mobile app would not only be a disadvantage to an individual with a disability, but it would disrupt the ordering process every time they visited the website or mobile app. If this information was not accessible, it could support a risk of immediate future harm for the plaintiff, and the plaintiff may show necessary standing to bring a website accessibility lawsuit.¹⁴⁴

D. Fundamental Alteration or Undue Burden Defense

If a plaintiff’s claims survive the standing analysis, would a defendant have any defenses to not having accessible websites and mobile apps? After *Robles* and COVID-19, another important aspect of ADA litigation going forward will be asserting the fundamental alteration or undue burden defense to a website accessibility lawsuit.¹⁴⁵ A defendant in a Title III ADA lawsuit can argue that modifications to fully comply with the ADA would “fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation” or impose an “undue burden” on the entity.¹⁴⁶ When analyzing an undue burden, some of the factors considered by courts include the financial resources and profitability of the entity.¹⁴⁷ If a defendant successfully asserts this “fundamental alteration” or “undue burden” defense, they

¹³⁹ *Price*, 2019 U.S. Dist. LEXIS 76288, at *17–19.

¹⁴⁰ *Id.*

¹⁴¹ *Price*, 2019 U.S. Dist. LEXIS 76288, at *17–18; *see, e.g., Price*, 375 F. Supp. 3d at 1274.

¹⁴² Brief of Appellant, *supra* note 133, at 7; *see also* Brief of Appellee, *supra* note 133, at 2–4. *See generally* *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898 (9th Cir. 2019).

¹⁴³ *Price*, 2019 U.S. Dist. LEXIS 76288, at *18; *see, e.g., Price*, 375 F. Supp. 3d at 1274–77.

¹⁴⁴ *Price*, 2019 U.S. Dist. LEXIS 76288, at *18; *see, e.g., Price*, 375 F. Supp. 3d at 1274–77.

¹⁴⁵ *See* 42 U.S.C. § 12182(b)(2)(A)(iii). *See generally* *Stuy*, *supra* note 2.

¹⁴⁶ 42 U.S.C. § 12182(b)(2)(A)(iii).

¹⁴⁷ *Stuy*, *supra* note 2, at 1098 (citing 28 C.F.R. § 36.104 (2012)); *see* *Tauscher v. Phx. Bd. of Realtors*, 931 F.3d 959, 965–66 (9th Cir. 2019) (discussing the elements of the undue burden defense).

may escape liability under the ADA.¹⁴⁸ This defense comes from a recognition that not all businesses have the same financial resources and technological capabilities for designing and implementing websites and mobile apps.¹⁴⁹

The undue burden defense was addressed in the context of website and mobile app accessibility in *Gil v. Winn-Dixie Stores, Inc.*¹⁵⁰ There, a visually impaired individual attempted to use the Winn-Dixie Store's website, but his screen reader software was unable to access most of the website's tabs.¹⁵¹ A software tester analyzed the website and estimated that it would potentially cost Winn Dixie Stores \$37,000 to fix the accessibility problems with the website.¹⁵² Winn-Dixie believed it was feasible to fix the accessibility issues and previously budgeted \$250,000 toward making repairs.¹⁵³ The district court sided with the plaintiff and stated that "whether the cost to modify the website is \$250,000 or \$37,000 is of no moment" and compared those costs to significant amounts already budgeted and spent on designing and maintaining the website.¹⁵⁴ Accordingly, a successful "undue burden" defense may be a high hurdle for most defendants to clear, especially for those with large website and mobile app budgets.

In the *Robles* case, Domino's never asserted this defense,¹⁵⁵ and it would not likely prevail in doing so. *Robles* did not address potential costs of ADA compliance.¹⁵⁶ Because Domino's operates a highly interactive website with several links and

¹⁴⁸ See generally *Roberts v. KinderCare Learning Ctrs.*, 86 F.3d 844 (8th Cir. 1996).

¹⁴⁹ The proposed Online Accessibility Act has a provision that calls for regulations regarding "flexibility for small business concerns" for complying with the new website accessibility standards. Online Accessibility Act, H.R. 8478, 116th Cong. § 601(c)(3) (2020). See generally Stuy, *supra* note 2.

¹⁵⁰ See generally *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340 (S.D. Fla. 2017), *vacated and remanded*, 993 F.3d 1266 (11th Cir. 2021).

¹⁵¹ *Id.* at 1344.

¹⁵² *Id.* at 1346–47.

¹⁵³ *Id.* at 1345.

¹⁵⁴ *Id.* at 1347. *Gil* was recently reversed on appeal in the Eleventh Circuit, but this case provides an example of how a district court analyzed the undue burden defense. *Gil v. Winn-Dixie Stores, Inc.*, 933 F.3d 1266 (11th Cir. 2021). On appeal, the Eleventh Circuit determined that websites and mobile apps are not places of public accommodation, and Winn Dixie's website was not an intangible barrier to enjoy the services at the Winn-Dixie physical stores. *Id.* at 1276–84. After determining that the Winn-Dixie website did not violate the ADA, the court did not address the undue burden defense. See *id.* The undue burden defense was also analyzed by the Eight Circuit in *Roberts v. KinderCare Learning Centers, Inc.*, where a child daycare center argued that offering one-on-one accommodations would unduly burden the daycare center. See generally *Roberts v. KinderCare Learning Ctrs.*, 86 F.3d 846 (8th Cir. 1996) (explaining that a \$95 per week loss to make the accommodation was unduly burdensome to the daycare center with operating income of only \$9,600 per month).

¹⁵⁵ See Brief in Opposition to Petition for Writ of Certiorari at 30, *Domino's Pizza, LLC v. Robles*, 140 S. Ct. 122 (2019) (No.18-1539), 2019 WL 3889933, at 30.

¹⁵⁶ See *Robles v. Domino's Pizza, LLC*, 913 F.3d 898 (9th Cir. 2019).

features, Domino's may incur high costs to design and maintain the website.¹⁵⁷ Further, its website and mobile app are key aspects of its business. Domino's claims to have "industry-leading technology" while stating that "more than 65% of . . . U.S. sales came via digital platforms [in 2018]."¹⁵⁸ Although *Robles* did not provide any information about potential costs of updating the website and mobile app to comply with Title III, the Southern District of Florida court in *Gil v. Winn-Dixie Stores, Inc.* discussed potential estimates.¹⁵⁹ In *Gil*, the total repairs to the website were estimated around \$37,000, but the district court did not find it unduly burdensome for Winn Dixie Stores to repair the website.¹⁶⁰ The same result likely follows for a company in a financial position similar to Domino's.

According to its 2019 annual report, "Domino's is the largest pizza company in the world based on global retail sales," and its revenues and net income in 2019 both increased as compared to its 2018 numbers.¹⁶¹ Further, "more than half of all [its] global retail sales were derived from digital channels, primarily through . . . online ordering website and mobile applications."¹⁶² In addition, its "Piece of the Pie Rewards loyalty program boast[ed] more than 20 million active users" for the year 2018.¹⁶³ A large company in a financial position like Domino's, which claims to be "among the largest e-commerce retailers in terms of annual transactions," is not a likely candidate for a successful undue burden defense to making accessible websites and mobile apps.¹⁶⁴ However, depending on the financial position and online capabilities of a business, high costs for website and mobile app development could support a different result.

¹⁵⁷ See, e.g., *Gil*, 257 F. Supp. 3d at 1345–46 (providing estimated costs for designing and maintaining websites); see also DOMINO'S PIZZA, <https://www.dominos.com/> [<https://perma.cc/2JP5-NF28>].

¹⁵⁸ DOMINO'S PIZZA, 2018 ANNUAL REPORT at iii (2019) (CEO message to shareholders) [hereinafter DOMINO'S 2018 REPORT]; see also *id.* at 7 ("Technological innovation is vital to our . . . long-term success. We believe we are among the largest e-commerce retailers in terms of annual transactions."), <https://ir.dominos.com/static-files/593a1150-28b1-49a9-8263-88710bb1237a> [<https://perma.cc/95QQ-53HU>].

¹⁵⁹ *Gil*, 257 F. Supp. 3d at 1345 (discussing how Winn-Dixie intended to modify its website and set aside \$250,000.00 for the project); see Stuy, *supra* note 2, at 1099–1101.

¹⁶⁰ *Gil*, 257 F. Supp. 3d at 1350.

¹⁶¹ DOMINO'S PIZZA, 2019 ANNUAL REPORT 2, 27–28 (2020), <https://ir.dominos.com/static-files/020eed02-b06c-4314-8d9c-5fcab09fc748> [<https://perma.cc/6REA-FQAX>].

¹⁶² *Id.* at 7.

¹⁶³ DOMINO'S 2018 REPORT, *supra* note 158, at iii (CEO message to shareholders).

¹⁶⁴ See *Gil*, 257 F. Supp. 3d at 1346 (showing that Winn-Dixie Stores had the funding to spend upwards of \$7 million on website modifications in the past but did not include accessibility updates).

In *Roberts v. KinderCare Learning Centers, Inc.*, the defendant daycare center had a history of financial problems.¹⁶⁵ The court held that the accommodation of one-on-one care for students with certain disabilities would have been unduly burdensome for the day care center because paying a full time aid would have created a \$95 per week financial loss.¹⁶⁶ The daycare center was a for-profit corporation that must remain profitable to stay open; thus, losses from making certain accommodations were significant expenses that supported a successful undue burden defense.¹⁶⁷ Like the cost of accommodations here, if a business could show that investing in technology-based accommodations causes them to operate at significant losses, they may have a better chance of successfully asserting the undue burden defense.

The impact of the COVID-19 pandemic could factor into future “undue burden” discussions. If the ADA applies to websites and mobile apps, businesses will have to invest in their online technology to maintain compliance. Some businesses may argue that these additional costs can be unduly burdensome. However, the COVID-19 pandemic has shown that when online services are not available to customers with disabilities, several burdens may fall on the customers as well. Using websites and mobile apps to carry out everyday tasks during a pandemic can be a safer alternative to visiting physical stores, specifically those that draw large crowds. Further, businesses would be missing out on potential customers if they did not invest in accessible websites and mobile apps.¹⁶⁸ During difficult economic conditions, such as those caused by a pandemic, businesses should do whatever they can to reach as many potential customers as possible. Accordingly, investing in online technology accessible to individuals with disabilities may not be considered as burdensome to most businesses as it may have been in the past.

However, it is no secret that the pandemic has been devastating on small businesses.¹⁶⁹ Finding ways to help businesses provide accessible websites and mobile apps would help both businesses and individuals with disabilities in the aftermath of COVID-19. Congress passed the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) to provide economic assistance to individuals and businesses during the pandemic.¹⁷⁰ The CARES Act provides forgivable loans for businesses to use toward payroll, interest expenses, rent, and utilities.¹⁷¹ It also offered tax credits for

¹⁶⁵ *Roberts v. KinderCare Learning Ctrs.*, 86 F.3d 844, 845 (8th Cir. 1996) (explaining that the childcare center experienced bankruptcy, reorganization and operated on a limited budget).

¹⁶⁶ *Id.* at 846.

¹⁶⁷ *Id.*

¹⁶⁸ Stuy, *supra* note 2, at 1103–04.

¹⁶⁹ Ben Casselman, *States Try to Rescue Small Businesses as U.S. Aid is Snarled*, N.Y. TIMES (Dec. 10, 2020), <https://www.nytimes.com/2020/12/10/business/economy/states-small-businesses.html?searchResultPosition=2> [<https://perma.cc/LN5K-BTWA>].

¹⁷⁰ *Assistance for Small Businesses*, U.S. DEP’T OF THE TREASURY, <https://home.treasury.gov/policy-issues/cares/assistance-for-small-businesses> [<https://perma.cc/F2JH-XHLR>].

¹⁷¹ *Id.*

employee retention and payroll tax cuts.¹⁷² One way to ease the potential burden of designing accessible websites and mobile apps could be to allow businesses to use similar relief funding for investing in their online technology, which would include accessible websites and mobile apps. Not only would this help individuals with disabilities access safe, convenient online resources, but the investment into accessible online technology could also help businesses reach more customers during a time where they need as many customers as possible.

When discussing the “undue burden” defense, courts and small businesses may consider possible incentives to offset costs.¹⁷³ Although designing and maintaining ADA compliant technology may bring significant costs, especially for small businesses, possible tax incentives may weaken an undue burden for compliance.¹⁷⁴ The Internal Revenue Code currently provides tax incentives for certain businesses to comply with the ADA.¹⁷⁵ The Disabled Access Credit may lighten the potential ADA compliance costs on eligible small businesses.¹⁷⁶ Eligible small businesses may currently claim a credit equal to fifty percent of eligible expenditures up to \$10,250.00.¹⁷⁷

Any future pandemic or other economic relief similar to the CARES Act could include additional tax credits to incentivize businesses to maintain accessible websites and mobile apps. These additional tax credits could be similar to the current Disabled Access Credit, and expenses to design and maintain accessible websites could now be considered “eligible access expenditures” for tax purposes with any resulting credits decreasing the tax burden on businesses.¹⁷⁸ Incentives like tax credits may offset

¹⁷² *Assistance for American Industry*, U.S. DEP’T OF THE TREASURY, <https://home.treasury.gov/policy-issues/cares/preserving-jobs-for-american-industry> [<https://perma.cc/MN8P-6KFD>].

¹⁷³ See, e.g., *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340 (S.D. Fla. 2017).

¹⁷⁴ See Marianne DelPo Kulow & Scott Thomas, *Assistive Technology and the Americans with Disabilities Act*, 40 BERKELEY J. EMP. & LAB. L. 257, 277 (2019); Joseph Chandlee, *ADA Regulatory Compliance: How the Americans with Disabilities Act Affects Small Businesses*, 7 U. BALT. J. LAND & DEV. 37, 45 (2018); Josephine Meyer, *Accessible Websites and Mobile Applications Under the ADA: The Lack of Legal Guidelines and What This Means for Businesses and Their Customers*, 44 SEATTLE U. L.R. SUP. 14, 30–31 (2020); Victoria Scaglione, *Website Compliance with the ADA: The Demand for Legislation and Defenses for Defendants*, 38 HOFSTRA LAB. & EMP. L.J. 129, 152 (2020).

¹⁷⁵ Kulow & Thomas, *supra* note 174, at 276; Chandlee, *supra* note 174, at 45; Meyer *supra* note 174, at 30–31; Scaglione *supra* note 174, at 152.

¹⁷⁶ Kulow & Thomas, *supra* note 174, at 276; Chandlee, *supra* note 174, at 45; Meyer *supra* note 174, at 30–31; Scaglione *supra* note 174, at 152; 26 U.S.C. § 44(a).

¹⁷⁷ 26 U.S.C. § 44(a). These expenditures include amounts “for the purpose of removing architectural, communication, physical, or transportation barriers which prevent a business from being accessible . . . [and] to provide . . . effective methods of making visually delivered materials available to individuals with visual impairments.” *Id.* § 44(c)(2)(A), (C).

¹⁷⁸ *Id.* § 44(c)(1); see also Kulow & Thomas, *supra* note 174, at 287–89 (discussing adjusting the Disabled Access Credit and “expanding the deduction to include the cost of addressing communication and electronic ‘barriers’ in today’s modern workplace”).

potential burdens on businesses while helping expand online accessibility to individuals with disabilities, which would help both businesses and individuals adapt to an internet-dependent society after COVID-19.

The proposed Online Accessibility Act addresses ADA compliance for small businesses as well.¹⁷⁹ This legislation acknowledges the need for regulations with “flexibility for small business concerns” in creating accessible websites and mobile apps for all.¹⁸⁰ But, until the adoption of new regulations or further analysis of the “undue burden defense” in courts, uncertainty remains in asserting this defense in website accessibility cases going forward.¹⁸¹

V. CONCLUSION

Determining whether the provisions of the ADA should apply to websites and mobile apps has been a significant issue faced by courts in recent years.¹⁸² If *Robles v. Domino’s Pizza, LLC* made it to the Supreme Court, it could have resolved uncertainty experienced by individuals, businesses and public entities in future website accessibility cases.¹⁸³ However, because the petition was denied, uncertainty surrounding the ADA and website accessibility litigation remains.¹⁸⁴

Since the enactment of the ADA, some courts have limited its application to physical structures or places or to online technology having a sufficient nexus to physical structures or places.¹⁸⁵ However, because COVID-19 has forced America into becoming even more reliant on internet-based technology, ADA protections should not be limited to physical places only. Since 1990, society has adapted to changes in technology, and now is the time for the ADA to adapt as well. Title III has been the subject of most recent website accessibility cases; however, applying ADA provisions to websites and mobile apps impacts Title II litigation as well.¹⁸⁶

Further, since *Robles* and other courts have applied provisions of the ADA to websites and mobile apps, an increase in ADA litigation may occur, and a common

¹⁷⁹ See Online Accessibility Act, H.R. 8478, 116th Cong. § 601(c)(3) (2020).

¹⁸⁰ *Id.*

¹⁸¹ *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898, 908 (noting a lack of DOJ guidance on websites accessibility issues); see Brief in Opposition to Petition for Writ of Certiorari, *supra* note 155, at 30 (noting that the undue burden defense was not analyzed in the *Robles* opinion); see also Stuy, *supra* note 2, at 1099, 1103–04.

¹⁸² *Price v. City of Ocala*, 375 F. Supp. 3d 1264, 1270 (M.D. Fla. 2019) (noting a “complete lack of rules and regulations being promulgated by the Department of Justice despite being aware of this issue for years”); *Price v. Escalante – Black Diamond Golf Club LLC*, No. 5:19-cv-22-Oc-30PRL, 2019 U.S. Dist. LEXIS 76288, at *4-5 (M.D. Fla. Apr. 29, 2019). See generally *Robles*, 913 F.3d 898.

¹⁸³ See Barnes, *supra* note 11.

¹⁸⁴ *Domino’s Pizza, LLC v. Robles*, 140 S. Ct. 122 (2019) (mem.) (denying Domino’s Pizza, LLC’s petition for writ of certiorari).

¹⁸⁵ See, e.g., *Parker v. Metro. Life Ins.*, 121 F.3d 1006, 1010–11 (6th Cir. 1997).

¹⁸⁶ See generally *Price*, 375 F. Supp. 3d. at 1264.

issue will be which plaintiffs actually have standing to sue.¹⁸⁷ Aside from meeting general standing requirements, courts must decide what additional factors will be required for standing in these new website accessibility cases.¹⁸⁸ After plaintiffs establish the necessary standing to bring website accessibility lawsuits, defendants in these lawsuits may attempt to reach the seemingly high bar to a successful fundamental alteration or undue burden defense to ADA compliance.¹⁸⁹

These issues were not resolved after *Robles*¹⁹⁰ but, due to societal changes stemming from the COVID-19 pandemic, ADA protections should finally adapt and apply to website accessibility discrimination nationwide. Not only would this allow more individuals to experience the mainstream of an online society, but it could limit future disadvantages and harm faced by individuals during a pandemic as well.

¹⁸⁷ See, e.g., *id.* at 1268–71. See generally *Robles*, 913 F.3d at 898.

¹⁸⁸ See *Price*, 375 F. Supp. 3d at 1273.

¹⁸⁹ See 42 U.S.C. § 12182(b)(2)(A)(iii).

¹⁹⁰ See *Robles*, 913 F.3d at 911.