



THE IMPACT OF RECENT LEGISLATIVE AND JUDICIAL ACTIONS ON THE FUTURE OF WEBSITE ACCESSIBILITY

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INTRODUCTION

Individuals have increasingly relied on the internet to complete many of their daily activities.1 However, with the internet’s rise in importance, there has been a proliferation of accessibility issues.2 Many individuals with intellectual and physical disabilities are unable to use critical websites and technologies and, consequently, experience widespread exclusion.3

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1. See, e.g., Colleen McClain et al., The Internet and the Pandemic, PEW RSCH. CTR. (Sept. 1, 2021), https://www.pewresearch.org/internet/2021/09/01/the-internet-and-the-pandemic/.

2. See Jonathan Lazar & Paul Jaeger, Reducing Barriers to Online Access for People with Disabilities, ISSUES SCI. & TECH. (2011), https://issues.org/lazar-online-internet-access-people-with-disabilities/.

3. See id.

Title III of the Americans with Disabilities Act (“ADA”)<sup>4</sup> has proven an important avenue of relief.<sup>5</sup> From 2017 to 2021, the number of website accessibility cases filed in federal court increased from 814 to 2,895.<sup>6</sup> Predatory lawsuits—where a few individuals file numerous lawsuits—have predominated Title III litigation and drawn much criticism, especially from businesses.<sup>7</sup>

Both the judicial and legislative branches have attempted to find a solution. *Gil v. Winn-Dixie Stores, Inc.*, eventually vacated as moot,<sup>8</sup> drastically changed an existing circuit split by introducing the intangible barrier standard, which effectively granted businesses greater latitude to discriminate against individuals with disabilities.<sup>9</sup> The Online Accessibility Act (“OAA”),<sup>10</sup> which lapsed with the expiration of the 2021-2022 congressional term, attempted to clearly articulate standards for website compliance.<sup>11</sup> While both on the surface appear harmful to individuals with disabilities, *Gil* and the OAA illustrate an encouraging evolution toward a more uniform and clear system of internet compliance that will ultimately improve accessibility.<sup>12</sup>

Part I of this Commentary details the current circuit split. Part II explains the intangible barrier standard and *Gil v. Winn-Dixie Stores Inc.* Part III outlines the provisions of the OAA and its criticisms. Part IV explains the lasting impacts of *Gil* and the OAA, while Part V outlines suggestions for future legislation to improve website accessibility, such as (1) committing to one compliance standard, (2) shortening the notice

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4. 42 U.S.C. § 12182.

5. See Mayra Fornos, *The Disability-Rights Personal-Injury “Crossover” Case in Public Accommodations*, ADVOCATE (Mar. 2018), <https://www.advocatemagazine.com/article/2018-march/the-disability-rights-personal-injury-crossover-case-in-public-accommodations> (discussing the application of Title III of the ADA).

6. Kristina M. Launey & Minh N. Vu, *Federal Website Accessibility Lawsuits Increased in 2021 Despite Mid-Year Pandemic Lull*, SEYFARTH L. LLP (Mar. 21, 2022), <https://www.adatitleiii.com/2022/03/federal-website-accessibility-lawsuits-increased-in-2021-despite-mid-year-pandemic-lull/>.

7. See Sarah E. Zehentner, *The Rise of ADA Title III: How Congress and the Department of Justice Can Solve Predatory Litigation*, 86 BROOK. L. REV. 701, 708–12 (2021); Helia Garrido Hull, *Vexatious Litigants and the ADA: Strategies to Fairly Address the Need to Improve Access for Individuals with Disabilities*, 26 CORNELL J. L. & PUB. POL’Y 71, 74 (2016).

8. *Gil v. Winn-Dixie Stores, Inc. (Gil I)*, 993 F.3d 1266 (11th Cir. 2021), *vacated as moot*, 214 F.4th 775 (11th Cir. 2021).

9. See *id.* at 1280 (citing *Rendon v. Valleycrest Prods.*, 294 F.3d 1279, 1283–84 (11th Cir. 2002)).

10. Online Accessibility Act, H.R. 1100, 117th Cong. (2021).

11. See *id.* § 601(b)(1); *Congress Did Not Pass ADA Amendment Clarifying Web Accessibility Standards*, BUREAU OF INTERNET ACCESSIBILITY (Jan. 19, 2021), <https://www.boia.org/blog/congress-did-not-pass-ada-amendment-clarifying-web-accessibility-standards>.

12. See *Gil I*, 993 F.3d at 1280 (citing *Rendon*, 294 F.3d at 1283–84); H.R. 1100 § 601(b).

and cure period, and (3) delegating rulemaking and enforcement responsibilities to either the U.S. Access Board or the Department of Justice.

### I. CIRCUIT SPLIT

Title III of the ADA mandates that, “[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*.”<sup>13</sup> If a location is considered a public accommodation, it must provide auxiliary aids and services so that it is accessible to individuals with disabilities.<sup>14</sup> Title III defines public accommodations and lists examples, such as hotels, restaurants, and theaters.<sup>15</sup>

Aside from the Eleventh Circuit Court of Appeal’s formulation of the intangible barrier standard,<sup>16</sup> jurisdictions have followed two different approaches. Some jurisdictions find that all websites fall under the scope of Title III and must be accessible to individuals with disabilities.<sup>17</sup> Other jurisdictions apply the nexus standard and find that a website is protected by Title III only if there is a sufficient connection between the services that it offers and its physical location.<sup>18</sup>

#### A. All Websites Are Places of Public Accommodation Under Title III

The First and Seventh Circuits recognize that all websites are places of public accommodation.<sup>19</sup> Many of these courts find support in the language of the ADA.<sup>20</sup> For example, in *Carparts Distribution Center v. Automotive Wholesaler’s Association*, the court emphasized that Title III listed both “travel service” and “service establishments” as public accommodations.<sup>21</sup> Since travel services allowed customers to do business

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13. 42 U.S.C. § 12182(a) (emphasis added).

14. *Id.* § 12182(b)(2)(A)(iii).

15. *Id.* § 12181(7).

16. *See Gil I*, 993 F.3d at 1280.

17. *See, e.g., Nat’l Ass’n of the Deaf v. Netflix*, 869 F. Supp. 2d 196, 200 (D. Mass. 2012) (“This argument fails because the fact that the ADA does not include web-based services as a specific example of a public accommodation is irrelevant.”).

18. *See, e.g., Robles v. Domino’s Pizza, LLC*, 913 F.3d 898, 905 (9th Cir. 2019) (“This nexus between Domino’s website and app and physical restaurants—which Domino’s does not contest—is critical to our analysis.”).

19. *See, e.g., Carparts Distrib. Ctr. v. Auto. Wholesaler’s Ass’n*, 37 F.3d 12, 19 (1st Cir. 1994); *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999).

20. *See Carparts Distrib. Ctr.*, 37 F.3d at 19 (citing 42 U.S.C. § 12181(7)(f)).

21. *See id.*

without being present in their buildings, the court reasoned that public accommodations were not limited to physical locations.<sup>22</sup>

Other courts explain that the ADA's broad purpose is to "end widespread discrimination against disabled individuals."<sup>23</sup> Even though it was written in 1990 and could not have contemplated the rise of the internet, some courts reason that "Congress intended the ADA to adapt to changes in technology."<sup>24</sup> Therefore, the public accommodations listed in Title III are not exclusive, and the absence of "websites" is not fatal.<sup>25</sup>

Some courts on this side of the circuit split also note that adopting the nexus standard creates absurd results.<sup>26</sup> If defendants are required only to make information on their websites that is related to their physical locations accessible, but not other types of information, design problems and confusion will proliferate.<sup>27</sup> As one court observed: "A rigid adherence to a physical nexus requirement leaves potholes of discrimination in what would otherwise be a smooth road to integration."<sup>28</sup>

*B. A Website Must Have a Nexus to a Physical Location to Be Covered by Title III*

On the other side of the circuit split, the Third, Sixth, and Ninth Circuits apply the nexus standard, finding that only websites with a sufficient connection to the defendant's physical location must be accessible to individuals with disabilities.<sup>29</sup> Utilizing the *noscitur a sociis* statutory canon—which explains that the definition of a word should be derived from the other words around it—these courts emphasize that all of the locations listed in Title III are physical locations.<sup>30</sup> Websites are not physical locations and, therefore, not protected unless the physical location offers goods or services through it.<sup>31</sup>

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22. *Id.*

23. Nat'l Fed'n of the Blind v. Scribd Inc., 97 F. Supp. 3d 565, 573 (D. Vt. 2015).

24. See Nat'l Ass'n of the Deaf v. Netflix, 869 F. Supp. 2d 196, 200–01 (D. Mass. 2012) (citing H.R. REP. NO. 101-485(II), at 108 (1990)).

25. See *id.*

26. See Andrews v. Blick Art Materials, LLC, 268 F. Supp. 3d 381, 396–97 (E.D.N.Y. 2017).

27. See *id.* at 396.

28. *Id.* at 397.

29. See, e.g., Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1011 (6th Cir. 1997); Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114 (9th Cir. 2000); Mahoney v. Herr Foods, Inc., No. 19-5759, 2020 U.S. Dist. LEXIS 72333, at \*8–10 (E.D. Pa. Apr. 24, 2020).

30. Parker, 121 F.3d at 1014 (citing *Noscitur a Sociis*, BLACK'S LAW DICTIONARY (6th ed. 1990)).

31. See *id.*

For example, the court in *Robles v. Domino's Pizza, LLC*<sup>32</sup> found that Domino's Pizza had violated Title III after the plaintiff was unable to use its application and website to order pizza.<sup>33</sup> While the defendant's website was not a place of public accommodation, the court found that it was still protected by Title III because of its connection to the restaurant.<sup>34</sup> It affirmed the lower court's injunctive order, mandating the defendant to make its website compliant with the Web Content Accessibility Guidelines ("WCAG") 2.0.<sup>35</sup>

The WCAG 2.0 was written by W3C, a private company that "make[s] content accessible to a wider range of people with disabilities."<sup>36</sup> It is guided by four main principles: perceivability, operability, understandability, and robustness.<sup>37</sup> Under each principle are guidelines and success criteria.<sup>38</sup> For example, the perceivability principle includes guideline 1.1.1, which covers the use of text alternatives for non-text content.<sup>39</sup> The success criteria serves as an objective indicator and is divided into levels A, AA, and AAA, indicating the level of the website's conformity to the guideline.<sup>40</sup> Level A is the minimum level of conformity, while level AAA is the highest level of conformity.<sup>41</sup>

## II. *GIL V. WINN-DIXIE STORES, INC.*

### A. *The Intangible Barrier Standard*

*Gil v. Winn-Dixie Stores, Inc.* disrupted the already controversial circuit split by introducing a third standard for website accessibility.<sup>42</sup> Plaintiff Juan Carlos Gil ("Gil") was legally blind and had been shopping and refilling prescriptions in person at Defendant Winn-Dixie Stores ("Winn-Dixie") for fifteen years.<sup>43</sup> However, when he tried to use Winn-Dixie's website for the same services, he found that it was inaccessible with the screen readers he used to read online content.<sup>44</sup>

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32. 913 F.3d 898 (9th Cir. 2019).

33. *See id.* at 902–03, 905–06.

34. *See id.* at 905.

35. *See id.* at 907.

36. *Web Content Accessibility Guidelines (WCAG) 2.0*, W3C (Dec. 11, 2008), <https://www.w3.org/TR/WCAG20/>.

37. *Id.*

38. *See id.*

39. *See id.*

40. *See id.*

41. *See What Are the Levels of WCAG Compliance?*, ACCESSIBLE METRICS (Nov. 5, 2019), <https://www.accessiblemetrics.com/blog/what-are-the-levels-of-wcag-compliance/>.

42. *See Gil I*, 993 F.3d 1266, 1280 (11th Cir. 2021).

43. *See id.* at 1270.

44. *See id.* at 1271.

The United States District Court for the Southern District of Florida first heard the case and ruled in favor of Gil.<sup>45</sup> Applying the nexus standard, it found that the inaccessibility of Winn-Dixie's website denied Gil "equal access to the services, privileges, and advantages of Winn-Dixie's physical stores and pharmacies."<sup>46</sup> It also mandated that Winn-Dixie make its website compliant with the WCAG 2.0.<sup>47</sup>

The Eleventh Circuit Court of Appeals reversed, rejecting both sides of the current circuit split and instead adopting the intangible barrier standard.<sup>48</sup> It explained that "the inaccessibility of the website must serve as an 'intangible barrier' to [plaintiff's] ability to communicate with [defendant's] physical stores, which results in [plaintiff] being excluded, denied services, segregated, or otherwise treated differently from other individuals in the physical stores."<sup>49</sup> In other words, a defendant would violate Title III by failing to furnish an auxiliary aid or service that was necessary for the plaintiff to enjoy the "goods, services and privileges" of its physical location.<sup>50</sup> However, the aid must be "necessary," not just "reasonable."<sup>51</sup>

While some have interpreted *Gil* as merely expanding the nexus standard, the majority opinion explicitly disaffirmed that approach, "find[ing] no basis for [the nexus standard] in in the statute or in . . . precedent."<sup>52</sup> Instead, it articulated the intangible barrier standard as a separate and much narrower approach to website accessibility.<sup>53</sup> The nexus standard requires a business to make its websites accessible if it has a connection to its physical locations.<sup>54</sup> In contrast, the intangible barrier standard requires only a website to be accessible if it is the "sole access point" for the physical store or a "point of sale."<sup>55</sup> If the individual

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45. See *Gil v. Winn-Dixie Stores, Inc. (Gil II)*, 257 F. Supp. 3d 1340, 1349 (S.D. Fla. 2017).

46. *Gil v. Winn-Dixie Stores, Inc. (Gil III)*, 242 F. Supp. 3d 1315, 1321 (S.D. Fla. 2017).

47. *Gil II*, 257 F. Supp. at 1350.

48. See *Gil I*, 993 F.3d at 1280.

49. *Id.* at 1280 (citing *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279, 1283–84 (11th Cir. 2002)).

50. *Id.* at 1278 (quoting *Rendon*, 294 F.3d at 1283).

51. See *id.* at 1282 (quoting 42 U.S.C. § 12182(b)(2)(A)(iii)).

52. *Id.* at 1281; see, e.g., Amelia Hensel, *Disability Law from Stair Flights to Websites: An Argument for Amending the Americans with Disabilities Act to Include Title VI That Applies to Online Spaces*, 45 U. ARK. L. REV. 509, 524 (explaining that "this expansion of the nexus test continued the trend of discrimination").

53. See *Gil I*, 993 F.3d at 1280.

54. See *supra* Section I.B.

55. See *Gil I*, 993 F.3d at 1278–80.

can access the physical store in any way, like in Gil's case, by physically going there, then the defendant's website does not need to be accessible.<sup>56</sup>

*B. Judge Pryor's Dissent*

In contrast, Judge Pryor's dissent was much more favorable to individuals with disabilities and emphasized the ADA's broad purpose.<sup>57</sup> Taking an expansive view of the word "necessary," Judge Pryor concluded that Winn-Dixie had violated Title III by failing to provide individuals with disabilities a comparable experience to that of non-disabled individuals.<sup>58</sup> Specifically, she highlighted the inconvenience and lack of privacy that individuals with disabilities experienced having to refill prescriptions, use coupons, and locate stores in person when compared to non-disabled individuals who could complete those same functions online.<sup>59</sup>

Judge Pryor also refuted the majority's formulation of the intangible barrier standard, attacking the cases it cited in support as "establish[ing] only a sufficient, not a necessary, condition for stating a [Title III] claim."<sup>60</sup> She asserted that *Robles v. Domino's Pizza, LLC* and *Rendon v. Valleycrest Prods., Ltd.* were not decided based on whether the websites were the only point of access to the defendants' physical stores.<sup>61</sup> Rather, the courts simply found that the defendants violated Title III because their websites "prevented [the plaintiffs] from accessing . . . public accommodation[s] offerings."<sup>62</sup>

Further, Judge Pryor explained that Gil's ability to refill prescriptions and use coupons at Winn-Dixie's physical stores did not nullify his claim because he could not use Winn-Dixie's website to complete the same functions.<sup>63</sup> The majority's contradictory holding, Judge Pryor remarked, "[gave] stores and restaurants license to provide websites and apps that are inaccessible to visually-impaired customers so long as those customers can access an inferior version of [the] publication accommodations' offerings."<sup>64</sup> Importantly, while Judge Pryor's view of website accessibility was more aligned with the pre-

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56. *See id.* at 1279 ("Although Gil was not always happy with the speed or privacy of the service he received at the pharmacy, nothing prevented Gil from refilling his prescriptions during his time as a Winn-Dixie customer.")

57. *See id.* at 1286 (Pryor, J., dissenting) (citing 42 U.S.C. § 12182(a)).

58. *See id.* at 1290 (citing *A.L. v. Walt Disney Parks & Resorts U.S., Inc.*, 900 F.3d 1270, 1296 (11th Cir. 2018)).

59. *See id.* at 1290–92.

60. *Id.* at 1297.

61. *Id.*

62. *Id.*

63. *Id.* at 1298.

64. *Id.* at 1299.

existing circuit split and recognized a greater right of individuals with disabilities to access technology, courts and the legislative branch have increasingly followed the majority's more constricted view.<sup>65</sup>

### III. THE ONLINE ACCESSIBILITY ACT

The OAA proposed to amend the ADA to include a Title VI, which would establish the WCAG 2.0 level A or AA as the standard of compliance for business websites.<sup>66</sup> However, it also allowed businesses that were unable, or simply unwilling, to change their websites to avoid liability by offering an “alternative means of access for individuals with disabilities that is equivalent to access the content available on such website[s] or mobile application[s].”<sup>67</sup>

If a potential plaintiff determined that a website was not compliant with the OAA, it could seek administrative remedies by giving the owner of the website or mobile application ninety days to fix the issues and then filing a complaint with the Department of Justice.<sup>68</sup> The Attorney General would then investigate the complaint and decide to bring a civil action on behalf of the plaintiff.<sup>69</sup> Only after exhausting all of these requirements could a plaintiff bring an action in court.<sup>70</sup>

The OAA was heavily opposed by disability rights advocates because of its confusing standards for compliance and overly burdensome exhaustion of remedies requirements.<sup>71</sup> Additionally, the OAA only required “substantial” compliance with the WCAG 2.0, which raised questions about the extent to which businesses would need to act to follow

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65. See *id.* at 1280–81, 1299; *Carparts Distrib. Ctr. v. Auto. Wholesaler's Ass'n*, 37 F.3d 12, 19 (1st Cir. 1994); *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 905 (9th Cir. 2019); see, e.g., Online Accessibility Act, H.R. 1100, 117th Cong. § 601(b) (2021).

66. H.R. 1100 § 601(b)(1)

67. *Id.* § 601(b)(2).

68. *Id.* § 602(b)–(c).

69. *Id.* § 602(d)(1)(B).

70. *Id.* § 603.

71. See *In 2021 the Proposed Online Accessibility Act in U.S. Congress Is [STILL] Bad for Digital Inclusion*, LAW OFF. OF LAINEY FEINGOLD (Apr. 3, 2021), <https://www.lflegal.com/2020/10/ada-backlash/> (“The new bill is framed as a step forward for digital inclusion and as an expansion of the Americans with Disabilities Act. More accurately it should be called a bill to limit web accessibility coverage and lawsuits.”); Letter from Nat'l Disability Rts. Network, to Ted Budd, Representative, U.S. H.R., & Lou Correa, Representative, U.S. H.R. (Oct. 14, 2020) (on file with author) [hereinafter Letter from Nat'l Disability Rts. Network] (explaining that the OAA undermines the ADA's purpose of safeguarding the rights of individuals with disabilities and “just allow[s] businesses to put off coming into compliance with the law”); Ken Nakata, *Online Accessibility Act: Review and Legal Analysis*, COVERAGE ACCESSIBILITY (Jan. 2021), <https://convergeaccessibility.com/2020/10/04/online-accessibility-act-review-and-legal-analysis/>.



the law.<sup>72</sup> Would a business be compliant simply if most of its website was accessible, or did it depend on the importance of the features that were inaccessible? It was also unclear the alternatives that businesses could use to make their websites compliant with the OAA and how the Department of Justice and U.S. Access Board were supposed to exercise their rulemaking and enforcement authority.<sup>73</sup>

While some have simply argued for a better definition of acceptable alternative means, disability rights advocates criticize this provision on a more fundamental level.<sup>74</sup> Allowing businesses to avoid spending the necessary money and effort to make their websites WCAG compliant will perpetuate the current landscape of inaccessibility.<sup>75</sup> Many businesses will make minor changes to their websites and claim they have fulfilled their obligations, even if their websites are still largely inaccessible.<sup>76</sup> As one critic expressed: “What could be equivalent to independent, confidential 24-hour access to digital content that accessibility provides?”<sup>77</sup>

The exhaustion of remedies requirement also would have forced plaintiffs to wait almost a year before bringing a claim themselves in court.<sup>78</sup> However, the National Disability Rights Network argued that “[t]he ADA makes clear that people with disabilities have the right to immediately go to court to enforce their rights.”<sup>79</sup> Under Title III, plaintiffs can also be awarded up to \$50,000 for defendants’ first time violations and \$100,000 for subsequent violations.<sup>80</sup> However, under the OAA, the remedies were limited to \$20,000 for first time offenses and \$50,000 for subsequent offenses.<sup>81</sup>

#### IV. THE LASTING IMPACTS OF *GIL* AND THE OAA

Despite their faults, *Gil* and the OAA should inspire hope for the future. Their attempts at establishing a system with definitive standards

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72. H.R. 1100 § 601(b)(1); Richard M. Hunt, *The Online Accessibility Act of 2020 - Does It Do What It Needs to Do?*, ACCESSIBILITY DEF. (Oct. 4, 2020), <https://accessdefense.com/?p=5549>.

73. See *In 2021 the Proposed Online Accessibility Act in U.S. Congress Is [STILL] Bad for Digital Inclusion*, *supra* note 71.

74. See Hensel, *supra* note 52, at 535–36; *In 2021 the Proposed Online Accessibility Act in U.S. Congress Is [STILL] Bad for Digital Inclusion*, *supra* note 71.

75. See *In 2021 the Proposed Online Accessibility Act in U.S. Congress Is [STILL] Bad for Digital Inclusion*, *supra* note 71.

76. See *id.*

77. *Id.*

78. See Online Accessibility Act, H.R. 1100, 117th Cong. § 602(c) (2021).

79. Letter from Nat’l Disability Rts. Network, *supra* note 71.

80. Nakata, *supra* note 71.

81. See *id.*

and uniform enforcement should spur future action toward accomplishing this goal.

Currently, there is no effective system of enforcement for website accessibility.<sup>82</sup> Predatory lawsuits, however, have filled the void.<sup>83</sup> In fact, many of the plaintiffs in the cases referenced in this Commentary may be considered predatory plaintiffs.<sup>84</sup> For example, as of 2017, Gil had filed 108 lawsuits, alleging that websites were not accessible.<sup>85</sup> Shortly after his suit against Domino's, Robles filed a suit against Pizza Hut alleging very similar claims.<sup>86</sup>

Because of predatory plaintiffs' indiscriminate methods of filing claims that target businesses of all sizes and financial statuses, they have been heavily criticized.<sup>87</sup> However, in the vast majority of cases, the service or good in question truly is inaccessible.<sup>88</sup> By arguing that they should not be held responsible for Title III violations, businesses discount the unequal treatment that disabled individuals experience.<sup>89</sup> As Gil stated in the *Palm Beach Post*: "We live in the United States where we beat our chests and say we're the No. 1 place to be. But there are holes in it. It's very disconcerting that it's now 2018 and websites aren't accessible to the visually impaired. It dismisses a whole population."<sup>90</sup>

Albert Dytch, who has filed numerous Title III lawsuits alleging inaccessibility of physical locations, elaborated on this perspective.<sup>91</sup> He explained that, while he made money from the lawsuits, "he was fighting not just against the difficulties, barriers and humiliations he routinely faces as a disabled person trying to go about his life, but on behalf of a

82. See Letter from Clark Rachfal, Am. Council of the Blind, et al., to Kristen Clarke, U.S. Assistant Att'y Gen., Dep't of Just. (Feb. 28, 2022), <https://nfb.org/programs-services/advocacy/policy-statements/letter-assistant-attorney-general-regarding-website>.

83. See Zehentner, *supra* note 7, at 708–12.

84. See, e.g., John O'Brien, *Lawyers Awarded \$100K After Historic Verdict for Blind Internet Users; Winn-Dixie Appealing*, FORBES (Oct. 2, 2017, 11:03 AM), <https://www.forbes.com/sites/legalnewsline/2017/10/02/lawyers-awarded-100k-after-historic-verdict-for-blind-internet-users-winn-dixie-appealing/?sh=23639d726b2e>.

85. See *id.*

86. See *Robles v. Yum! Brands, Inc.*, No. 16-cv-08211, 2018 U.S. Dist. LEXIS 13247, at \*4–5 (C.D. Cal. Jan. 24, 2018).

87. See Mark Pulliam, *The ADA Litigation Monster*, CITY J. (Spring 2017), <https://www.city-journal.org/html/ada-litigation-monster-15128.html>.

88. See, e.g., *Gil II*, 257 F. Supp. 3d 1340, 1342 (S. D. Fla. 2017).

89. See Pulliam, *supra* note 87.

90. Jane Musgrave, *Why This Legally Blind Athlete Has Filed 175 Lawsuits over Websites*, PALM BEACH POST (Nov. 22, 2018, 11:06 AM), <https://www.palmbeachpost.com/story/news/crime/2018/11/09/why-this-legally-blind-athlete-has-filed-175-lawsuits-over-websites/8311827007/>.

91. See Lauren Markham, *The Man Who Has Filed More Than 180 Disability Lawsuits*, N.Y. TIMES, <https://www.nytimes.com/2021/07/21/magazine/americans-with-disabilities-act.html> (Aug. 29, 2021). Though it focuses on ADA claims related to the inaccessibility of physical locations, Markham's article is also relevant to website accessibility. *Id.*

larger community.”<sup>92</sup> Without the lawsuits, Dytch reasoned that businesses would be unlikely to voluntarily incur expenses to improve accessibility.<sup>93</sup> In his experience, merely asking for change was futile.<sup>94</sup>

Yet, predatory lawsuits are not a long-term solution. A system predicated on many expensive and time-consuming lawsuits is harmful to both businesses and judicial efficiency and not sustainable.<sup>95</sup> Instead, a more uniform, national system of enforcement is necessary. *Gil* and the OAA show important movement in the right direction.<sup>96</sup> Both will prompt further judicial and legislative action, hopefully resulting in more definitive and clear standards for internet accessibility.<sup>97</sup>

The Supreme Court may decide the circuit split in the near future.<sup>98</sup> It previously considered a writ of certiorari filed by Domino’s in *Domino’s Pizza LLC v. Robles*, but ultimately denied it.<sup>99</sup> *Gil*’s expansion of the circuit split further complicates the issue.<sup>100</sup> Even though it later was determined moot, Eleventh Circuit courts may apply the intangible barrier standard, and, consequently, leave businesses with no guidance on when they must make their websites accessible.<sup>101</sup> The Supreme Court is the only judicial authority that can give a final answer.<sup>102</sup>

The media traction that the OAA created, and the debate it prompted, will bring attention to the need for website compliance.<sup>103</sup> There have been numerous articles written about the OAA, and businesses that were previously unaware of the WCAG and Title III likely will make their websites compliant.<sup>104</sup> Importantly, the OAA also

92. *Id.*

93. *See id.*

94. *See id.*

95. *See* Pulliam, *supra* note 87.

96. *See generally Gil I*, 993 F.3d 1266 (11th Cir. 2021); Online Accessibility Act, H.R. 1100, 117th Cong. § 601 (2021).

97. *See* Alison Frankel, *11th Circuit’s Winn-Dixie Ruling Deepens Confusion on ADA and Digital Access*, REUTERS (Apr. 8, 2021, 6:01 PM), <https://www.reuters.com/article/us-otc-ada/11th-circuits-winn-dixie-ruling-deepens-confusion-on-ada-and-digital-access-idUSKBN2BV2UU>; Letter from Nat’l Disability Rts. Network, *supra* note 71.

98. *See* Frankel, *supra* note 97 (“The Supreme Court denied Domino’s petition – but now Winn-Dixie plaintiff Gil can cite the clear split between the 9th and 11th Circuits.”).

99. *Domino’s Pizza LLC v. Robles*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/dominos-pizza-llc-v-robles/> (last visited Mar. 28, 2023).

100. *See* Rebecca Klein, *Gil v. Winn-Dixie: A Landmark Ruling is Reversed*, 3PLAY MEDIA (Apr. 27, 2021), <https://www.3playmedia.com/blog/gil-versus-winn-dixie-is-reversed/>.

101. *See id.*

102. *See* Frankel, *supra* note 97.

103. *See, e.g.*, Press Release, Ted Budd, Representative, U.S. H.R., Rep. Ted Budd Introduces Bipartisan Legislation to Stop Frivolous Lawsuits (Feb. 18, 2021) (on file with author).

104. *See, e.g.*, Tamara El-Waylly, *This House Bill Could Finally Offer Businesses Clarity on ADA Web Accessibility*, BUILT IN (Oct. 27, 2020), <https://builtin.com/operations/web->

serves as a model for future legislation that attempts a similar objective. Legislators should take note of the criticisms that the OAA has received, as well as its benefits, to write legislation that creates binding but workable guidelines for businesses to make their websites accessible, while limiting the consequences for individuals with disabilities.<sup>105</sup>

#### V. RECOMMENDATIONS FOR FUTURE LEGISLATION

There are three important recommendations for future legislative efforts. First, the importance of including a definite standard in any future piece of legislation cannot be overemphasized.<sup>106</sup> However, choosing one standard becomes more difficult with the W3C frequently releasing new versions of the WCAG.<sup>107</sup> While periodic revisions are necessary, frequent, major changes undermine its widespread applicability. Instead of attempting to perfect one standard, the W3C and legislators should focus on improving familiarity with the existing standards to improve business' abilities to make the necessary changes to their websites.

Second, in responding to the dangers of predatory lawsuits, the OAA overcorrected itself, adding notice requirements that severely limited a plaintiff's ability to seek redress from the courts.<sup>108</sup> However, the idea of notice provisions is logical because it decreases the damages and attorneys' fees that a business must incur over what could be a simple violation, such as having a small portion of text that is incompatible with a screen reader.<sup>109</sup> One solution, to strike a balance between the extremes of the OAA and the current scheme, is to require a plaintiff to give notice to a business and allow it a short period of time to cure the defect. If the defect still exists, then the plaintiff could file a lawsuit. Unlike the OAA, this proposal includes a minimal number of steps before allowing a plaintiff to file a complaint and therefore should not be burdensome.<sup>110</sup> At the same time, it provides businesses with the necessary time to fix the violation.

While others have also recommended changing the notice and cure period, many of their suggestions would negatively impact disabled

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accessibility-ADA-compliance ("Many businesses are surprised to learn that they might be violating federal law and are unsure on how to shield themselves.").

105. See *supra* Part III.

106. See Nakata, *supra* note 71.

107. See, e.g., *W3C Accessibility Guidelines (WCAG) 3.0*, W3C (Dec. 7, 2021), <https://www.w3.org/TR/wcag-3.0/>.

108. See Letter from Nat'l Disability Rts. Network, *supra* note 71.

109. See Nakata, *supra* note 71.

110. See *supra* Part III.

individuals' abilities to seek relief.<sup>111</sup> For example, Amelia Hensel explained that some businesses may ignore plaintiffs' notices of violations, and without any oversight, would be unlikely to cure the defects in their websites.<sup>112</sup> As a result, Hensel proposed that the U.S. Access Board should support businesses in fixing accessibility violations and that plaintiffs should report violations to the U.S. Access Board as well as the business owner to ensure that notice is received.<sup>113</sup> However, imposing additional burdens on plaintiffs would further constrain their abilities to seek relief and punish them for issues beyond their control.<sup>114</sup> Instead, shortening the notice and cure period will encourage businesses to timely remedy violations, while still recognizing that the ultimate goal is to improve website accessibility without predatory lawsuits.<sup>115</sup>

Lastly, if the OAA had passed, it would have required considerable support and communication between different governmental bodies. The U.S. Access Board, was charged with creating specific regulations for website accessibility.<sup>116</sup> But enforcement still was delegated to the Department of Justice.<sup>117</sup> The resulting confusion of asking the Department of Justice to interpret and enforce regulations created by the U.S. Access Board could have been problematic.<sup>118</sup>

Two solutions become immediately apparent. First, the Department of Justice could publish and enforce the regulations itself. This option would be preferable, as it currently enforces Title II and some parts of Title III.<sup>119</sup> In the past, the Department of Justice has been reluctant to publish any regulations or take any concrete action about website accessibility.<sup>120</sup>

However, in March 2022, the Department released guidance on how businesses and state and local governments can make their websites Title II and Title III compliant.<sup>121</sup> The guidance listed common website accessibility issues, like not having captions for videos or being conducive to keyboard navigation, and included links to helpful resources like the

111. *See, e.g.*, Hensel, *supra* note 52, at 538–39.

112. *See id.*

113. *See id.*

114. *See* Letter from Nat'l Disability Rts. Network, *supra* note 71.

115. *See supra* Part IV.

116. *See* Kristina Launey, *Renewed Attempt at ADA Web Accessibility Legislation*, JD SUPRA (Apr. 1, 2021), <https://www.jdsupra.com/legalnews/renewed-attempt-at-ada-web-3373818/>.

117. Online Accessibility Act, H.R. 1100, 117th Cong. § 601(c)(2) (2021).

118. *See id.* § 601(c).

119. *See* U.S. Dep't of Just. C.R. Div., *Review Laws, Regulations & Standards*, ADA, [https://www.ada.gov/2010\\_regs.htm](https://www.ada.gov/2010_regs.htm) (last visited Mar. 28, 2023).

120. *See* Zehentner, *supra* note 7, at 720–23.

121. *See* U.S. Dep't of Just. C.R. Div., *Guidance on Web Accessibility and the ADA*, ADA (March 18, 2022), <https://www.ada.gov/resources/web-guidance/>.

WCAG.<sup>122</sup> Commenting on the guidance, Assistant Attorney General Kristen Clarke said that the Department of Justice, “ha[s] heard the calls from the public on the need for more guidance on website accessibility, particularly as our economy and society become increasingly digitized.”<sup>123</sup>

In an even more encouraging development, in July 2022, the Department of Justice announced that it will release a Notice of Proposed Rulemaking with regulations for state and local governments to make their websites accessible.<sup>124</sup> While not applicable to private businesses, it signals the Department of Justice’s dedication to the issue and could mean that it will release regulations for private businesses soon.<sup>125</sup>

Second, the U.S. Access Board could be responsible for drafting and enforcing regulations.<sup>126</sup> It is currently responsible for drafting information and communication standards under section 508 of the Rehabilitation Act of 1973.<sup>127</sup> The Act serves a similar purpose to the intended purpose of the OAA.<sup>128</sup> It requires “federal agencies to create, buy, and use Information and Communication Technology (ICT) that is accessible to people with disabilities.”<sup>129</sup> In the standards released in 2018, the Access Board incorporated the WCAG 2.0, which is one of the features of the OAA.<sup>130</sup> Thus, the U.S. Access Board would be performing essentially the same role as it does under section 508 with additional enforcement responsibilities.<sup>131</sup>

122. *See id.*

123. Press Release, U.S. Dep’t of Just. Off. of Pub. Affs., Justice Department Issues Website Accessibility Guidance Under the Americans with Disabilities Act (March 18, 2022), <https://www.justice.gov/opa/pr/justice-department-issues-web-accessibility-guidance-under-americans-disabilities-act>.

124. *See* Nondiscrimination on the Basis of Disability: Accessibility of Web Information and Services of State and Local Governments (Spring 2022), <https://www.reginfo.gov/public/do/eAgendaViewRule?RIN=1190-AA79&pubId=202204> (to be codified at 28 C.F.R. pt. 35).

125. *See id.*

126. *See About the U.S. Access Board*, U.S. ACCESS BD., <https://www.access-board.gov/about/rulemaking.html> (last visited Mar. 28, 2023). *But see* Hensel, *supra* note 52, at 536–38 (describing the difficulties the U.S. Access Board would have if given authority over the OAA and arguing that “the Access Board’s experience would not allow for a seamless transition from regulating government websites in 2000 to regulating privately owned websites under [the OAA] decades later”).

127. Rehabilitation Act of 1973, 29 U.S.C. § 794d(a)(2).

128. *See, e.g., Section 508 Compliance*, LEVEL ACCESS, <https://www.levelaccess.com/accessibility-regulations/section-508-rehabilitation-act/> (last visited Mar. 28, 2023) (showing how businesses interpret section 508).

129. *Id.*

130. *See id.*

131. *See* Rehabilitation Act of 1973 § 794d(a)(2). The U.S. Access Board also has experience in enforcing the Architectural Barriers Act of 1968 and investigating complaints submitted by individuals. *See File an Architectural Barriers Act Complaint*, U.S. ACCESS BD., <https://www.access-board.gov/enforcement/> (last visited Mar. 28, 2023). If a business is found not compliant with the Act, “the Board works with the[]till responsible entities to

## CONCLUSION

The issue of website accessibility has attracted much judicial and legislative attention in recent years.<sup>132</sup> However, on the surface, most of it appears to hurt individuals with disabilities. The Eleventh Circuit found that websites were not covered under Title III of the ADA and articulated the intangible barrier standard that was narrower than either side of the circuit split.<sup>133</sup> Additionally, the OAA created a new scheme for plaintiffs to bring Title III claims against businesses.<sup>134</sup> It received much criticism for its pro-business stance.<sup>135</sup> Yet, underneath the surface, these actions should inspire a sense of optimism for the future. The extremity of *Gil* and the OAA will spur further legislative and judicial action. For example, the Supreme Court is more likely to resolve the split than in the past.<sup>136</sup> Also, legislators can learn many important lessons from the OAA's benefits and drawbacks. Though the landscape of website accessibility is only becoming more complex, the flurry of action taking place will promote positive change for individuals with disabilities.

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develop a plan to bring the facility into compliance.” *How Complaints Are Investigated*, U.S. ACCESS BD., <https://www.access-board.gov/enforcement/investigation.html> (last visited Mar. 28, 2023).

132. See, e.g., *Gil I*, 993 F.3d 1266 (11th Cir. 2021); Online Accessibility Act, H.R. 1100, 117th Cong. § 601 (2021).

133. See *Gil I*, 993 F.3d at 1280 (citing *Rendon v. Valleycrest Prods*, 294 F.3d 1279, 1283–84 (11th Cir. 2002)).

134. See generally H.R. 1100.

135. See, e.g., Letter from Nat'l Disability Rts. Network, *supra* note 71; Nakata, *supra* note 71.

136. See Frankel, *supra* note 97.