

APPLYING TITLE III OF THE AMERICANS WITH DISABILITIES ACT TO WEBSITES: USING CURRENT EXEMPTIONS TO CREATE AN ADAPTABLE SOLUTION THAT DOES NOT OVERLY BURDEN BUSINESS

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ABSTRACT: Whether websites meet the definition of places of accommodation under Title III of the Americans with Disabilities Act (Title III) has been debated in numerous articles and created a split in the circuit courts. This split is the result of thousands of suits, brought primarily by the same plaintiffs, and has led to different interpretations of what it means to be a “place of public accommodation.” So far, three circuit courts have held that places of public accommodation are not limited to physical places, while four other circuit courts have developed tests that compare the closeness of the services offered online to those offered in a physical store. Regardless of the test, it appears that these seven circuit courts are willing to agree that websites are places of public accommodation in some circumstances, but disagree on how broadly to apply accessibility legislation to websites. Recently, the Department of Justice (DOJ) has taken steps to ensure that websites are accessible to people with disabilities. The DOJ announced its intent to amend its current Title II regulations and provide technical standards for public entities to ensure that their websites are accessibility compliant. It is predicted by attorneys practicing in ADA Title III that new Title II regulations will lead to the DOJ releasing long-awaited Title III regulations. Considering the circuit split and the recent efforts of the DOJ, it is likely that websites will be viewed as “places of accommodation” or will need to comply with Title III to some extent in the near future. However, even if this prediction that new Title III regulations are forthcoming proves false, something needs to be done to fix the frustration this ambiguity and lack of guidance has caused. Because of the cross-boundary nature of the internet, having different tests to determine whether a website is a place of public accommodation is inefficient. Instead, a solution should start with the premise that websites are places of accommodation. From there, three issues should be addressed with the implementation of website accessibility regulations: (1) identifying which websites would not need to comply with accessibility requirements using current Title III exemptions and determining who should bear the burden of compliance; (2) carving out a narrow set of new website-specific exemptions where providing accommodations would be overly burdensome or superfluous; and (3) creating clear, adaptable guidelines that businesses can follow to ensure accessibility and protect themselves from litigation. These issues can be confronted efficiently by using the most common accessibility compliance standard and applying similar “real world” tests and implementation strategies of Title III to the “virtual world” of websites. This method could mitigate some of the difficulties of applying Title III to websites, minimize website accessibility litigation, and provide clear tests and remedies to courts.

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On July 26, 1990, President George H.W. Bush signed the Americans with Disabilities Act (ADA) into law.¹ The goal of the ADA is to prevent discrimination and “to assure equality of opportunity” so those with disabilities are able to fully participate in American life including employment opportunities, purchasing services, and participating in government programs and services at the local and State level.² Unfortunately, the ADA’s spirit of inclusivity and opportunity has not extended its application to the online world.³ Currently, the circuit courts are split on whether to apply Title III of the ADA to websites.⁴ This failure to uniformly apply the ADA has left a large portion of the online world inaccessible to people with disabilities.⁵

Despite this, it appears that websites will likely be included under Title III of the ADA soon. In July 2022, the Department of Justice (DOJ) announced that it intended to “publish a Notice of Proposed Rulemaking (NPRM) to amend its Title II ADA regulation to provide technical standards to assist public entities in complying with their existing obligations to make their websites accessible to individuals with disabilities.”⁶ Title II of the ADA applies to state and local governments, like Title III’s application to businesses and nonprofit service providers.⁷ Attorneys practicing in ADA Title III believe that the DOJ’s announcement of proposed rulemaking will lead to clear regulations on website accessibility that will serve as a template for future regulations for private businesses under Title III of the ADA.⁸

1. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213; *see also* U.S. Dep’t of Just. C.R. Div., *Introduction to the ADA*, ADA.GOV, https://www.ada.gov/ada_intro.htm [<https://perma.cc/W2R3-9Q2M>].

2. 42 U.S.C. § 12101.

3. *See infra* Part I.

4. The Third, Sixth, and Ninth Circuits adopted a narrower reading of the ADA limiting “places of accommodation” to physical locations. *See Peoples v. Discover Fin. Servs., Inc.*, 387 F. App’x 179, 183 (3d Cir. 2010); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114–15 (9th Cir. 2000); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010–11 (6th Cir. 1997). The First, Second, and Seventh Circuits have held that websites are places of public accommodation regardless of their connection with a physical store. *See Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 393 (E.D.N.Y. 2017); *Morgan v. Joint Admin. Bd.*, 268 F.3d 456, 459 (7th Cir. 2001); *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999); *see also Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New England*, 37 F.3d 12, 19 (1st Cir. 1994).

5. An analysis of the homepages of the top 1,000,000 websites showed that 96.8% had accessibility issues and were potentially inaccessible to users with disabilities. *The WebAIM Million: The 2023 Report on the Accessibility of the Top 1,000,000 Home Pages*, WEBAIM, <https://webaim.org/projects/million/> [<https://perma.cc/49M9-9S6M>].

6. *Nondiscrimination on the Basis of Disability: Accessibility of Web Information and Services of State and Local Governments*, OFF. INFO. & REGUL. AFFS., <https://www.reginfo.gov/public/do/eAgendaViewRule?RIN=1190AA79&pubId=202204> [<https://perma.cc/J6VG-7ZLN>].

7. 42 U.S.C. §§ 12131–12165; 42 U.S.C. §§ 12181–12189.

8. Kristina M. Launey & John W. Egan, *DOJ Rules Coming on Web Accessibility for State, Local Governments; Businesses Should Pay Attention, Too*, CORP. COMPLIANCE INSIGHTS (Aug.

This belief is bolstered by the Biden Administration’s accessibility statement on the White House website, which supports website accessibility and affirms its commitment to conform to Web Content Accessibility Guidelines.⁹ White House support of website accessibility is not new; the Obama Administration also committed to promoting website accessibility.¹⁰ However, the Obama Administration stopped short of issuing actual guidelines, and the DOJ “delayed a plan to issue accessibility regulations for two more years until 2018.”¹¹ The DOJ thought this delay would provide businesses and engineers “a reasonable time frame” to begin moving towards accessibility.¹² Unfortunately for the accessibility battle, the Trump Administration moved ADA accessibility regulation to its “inactive list.”¹³ This meant that the regulation was neither formally withdrawn nor had a place in the DOJ’s planned rulemaking.¹⁴ This was a complete about-face from the DOJ’s prior position.¹⁵ Although this served the Trump Administration’s goal of lessening regulation, it opened the floodgates to more accessibility litigation and left businesses and judges lost, not knowing how to avoid litigation or what the proper remedy should be.¹⁶ But, this shift against compliance was short lived. Almost immediately after his inauguration, President Biden had the White House website completely redesigned to promote accessibility.¹⁷ As a result of this clear support of website accessibility, the DOJ “stepped up ADA enforcement.”¹⁸ By pursuing multiple highly public web accessibility investigations, the DOJ sent the message that “[t]he ADA applies to websites, and compliance isn’t optional.”¹⁹

The DOJ’s stance is echoed—albeit less strongly—by the circuit courts.²⁰ Although website accessibility lawsuits have created a circuit split, of the seven circuits confronted with website accessibility lawsuits, all of them held that at least some websites were places of accommodation.²¹ The split is not over whether websites should be included at all but rather the scope of inclusion.²² Based on the current circuit split, the history of support, the current administra-

31, 2022), <https://www.corporatecomplianceinsights.com/web-accessibility-rules-government/> [https://perma.cc/LCM7-V4BX].

9. *Accessibility Statement*, WHITE HOUSE, <https://www.whitehouse.gov/accessibility/> [https://perma.cc/M6K7-APBG].

10. *Accessibility*, WHITE HOUSE, <https://www.boia.org/blog/ada-website-lawsuits-rise-under-biden-administration> [https://perma.cc/694S-87ZN].

11. Venus Tamturk, *Trump Moved Web Accessibility Regulation to “Inactive List”*, CMS CONNECTED (Aug. 8, 2017), <https://www.boia.org/blog/ada-website-lawsuits-rise-under-biden-administration> [https://perma.cc/Z754-97DB].

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *See ADA Website Lawsuits Rise Under Biden Administration*, BUREAU INTERNET ACCESSIBILITY (Apr. 1, 2022), <https://www.boia.org/blog/ada-website-lawsuits-rise-under-biden-administration> [https://perma.cc/YC8R-T8UP].

18. *Id.*

19. *Id.*

20. *Infra* Part I.

21. *Infra* Part I.

22. *Infra* Part I.

tion's strong stance, and the DOJ's notice of proposed rulemaking for Title II, some form of uniform website accessibility requirements for private entities under Title III is needed.

When and if these regulations are created, most websites will likely have to comply with Title III because, as discussed in Part I of this Comment, the definition of commerce used by the ADA is broad, the application of Title III to physical spaces is equally broad, and the stated purpose of the ADA would be severely impacted by not applying the ADA to websites. Starting with the premise that websites should have accessibility requirements under Title III of the ADA, this Comment takes the position that better regulation would develop by first asserting that all websites are places of accommodation then working to carve out exemptions to compliance and assigning the burden of compliance. This Comment seeks to identify which websites would not need to comply using current exemptions to Title III, carve out new exemptions when websites would be overly burdened by compliance or compliance would be superfluous, and set clear guidelines that businesses can use to determine whether they comply.

Part I of this Comment explains the history of the ADA, the history of website accessibility lawsuits, and the current circuit split regarding the application of Title III of the ADA to websites. Part II discusses the basic steps of website creation that are necessary to understand the proposed burden shift in later sections. Part III of this Comment discusses using current exemptions to Title III to narrow the scope of which websites must comply with accessibility regulations. Part IV of this Comment discusses carving out exemptions for website compliance when it would be overly burdensome. Part V proposes a solution for compliance where the guidelines can be consistently updated to match technological innovation without overly burdening businesses.

I. THE HISTORY OF THE ADA AND THE BATTLE FOR WEBSITE ACCESSIBILITY

The ADA was passed by Congress based on findings that people with mental and physical disabilities have been excluded from participation in "all aspects of society," even though their disabilities do not diminish their right to do so.²³ People with disabilities also often lacked "legal recourse to redress such discrimination."²⁴ Congress found that this discrimination "denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities . . . and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity."²⁵ The purpose of the ADA was to eliminate discrimination against people with disabilities and to provide clear standards to address discrimination.²⁶ The ADA is a broad piece of

23. 42 U.S.C. § 12101(a).

24. *Id.*

25. *Id.*

26. 42 U.S.C. § 12101(b).

legislation that covers employment in Title I,²⁷ public services in Title II,²⁸ public accommodations and services in Title III,²⁹ and additional miscellaneous provisions in Title IV.³⁰ This Comment primarily focuses on Title III.

Title III includes two important definitions that are at the center of the current circuit split. The first term, *commerce*, is defined as “travel, trade, traffic, commerce, transportation, or communication” either among the States, between foreign countries/territories and a State, or “between points in the same State but through another State or foreign country.”³¹ The second term, *public accommodation*, is a list of private entities that “are considered public accommodations . . . if the operations of such entities affect commerce.”³² The list of private entities includes hotels, restaurants, theatres, places of public gathering, professional offices, public transportation, museums, schools, social service centers, and places of exercise and recreation.³³

While this list is arguably expansive, it fails to expressly include websites, leading to an over-three-decades-long battle to provide online access for people with disabilities.³⁴ The ADA was signed into law in 1990, one year before the first website went online in 1991, at a time when only half of one percent of the global population was online.³⁵ In contrast today, close to two billion websites exist, eighty-five percent of American adults report going online daily, and thirty-one percent of American adults report being online “almost constantly.”³⁶ The internet has become a crucial part of modern life, and internet use has been linked to increased sociability and civic engagement.³⁷

Unfortunately, this life-altering tool is not equally accessible to all.³⁸ Technological innovations like screen readers—programs that read website text

27. 42 U.S.C. §§ 12111–17.

28. 42 U.S.C. §§ 12131–65.

29. 42 U.S.C. §§ 12181–89.

30. 42 U.S.C. §§ 12201–13.

31. 42 U.S.C. § 12181(1).

32. 42 U.S.C. § 12181(7).

33. *Id.*

34. See Liz Hartsel, *On ADA Website Compliance, the DOJ Has a Chance to End the Chaos in the Courts*, CORP. COMPLIANCE INSIGHTS (Sept. 24, 2019), <https://www.corporatecomplianceinsights.com/ada-compliance-doj/> [perma.cc/SZ5Z-9YCY].

35. Cf. The European Council for Nuclear Research (CERN) backed the first website in 1991. Max Roser, *The Internet’s History Has Just Begun*, OUR WORLD DATA (Oct. 3, 2018), <https://ourworldindata.org/internet-history-just-begun> [perma.cc/XWJ4-9NL4].

36. See *Total Number of Websites*, INTERNET LIVE STATS, <https://www.internetlivestats.com/total-number-of-websites/> [https://perma.cc/PW4U-DWW8]; Andrew Perrin & Sara Atske, *About Three-in-Ten U.S. Adults Say They Are ‘Almost Constantly’ Online*, PEW RSCH. CTR. (Mar. 26, 2021), <https://www.pewresearch.org/fact-tank/2021/03/26/about-three-in-ten-u-s-adults-say-they-are-almost-constantly-online/>.

37. Manuel Castells, *The Impact of the Internet on Society: A Global Perspective*, in CHANGE: 19 KEY ESSAYS ON HOW INTERNET IS CHANGING OUR LIVES 127, 132 (Jonathan Fox ed., 2014), <https://www.bbvaopenmind.com/wp-content/uploads/2014/01/BBVA-OpenMind-book-Change-19-key-essays-on-how-internet-is-changing-our-lives-Technology-Internet-Innovation.pdf>.

38. *Id.* (“The Internet is the decisive technology of the Information Age, as the electrical engine was the vector of technological transformation of the Industrial Age.”); *The WebAIM Million*, *supra* note 5.

aloud for the visually impaired—increase online access for individuals with some specific disabilities. In addition, Web Content Accessibility Guidelines (WCAG)—recommendations for web content accessibility developed by individuals and organizations on a global scale—have attempted to increase online access to individuals with a variety of disabilities.³⁹ However, despite this attempt, there are still a variety of accessibility problems. Because websites are not required to comply with WCAG recommendations, many websites have accessibility issues.⁴⁰ The most common accessibility issues are low-contrast text, missing alternative text for images, empty links, missing form input labels, empty buttons, and missing document language.⁴¹ These issues have led to thousands of lawsuits related to website accessibility.⁴² These lawsuits are often filed by the same plaintiffs and attorneys who seek out accessibility issues across all industries.⁴³ For example, one disabled client and his Texas lawyer were behind 385 website accessibility compliance lawsuits.⁴⁴ These lawsuits have overwhelmed the courts, and the number of lawsuits increases every year.⁴⁵

Rather than providing clarity, the lawsuits have led to two different interpretations of “places of accommodation” within Title III of the ADA. The First, Second, and Seventh Circuits have held that places of accommodation are not strictly limited to physical places.⁴⁶ Alternatively, the Third, Sixth, and Ninth Circuits have created a nexus test, holding that websites are only places of accommodation when there is a close nexus between the goods and services provided and a physical store.⁴⁷ The Eleventh Circuit also uses a standard—similar to the nexus test—that relies on the presence of a physical store called the in-

39. *WCAG 2 Overview*, W3C WEB ACCESSIBILITY INITIATIVE, <https://www.w3.org/WAI/standards-guidelines/wcag/> [<https://perma.cc/G9GY-G92X>] (Apr. 19, 2023).

40. *The WebAIM Million*, *supra* note 5; *Is There a Legal Requirement to Implement WCAG?*, BUREAU INTERNET ACCESSIBILITY, <https://www.boia.org/blog/is-there-a-legal-requirement-to-implement-wcag> [<https://perma.cc/A9WL-4CZ3>].

41. *Id.*

42. Kristina M. Launey & Minh N. Vu, *Federal Website Accessibility Lawsuits Increased in 2020 Despite Mid-Year Pandemic Lull*, SEYFARTH: ADA TITLE III (Apr. 28, 2021), <https://www.adatitleiii.com/2021/04/federal-website-accessibility-lawsuits-increased-in-2020-despite-mid-year-pandemic-lull/#more-3988> [<https://perma.cc/8EDU-G897>].

43. See Jason P. Brown & Robert T. Quackenboss, *The Muddy Waters of ADA Website Compliance May Become Less Murky in 2019*, HUNTON ANDREWS KURTH: HUNTON EMP. & LAB. PERSPS. (Jan. 3, 2019), <https://www.huntonlaborblog.com/2019/01/articles/public-accommodations/muddy-waters-ada-website-compliance-may-become-less-murky-2019/> [<https://perma.cc/54J3-XW5T>]; David O. Klein, *United States: DraftKings Sued for Alleged Website Accessibility Violations*, MONDAQ (July 6, 2022), <https://www.mondaq.com/unitedstates/it-and-internet/1209290/draftkings-sued-for-alleged-website-accessibility-violations> [<https://perma.cc/TMP6-XFTX>].

44. Brown & Quackenboss, *supra* note 43.

45. *Cf.* Klein, *supra* note 43.

46. See *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 393 (E.D.N.Y. 2017); *Morgan v. Joint Admin. Bd.*, 268 F.3d 456, 459 (7th Cir. 2001); *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999); *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New England*, 37 F.3d 12, 19 (1st Cir. 1994).

47. See *Peoples v. Discover Fin. Servs., Inc.*, 387 F. App’x 179, 183–84 (3d Cir. 2010); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114–15 (9th Cir. 2000); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010–11 (6th Cir. 1997).

tangible barrier standard.⁴⁸ This standard looks at whether the website impedes accessibility to services offered by the physical store.⁴⁹ The circuit split is an argument of scope with the Third, Sixth, Ninth, and Eleventh Circuits holding for a narrower definition of places of accommodation and the First, Second, and Seventh holding for a broader definition.⁵⁰ Despite the different tests used, in all seven circuits some websites are places of public accommodation and must comply with Title III.

Whether a website is a place of public accommodation is not the end of the battle. Even if a company is found to be in violation of Title III, the lack of specific regulation from the DOJ leaves private website holders and courts floundering, trying to develop remedies to comply with nonexistent federal accessibility guidelines.⁵¹ Typically, courts have used WCAG 2.0 AA to remedy website accessibility issues. But without Congress or the DOJ clearly stating these guidelines are the standard for website compliance, the door remains open for future litigation. Possible arguments include whether WCAG 2.0 AA is the correct standard or which version of WCAG is the standard of compliance.⁵² While some states have attempted to fix this by passing their own legislation and web compliance guidelines, this creates a plethora of new compliance problems for websites that operate on the global level. Those global websites could end up facing the accessibility guidelines of fifty jurisdictions in the United States alone.⁵³ Moreover, because technology develops rapidly, new WCAG guidelines are continually released, which further exacerbates compliance issues.⁵⁴ In light of this uncertainty, many companies and organizations have removed content from websites for fear of litigation.⁵⁵ For example, rather than face litigation or add captions to 20,000 videos from its website, the University of California Berkley chose to remove the videos entirely.⁵⁶ Until there are clear guidelines, website owners will likely opt to remove information rather than tackle the minefield of website accessibility compliance and litigation. The removal of content leaves all users to face the consequences of Congress' and the DOJ's refusal to explicitly expand Title III to websites and create clear regulations.⁵⁷

48. *See* *Rendon v. Valleycrest Prods.*, 294 F.3d 1279, 1283 (11th Cir. 2002); *Gil v. Winn-Dixie Stores, Inc.*, 993 F.3d 1266, 1278 (11th Cir. 2021).

49. *Gil*, 993 F.3d at 1278.

50. *See* cases cited *supra* notes 46–48.

51. *See* *Brown & Quackenboss*, *supra* note 43.

52. *Id.*

53. *See id.*

54. *See id.*; Shawn Lawton Henry et al., *What's New in WCAG 2.2 Draft*, WEB ACCESSIBILITY INITIATIVE (WAI), <https://www.w3.org/WAI/standards-guidelines/wcag/new-in-22/> [https://perma.cc/TE9Y-NZMN] (May 17, 2023).

55. Hartsel, *supra* note 34.

56. Kris Olson, *ADA Title III Website Suits Showing No Sign of Letting Up*, MASS. LAWS. WKLY. (Mar. 1, 2018), <https://masslawyersweekly.com/2018/03/01/ada-title-iii-website-suits-showing-no-sign-of-letting-up/> [https://perma.cc/E78D-UTUJ].

57. *Id.*; Hartsel, *supra* note 34.

II. BASIC STEPS TO WEBSITE CREATION

There are many ways to create a website. Larger companies with a broad online presence may choose to maintain their own development team that creates and manages their websites.⁵⁸ On the other hand, midsized or smaller companies may choose to outsource some or all of their website design and management depending on their budgets.⁵⁹ Others might choose to invest the time to create their own websites using a DIY website builder.⁶⁰ While website creation is not a linear path, it is important to grasp the gist of website creation to understand the burden-shifting proposals in later sections. There are three main components to website creation: a domain name, a website hosting platform, and a website builder.⁶¹

A domain name is simply a website's address, not—as many people think—the website itself. Imagine a box filled with physical pages of a website; the domain name is like the label on the box telling what's inside. Sometimes a website hosting platform will provide a domain name such as “yourname.wordpress.com.”⁶² Other times, there is an option to purchase a custom domain to be the primary address of the website such as “yourname.com.”⁶³ Purchasing and securing a domain can be expensive—especially top-level domains with popular keywords—but even a less expensive domain requires an annual subscription from a domain register, which may be included in the cost of a website building service.⁶⁴

A hosting platform is a “crucial part of website creation”; it is how a website gets online so visitors can access the content.⁶⁵ Web hosting platforms vary, with some DIY website builders including hosting in their annual subscription fees; however, if the website is designed without the use of a DIY website builder, then business owners or others seeking to create a website are required to purchase from a website hosting service provider.⁶⁶ While needs and costs for a hosting platform's services can vary greatly, it is important for those seeking to create a website to consider their website traffic and type of content to deter-

58. See, e.g., *Software Development*, AMAZON JOBS, https://www.amazon.jobs/en/job_categories/software-development [<https://perma.cc/AN8B-L57N>].

59. Kimberlee Leonard, *How Much Does a Website Cost? (2023 Guide)*, FORBES ADVISOR, <https://www.forbes.com/advisor/business/software/how-much-does-a-website-cost/> [<https://perma.cc/XU3Z-5G3R>] (July 3, 2023, 1:45 AM).

60. *Id.*

61. *Id.*

62. See, e.g., Tanya Thibodeau, *WordPress.com vs WordPress.org: What's the Difference?*, WORDPRESS.COM (Apr. 29, 2022), <https://wordpress.com/go/website-building/wordpress-com-vs-wordpress-org/> [<https://perma.cc/J49T-RCLW>].

63. *Id.*

64. Leonard, *supra* note 59.

65. *Id.*; *How to Create a Website from Scratch (Step-By-Step Beginner's Guide)*, BERKELEY EXTENSION, <https://bootcamp.berkeley.edu/blog/how-to-create-website-from-scratch-guide/> [<https://perma.cc/WM36-LUEL>].

66. Leonard, *supra* note 59.

mine their needs.⁶⁷ These hosting platforms have the ability to monitor, issue warnings, and even delete websites that violate their terms of service, so it is also important to check the hosting platform's terms and conditions.⁶⁸

Website builders offer templates and tools to create different aspects of a site, including templates for e-commerce or appointment setting.⁶⁹ Many of the DIY builders target users without technical skills and instead use “drag-and-drop” features.⁷⁰ These DIY builders are an easy option for beginners because they often have options that wrap hosting, domain names, and building all into one service provider. Some examples of these all-in-one providers are Squarespace, Weebly, GoDaddy, Wix, and Shopify.⁷¹

III. USING CURRENT EXEMPTIONS TO NARROW THE SCOPE OF WHICH WEBSITES MUST COMPLY AND WHO SHOULD BEAR THE BURDEN OF COMPLYING WITH REGULATION

With the strong statements by the DOJ and the current administration in favor of broad accessibility regulation, it is likely that any new regulations will be equally broad. Arguably, even without these regulations, many websites should have to comply so that the spirit of the ADA is upheld—providing people with disabilities the opportunity to address discrimination that isolates them from society.⁷² Title III contains a broad definition of commerce, and many of the places of accommodation listed in the definition have their own websites. Currently, the ADA includes two major exemptions to compliance with Title III, and there are a few novel exemptions that can be borrowed from other sections of the ADA to exclude certain websites from compliance entirely or to clarify who should bear the burden of compliance. The two major exemptions to compliance with Title III are for religious institutions and private clubs.⁷³ A current exemption from compliance with Title I (the section of the ADA governing employment) for businesses that employ fewer than fifteen employees or operate for less than twenty weeks of the year is an example of a novel exemption that could be useful in shifting the burden of compliance away from smaller businesses.⁷⁴ Another novel source of exemption for small businesses could be the “readily achievable” factor test that has been applied to barrier removal in physical locations.⁷⁵ Additionally, the exemption for strictly residential private

67. *Id.*; *How to Create a Website from Scratch (Step-By-Step Beginner's Guide)*, *supra* note 65.

68. Thibodeau, *supra* note 62.

69. *How to Create a Website from Scratch (Step-By-Step Beginner's Guide)*, *supra* note 65.

70. Leonard, *supra* note 59.

71. *Id.*

72. *See* 42 U.S.C. § 12101(a)–(b).

73. 42 U.S.C. § 12187.

74. *See* 42 U.S.C. § 12111(5)(a).

75. *See* 42 U.S.C. § 12181(9) (defining the term *readily achievable*).

apartments and homes could provide a framework for exempting some smaller websites from accessibility regulations.⁷⁶

A. Religious and Private Club Exemption

Religious organizations and private clubs are exempt from ADA Title III compliance.⁷⁷ The religious organization exemption is relatively broad; for example, if a religious organization operates a daycare or private elementary school open to both members of the religious group and nonmembers, it is still exempt from Title III.⁷⁸ Also, should the religious organization rent out its space to a nonreligious private daycare operator, then the tenant private daycare's activities would be covered by Title III, but the religious organization would still remain exempt.⁷⁹ Private clubs are exempt so long as they meet the definition of "private club under Title II of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, and national origin by public accommodations."⁸⁰

"Private club status" is most likely to be granted by courts when the following conditions are met:

- 1) Members exercise a high degree of control over club operations.
- 2) The membership selection process is highly selective.
- 3) Substantial membership fees are charged.
- 4) The entity is operated on a nonprofit basis.
- 5) The club was not founded specifically to avoid compliance with Federal civil rights laws.⁸¹

Courts also consider "[t]o what extent the facility is open to the public . . . [and] [t]o what extent the club receives public funding."⁸² It is important to note that private clubs can lose their exemption for the public accommodation provision more easily than religious organizations by renting out their space.⁸³ Further-

76. See *Does the ADA Cover Private Apartments and Private Homes?*, ADA NAT'L NETWORK, <https://adata.org/faq/does-ada-cover-private-apartments-and-private-homes#:~:text=The%20ADA%20does%20not%20cover,subject%20to%20the%20ADA's%20requirements> [https://perma.cc/6N JL-AUK4] (July 2023) [hereinafter ADA, *Cover*].

77. 42 U.S.C. § 12187.

78. U.S. Dep't of Just. C.R. Div., *American with Disabilities Act ADA Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities* § III-1.5200, ADA.GOV, <https://archive.ada.gov/taman3.html> [https://perma.cc/92VW-FCZW].

79. *Id.*

80. *Id.* § III-1.6000.

81. *Id.*; *Private Clubs Under the Americans with Disabilities Act*, ADA NAT'L NETWORK 1-2 (2018), [https://adata.org/sites/adata.org/files/files/Private%20Clubs%20Under%20the%20Americans%20with%20Disabilities%20Act_final2018\(1\).pdf](https://adata.org/sites/adata.org/files/files/Private%20Clubs%20Under%20the%20Americans%20with%20Disabilities%20Act_final2018(1).pdf) [https://perma.cc/YPR6-642V] [hereinafter ADA, *Private Clubs*].

82. ADA, *Private Clubs*, *supra* note 81, at 2; see U.S. Dep't of Just. C.R. Div., *supra* note 78, § III-1.6000.

83. See, e.g., *Disabled Rts. Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861 (9th Cir. 2004); *Defiore v. City Rescue Mission of New Castle*, 995 F. Supp. 2d 413 (W.D. Pa. 2013).

more, simply calling an organization a club and requiring a membership without any other selection criteria would not qualify the organization for the exemption.⁸⁴

In the realm of website accessibility, the most obvious exemption to compliance with accessibility regulations would be for websites run by religious organizations. As these groups already have the broadest exemption from compliance with Title III, it would be logical for this exemption to extend to their websites.⁸⁵ Additionally, because religious institutions can rent out their spaces to private businesses and remain exempt from Title III, religious organizations are likely exempt from website accessibility guidelines in those instances as well. The broad religious organization exemption from compliance within the ADA is more likely to be extended to websites given the Supreme Court's ruling in *Burwell v. Hobby Lobby*, where the Court held that for-profit businesses with religious owners could refuse to comply with the Affordable Care Act's requirement that employers provide insurance coverage for contraceptives.⁸⁶ In Justice Ginsburg's dissenting opinion, she questioned whether there is a limit to what business owners may do or withhold because of their religious beliefs.⁸⁷ Using this case and the ADA's broad physical exemptions for religious organizations as guides, it is unlikely that religious organizations will be forced to comply with website accessibility absent an express order stating otherwise. This is further supported since nonreligious private businesses operated by religious believers have wide latitude to refuse compliance based on their religious beliefs.⁸⁸

Reusing the daycare example from above, where a religious organization rents its space to a private nonreligious daycare operator, should the daycare have a section on the religious organization's website—advertising its services, including a portal for enrollment, and so forth—this section of the website would likely have to comply with website accessibility guidelines just like the daycare would have to comply with physical world accessibility guidelines. The daycare section of the website should then be viewed as severable from the religious organization's website. The daycare should be responsible for complying with web accessibility guidelines, just as it is responsible for complying with other aspects of Title III in the physical world. However, while carving this out makes logical sense, in application it would have accessibility issues, especially if a disabled user had to navigate through the exempted religious organization's website to access the daycare section. This means blind users would first have to access a homepage that was possibly unreadable by their screen readers to reach the daycare's accessible pages. The accessibility of the daycare pages becomes moot as there are significant barriers for the blind user to even reach the page. While this is a rudimentary example, it helps illustrate the complexities of

84. ADA, *Private Clubs*, *supra* note 81.

85. It is worth noting that while these religious organizations would likely receive an exemption for compliance, it would likely be in their best interest to comply with accessibility requirements to grow their organizations.

86. *See generally* *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

87. *Id.* at 770 (Ginsburg, J., dissenting).

88. *See id.*

website accessibility. Perhaps a better solution would be to require that unexempted activities operated out of exempted facilities—like those owned by religious organizations—maintain their own separate websites. This would enable the religious organization to continue to be fully exempted while ensuring the nonexempt activities can be held accountable for complying with web accessibility guidelines.

The second exemption for private clubs would also apply to certain websites; however, because private clubs must meet certain criteria to be exempt from the ADA, it is unlikely this exemption could be used to grant broad relief from the burden of web accessibility compliance and future litigation. For example, even websites that use paywalls to restrict access to content could not rely on the private club exemption, because merely charging a membership fee without a selective membership process is not sufficient to qualify as a private club.⁸⁹ Moreover, even if a private club does qualify for an exemption, certain sections of its webpage such as the homepage, about page, and application for club membership must comply with accessibility guidelines. This is because these portions of the website would be “open to the public” and not accessible to members alone, and the accessibility-friendly application page would likely be necessary to show that the club is not attempting to avoid complying with civil rights laws. Therefore, at the bare minimum, private clubs would likely have to comply with accessibility guidelines on their public web pages, which includes all pages before login. This is because, in the physical world, a private club is exempted from Title III if its activities covered by Title III are restricted to members only. For example, if a private club operates a coffee shop inside the club’s facility that only serves members, then the coffee shop and the private club are exempt from Title III compliance.⁹⁰ Yet, if the same coffee shop inside the facility is open to the public, then the coffee shop must comply with Title III, and other club “facilities and activities may remain exempt.”⁹¹ For this reason, the public pages of a private club’s website will have to comply with web accessibility guidelines.

B. Small Business Exemption from Title I and the “Readily Achievable” Exemption

While the exemption for compliance with the ADA for businesses with fewer than fifteen employees and operations for less than twenty weeks of the year was intended to serve as an exemption for Title I, it may be useful to expand this exemption to web accessibility under Title III.⁹² Unlike large companies such as Amazon, Netflix, or Walmart, smaller companies are less likely to have in-house tech personnel able to manage and implement website accessibility guidelines.⁹³ Furthermore, having a website can already be a large financial bur-

89. ADA, *Private Clubs*, *supra* note 81.

90. *See id.* at 2.

91. *Id.*

92. *See* Leonard, *supra* note 59.

93. *Software Development*, *supra* note 58.

den on small businesses, with website design costs ranging from \$2,000 to \$75,000, depending on the number of pages, and annual maintenance costs of around \$1,200 to \$60,000 a year, depending on the needs of the site.⁹⁴ The lack of in-house tech personnel and potentially prohibitive costs of hiring outside web designers leave the smallest businesses at a disadvantage in complying with accessibility guidelines. This is not an isolated issue; as of October 2020, there were 31.7 million small businesses in the United States, 81% of which have no employees.⁹⁵ If Congress or the DOJ expands the Title I exemption or creates a new identical exemption (limited only to small businesses under Title III), the exemption would remove what would likely be a huge burden for these small businesses.⁹⁶ These exemptions would not have to preclude all small-business websites from being accessible, but they could be used to take the burden of accessibility off of the small businesses and place it on larger businesses.⁹⁷ The DIY web builder companies mentioned earlier are examples of larger businesses that are better equipped to handle the accessibility burden.

The term *readily achievable* is defined by the ADA as “easily accomplishable and able to be carried out without much difficulty or expense.”⁹⁸ A few factors determine whether something is readily achievable, including “the nature and cost of the action needed”; the financial resources of the facility, such as the number of employees, the effect of the expense, and the impact of the expense; and the operations of the covered entity.⁹⁹ For example, a business housed in an older building with multiple steps leading to the entrance might be unable to install a ramp or unable to afford to install a lift.¹⁰⁰ In this instance, the business “must provide its services in another way if that is readily achievable,” like providing curbside service.¹⁰¹ This standard could be applied to a business’ website as well. As mentioned above, the cost of website creation and maintenance can be astronomical and, if the burden of compliance cannot be passed from small business websites to DIY web builders, this burden has the potential to be crippling.¹⁰² The readily achievable factor test can be used to protect small businesses from the large upfront costs of updating their websites to comply

94. It is important to note that the high-end cost of website creation and operation does not accurately state costs for websites like Netflix, Amazon, or other websites with thousands or even tens of thousands of pages. See Olson, *supra* note 56; Leonard, *supra* note 59.

95. *Frequently Asked Questions About Small Business*, U.S. SMALL BUS. ADMIN. OFF. ADVOCACY 1 (Oct. 2020), <https://cdn.advocacy.sba.gov/wp-content/uploads/2020/11/05122043/Small-Business-FAQ-2020.pdf> [<https://web.archive.org/web/20230321024630/https://cdn.advocacy.sba.gov/wp-content/uploads/2020/11/05122043/Small-Business-FAQ-2020.pdf>].

96. See *id.* (describing how small businesses make up a large portion of the economy); *Software Development*, *supra* note 58.

97. See Leonard, *supra* note 59 (listing examples of DIY website builder platforms and explaining that “DIY Website Design” is a cost-saving option).

98. See 42 U.S.C. § 12181(9) (defining the term *readily achievable*).

99. *Id.*

100. U.S. Dep’t of Just. C.R. Div., *ADA Update: A Primer for Small Business*, ADA.GOV, <https://www.ada.gov/resources/title-iii-primer/> [<https://perma.cc/3APC-P6YL>] (Feb. 28, 2020).

101. *Id.*

102. See Brown & Quackenboss, *supra* note 43; Klein, *supra* note 43; Leonard, *supra* note 59.

with accessibility guidelines.¹⁰³ While this is not a complete exemption from compliance with accessibility guidelines, it could be useful in the short term to protect small businesses by creating a safe-harbor period for them to either save for the resources to comply or gather the technical knowledge to make their own website improvements.

C. Private Residence Exemption

Another exemption to the ADA is for “strictly residential private apartments and homes.”¹⁰⁴ Under this exemption, a person’s private residence does not have to comply with the ADA; however, if “a place of public accommodation, such as a doctor’s office or day care center, is located in a private residence, the portions of the residence used for that purpose are subject to the ADA’s requirements.”¹⁰⁵ Additionally, places like rental and sales offices inside of residential buildings such as apartments still have to comply with ADA standards.¹⁰⁶ The private residence exemption could be used in two ways: as a parallel for certain websites in explaining why they should be exempt from compliance regulations and in explaining why web design companies should bear the burden of compliance rather than their individual users.

Consider a private residence. A person’s home is a record of who that person is and where that person has been. Everything from a picture on the refrigerator to a souvenir on a shelf conveys information about the person living there.¹⁰⁷ Compare this to a blog—specifically, one created and run by an individual—which is defined as “a regular record of your thoughts, opinions, or experiences that you put on the internet for other people to read.”¹⁰⁸ Both blogs and private residences act as living records of a person’s life. In contrast, an apartment building has sections like the sales office that must comply with the ADA, yet each individual apartment inside the building does not.¹⁰⁹ For example, a lessee of an apartment is not responsible for ensuring there is a ramp leading to the building or that there are grab bars in the shower. Similarly, a blogger should not be responsible for designing a website and maintaining compliance with accessibility standards.

Blogs are different from private residences because they are generally indiscriminately available to the public in ways private residences generally are not, and they can advertise products where the blogger is paid a commission

103. See U.S. Dep’t of Just. C.R. Div., *supra* note 100 (“For example, if a [business] identified barriers . . . but did not remove them because it could not afford the cost, the [business] has a continuing obligation to remove these barriers when it has the financial resources to do so.”).

104. ADA, *Cover, supra* note 76.

105. *Id.*

106. *Using the ADA Standards*, U.S. ACCESS BOARD TECHNICAL GUIDE 2 (Feb. 2014), <https://www.access-board.gov/files/ada/guides/using-ADASTandards.pdf>.

107. *The Psychology of Space: What Does Your Home Say About You*, HISCOX (Jan. 4, 2015), <https://www.hiscox.co.uk/home-insurance/cover-stories/psychology-space-home-say/> [<https://perma.cc/X6KY-JQKJ>].

108. *Blog*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/blog> [<https://perma.cc/TP8H-AAK4>].

109. ADA, *Cover, supra* note 76.

from purchases on other sites.¹¹⁰ While it is true that access to a person's private residence is usually more exclusive than access to a blog, in the case of smaller blogs—like a student's travel blog from study abroad or a blog about being a stay-at-home parent—earning commissions from affiliate links is more like the modern equivalent of a 1950's home Tupperware party or a friend recommending a new product while hosting.¹¹¹ Personal blogs are not a venue for exclusively selling goods and services. This is because the affiliate links take the visitor to the website of the goods seller like Walmart, Amazon, or Target rather than the blogger selling the item directly.¹¹² Furthermore, it is unlikely that these small-level advertisements on blogs will be captured by the ADA's definitions of commerce and public accommodation. Because if these activities by bloggers were captured by these definitions, anytime a person recommended a product or held a weekend garage sale, it would have to comply with the ADA.¹¹³ As a result, smaller bloggers should be exempted from compliance with accessibility guidelines.

That is not to say that all blogs will be inaccessible, but rather that the bloggers themselves should not bear the burden of complying with ever-changing accessibility guidelines. Bloggers do not create their pages out of thin air; they rely on and pay for similar services as the small business owners in the previous section from companies like WordPress, Squarespace, Weebly, or GoDaddy.¹¹⁴ Instead, like the apartment building is responsible for having an accessible sales office, the burden of compliance should fall on the service providers that bloggers use to design and host their websites rather than the bloggers themselves.¹¹⁵ Placing these website builder companies or hosting platforms in the driver's seat of accessibility compliance would not only remove a huge burden from bloggers, but also lead to better accessibility. This is because these companies already have the ability to control the templates available to users and the ability

110. Mark Hayes, *What Is Affiliate Marketing? A 2023 Guide to Getting Started*, SHOPIFY BLOG (Jan. 20, 2022), <https://www.shopify.com/blog/affiliate-marketing> [<https://perma.cc/H94H-ZHUC>].

111. Erin Blakemore, *Tupperware Parties: Suburban Women's Plastic Path to Empowerment*, HISTORY (Mar. 1, 2019), <https://www.history.com/news/tupperware-parties-brownie-wise> [<https://perma.cc/4VH7-BTL8>] (explaining that Tupperware parties were events where thousands of women sold Tupperware out of their homes by hosting events for their friends).

112. E.g. Sydney Bradley & Nathan McAlone, *Influencers Share How to Make Money with Affiliate Marketing and the Networks They Use*, BUS. INSIDER, <https://www.businessinsider.com/how-influencers-make-money-using-affiliate-marketing-programs-examples-2021-7> [<https://perma.cc/25V6-NLCQ>] (July 3, 2023, 12:05 PM).

113. 42 U.S.C. § 12181(1); 42 U.S.C. § 12181(7); cf. *Where/When Can a Business Be Operated from a Residence?*, MARICOPA CNTY., <https://www.maricopa.gov/Faq.aspx?QID=612> (last visited Jan. 3, 2023) (explaining that garage sales and home parties "held for the sale of goods or services" are not considered a business operated from a residence if they occur six or fewer days of the year).

114. WordPress refers to WordPress.com, which is a design and hosting service, not WordPress.org, which is not a host but rather an information hub. Thibodeau, *supra* note 62; Leonard, *supra* note 59; see also Ryan Robinson, *How to Start a Blog (and Make Money) in 2023*, RYAN ROBINSON, <https://www.ryrob.com/how-start-blog/> [<https://perma.cc/7KVB-FQK2>] (July 8, 2023).

115. See ADA, *Cover*, *supra* note 76.

to monitor their subscribers' sites for terms of service violations.¹¹⁶ Furthermore, DIY website builders and hosting platforms are better positioned to understand accessibility guidelines than their users, who often lack technical knowledge.¹¹⁷ Therefore, it would be more efficient for DIY website builders or hosts to handle accessibility compliance by only allowing accessibility-compliant websites to be built or by monitoring accessibility compliance like they monitor compliance to their own terms and conditions.¹¹⁸

IV. CARVING OUT NEW EXEMPTIONS TO COMPLIANCE WHEN IT WOULD BE OVERLY BURDENSOME OR SUPERFLUOUS

Technology develops rapidly, and sometimes tools to make new technologies accessible lag behind.¹¹⁹ Rather than create accessibility compliance guidelines that stifle innovation or lead to content removal over fears of litigation, there should be a few narrow exemptions to compliance.¹²⁰ In addition, there are limited cases where complying with accessibility guidelines would be superfluous because the content is already accessible on another website. These exemptions could be used until the new technology can be made accessible, or in situations when users with disabilities would benefit from the alternative versions.¹²¹

A. Exemptions When Compliance Would Be Overly Burdensome

The readily achievable factor test described in Section III.B can be applied beyond small businesses to instances when the magnitude of the work required to comply with accessibility guidelines would overly burden a company.¹²² For example, consider both Imgur and Instagram, two companies that rely on photo sharing and video sharing by users.¹²³ The nature of these websites presents a host of accessibility problems, and despite efforts by Instagram, in particular, to be more accessible, there are still many accessibility barriers.¹²⁴ For example, if an image includes text, the text is unlikely to be read by screen-reading software;

116. *The Most Common Web Accessibility Issues to Avoid*, BUREAU INTERNET ACCESSIBILITY (Nov. 3, 2017), <https://www.boia.org/blog/the-most-common-web-accessibility-issues-to-avoid> [<https://perma.cc/M77K-RMGP>]; e.g. Thibodeau, *supra* note 62.

117. Leonard, *supra* note 59.

118. *See generally id.*

119. *See* Brown & Quackenboss, *supra* note 43; Klein, *supra* note 43.

120. Olson, *supra* note 56.

121. *See generally* U.S. Dep't of Just. C.R. Div., *supra* note 100.

122. *See* 42 U.S.C. § 12181(9) (defining the term *readily achievable*); *supra* Section III.B.

123. Jacob Yohtment, *What Is Imgur and What Is It Used for?* SOFTONIC, <https://imgur.en.softonic.com/articles/imgur-guide-for-beginners> [<https://perma.cc/63XJ-WPEL>] (Aug. 29, 2022, 3:23 PM); *About Instagram*, INSTAGRAM, <https://help.instagram.com/424737657584573> [<https://perma.cc/NUJ9-PKRF>].

124. *Advancing Accessibility on Instagram*, INSTAGRAM (May 19, 2022), <https://about.instagram.com/blog/tips-and-tricks/advancing-accessibility-on-instagram> [<https://perma.cc/K9PW-6RN5>]; *Creating an Accessible Instagram Post*, CAL. STATE UNIV. SAN MARCOS, <https://www.csusm.edu/iits/services/accessibility/guides/socialmedia/instagram.html> [<https://perma.cc/D8RV-PZWL>].

GIFs have “very limited or no accessibility support”; emojis can be difficult to interpret and cause confusion; and using decorative fonts can result in those words not being “read” by a screen reader.¹²⁵ Solutions to these issues, including providing alternative text for images, are mostly left up to the user posting the content to mitigate.¹²⁶ To be fair, these issues are not easily solved; it would involve a large effort by both Instagram and Imgur to either provide alternative text for every image, GIF, or text-based emoticon posted by its users or to create new technologies that can accurately create alternative text.¹²⁷ This is an instance where the readily achievable factor test could shield Imgur and Instagram from accessibility compliance in these areas because “the nature and cost” of either solution would likely be great. Exerting the capital and able manpower necessary to develop new technologies or the cost to have employees manually enter alternative text for every post would likely have a large negative impact on the operation.¹²⁸ However, it is unclear, in this instance, whether this test would shield either Imgur or Instagram from compliance because both companies bring in large annual revenues. Without more information on the costs of either solution, it is not possible to accurately weigh the burden of compliance.¹²⁹

Despite the limitations of the Instagram-Imgur example, the readily achievable factor test could be beneficial for protecting new technologies when accessibility is unavailable because accessibility technology has yet to catch up to the innovation. Additionally, since this test is currently used to weigh the costs of removing physical barriers, it is familiar and would be easily applied to online accessibility barriers.¹³⁰ Having a familiar test is important because accessibility litigation is a murky area where judges lack clear guidelines and remedies to “easily” fix accessibility issues like alternative text for images.¹³¹ This test would provide clarity for judges trying to determine the burden of accessibility compliance on new technology that might not yet have a feasible accessible alternative.

125. See *Creating an Accessible Instagram Post*, *supra* note 124.

126. *Id.*

127. *Id.*; see *Advancing Accessibility on Instagram*, *supra* note 124.

128. See 42 U.S.C. §12181(9) (defining the term *readily achievable*); Jack Flynn, *30+ Instagram Statistics [2023]: Facts About This Important Marketing Platform*, ZIPPPIA (Mar. 23, 2023), <https://www.zippia.com/advice/instagram-statistics/#:~:text=As%20of%202022%2C%20Instagram%20has,posted%20on%20Instagram%20each%20day> [<https://perma.cc/ZSZ6-SZSM>] (“At least 95 million photos and videos are posted on Instagram each day.”).

129. Mansoor Iqbal, *Instagram Revenue and Usage Statistics (2023)*, BUSINESS APPS, <https://www.businessofapps.com/data/instagram-statistics/#:~:text=Instagram's%20revenue%20has%20increased%20rapidly,%2451.4%20billion%20revenue%20in%202022> [<https://perma.cc/W5VA-LH6M>] (May 2, 2023); Brent Davis, *How Does Imgur Make Money + Everything Else You Should Know!*, STOCK DORK (Sept. 21, 2022), <https://www.thestockdork.com/how-does-imgur-make-money> [<https://perma.cc/2MS2-JG5Z>].

130. See U.S. Dep’t of Just. C.R. Div., *supra* note 100.

131. See Brown & Quackenboss, *supra* note 43.

B. Exemptions When Compliance Would Be Superfluous

This set of exemptions would likely be the most narrow of the new exemptions for website accessibility, but is worth including for small operations and niche services. Perhaps the best example of exemptions in this area would be for service providers specializing in audiobooks like Chirp.¹³² Chirp sells audiobooks to its users, and while audiobooks are great for solving accessibility issues for people with visual impairments, this medium is unusable for those who are deaf or hard of hearing. However, other service providers like Amazon's Kindle or BookBub—created by the same group behind Chirp—offer e-books accessible to those with hearing impairments.¹³³ In light of this, making Chirp comply with guidelines that would force them to provide closed captioning for their audiobooks would be superfluous and illogical, because the same exact materials are available from another provider.¹³⁴ While this exemption is unlikely to be widely applicable, it is worth having for situations like the above example so that website accessibility guidelines are not so inflexible that they lead to illogical outcomes.

V. CREATING GUIDELINES THAT ARE CLEAR AND ADAPTABLE TO CHANGING TECHNOLOGY

To best implement accessibility guidelines, the DOJ should choose a set of guidelines already widely in use rather than creating a new set. Using the WCAG as a gold standard for website accessibility under Title III is the simplest solution.¹³⁵ WCAG is developed through cooperative efforts by people and organizations around the world with the “goal of providing a single shared standard for web content accessibility that meets the needs of individuals, organizations, and governments internationally.”¹³⁶ Furthermore, despite the DOJ's refusal to adopt WCAG in the past, “[it] is essentially the only standard in town.”¹³⁷ WCAG standards are useful because once published, they do not change, they are buildable—meaning “[a]ll requirements from 2.0 are included in 2.1”—and new criteria are listed in a “What's New in WCAG” page.¹³⁸ Additionally, WCAG is “backwards compatible,” so a website that conforms with the latest version of the guidelines will also form with the previous versions.¹³⁹

132. While Audible is likely the audiobook service that has the most brand awareness, this proposed exemption would not apply because of Audible's “listen while you read” feature with Kindle. See *Accessibility at Audible*, AUDIBLE, <https://www.audible.com/ep/accessibility> [<https://perma.cc/6MMQ-7DHG>]; *About Us*, CHIRP, <https://www.chirpbooks.com/about-us> [<https://perma.cc/YZ2B-SJ4F>].

133. See *About Us*, *supra* note 132.

134. *Id.*

135. *Cf. WCAG 2 Overview*, *supra* note 39.

136. *Id.*

137. *US DOJ Web Accessibility Guidance*, ADA SITE COMPLIANCE (Dec. 4, 2022), <https://adasitecompliance.com/us-doj-web-accessibility-guidance/> [<https://perma.cc/VKB6-J6QB>].

138. *WCAG 2 Overview*, *supra* note 39.

139. *Id.*

WCAG standards typically have around twelve or thirteen guidelines that are organized by four guiding principles.¹⁴⁰ These principles are (1) perceivable, meaning the information must be visible to at least one of a user’s senses; (2) operable, meaning “the interface cannot require interaction that a user cannot perform”; (3) understandable, meaning that both the information and the interface “cannot be beyond [the user’s] understanding”; and (4) robust, meaning “users must be able to access the content as technologies advance (as technologies and user agents evolve, the content should remain accessible).”¹⁴¹ There are three levels to testing guidelines: A, AA, and AAA. Level A generally signifies minimal conformance and level AAA signifies maximum conformance.¹⁴²

Previously, courts and the DOJ relied on the WCAG 2.0 AA standard.¹⁴³ As new WCAG standards are backwards compatible and published every few years—WCAG 2.1 was published in June 2018 and WCAG 2.2 is expected to be released in 2023—it would be reasonable to make guidelines that were adaptable to the new standards.¹⁴⁴ Using WCAG as the standard and requiring websites to comply with the newest three versions of WCAG—2.0, 2.1, and 2.2¹⁴⁵—would provide flexibility for businesses, while requiring them to continually update their websites as new guidelines are released. This would have the dual benefit of increasing accessibility while giving businesses the ability to update their accessibility gradually, rather than having to scramble to update when new standards are released. Furthermore, by relying on the AA testing level, there would be a balance between providing accessibility without forcing the maximum accessibility compliance of the AAA level.¹⁴⁶ Using the existing WCAG standards is the simplest solution to creating guidelines for website accessibility because it is continuously updated to keep up with advancing technology, does not require the development of a brand new system, and does not require businesses to completely overhaul their websites whenever new standards are released.¹⁴⁷



Because website accessibility issues are complex, they can be difficult to resolve. The varying needs of large and small businesses and users of accessibility software add to this complexity. An understanding of website creation and design is required to achieve a workable set of guidelines that can adapt to new technologies. Despite this complexity, it is possible to implement reasonable standards by using the existing exemptions for physical spaces in the ADA and creating a few new exemptions for website-only issues. Websites should be cre-

140. *Id.*

141. *Introduction to Understanding WCAG*, W3C WEB ACCESSIBILITY INITIATIVE, <https://www.w3.org/WAI/WCAG21/Understanding/intro#understanding-the-four-principles-of-accessibility> [<https://perma.cc/T8MX-MN46>].

142. Brown & Quackenboss, *supra* note 43.

143. *Id.*

144. *WCAG 2 Overview*, *supra* note 39.

145. *See id.*

146. *See* Brown & Quackenboss, *supra* note 43.

147. *WCAG 2 Overview*, *supra* note 39.

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ated using features that make them accessible to more users and standards that may be implemented without causing undue hardship to businesses.