

Websites, Apps, Accessibility, and Extraterritoriality Under Title III of the Americans with Disabilities Act

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The federal courts are currently split as to whether websites qualify as "places of public accommodation" under Title III of the Americans with Disabilities Act. Neither side of the split, however, offers a satisfactory interpretation of Title III, especially because both sides fail to consider the potential extraterritorial implications of applying Title III to websites. This Note proposes to head off the inevitable extraterritoriality issue, and resolves the Title III split by establishing a bright-line rule: data centers—not websites or apps—are places of public accommodation under Title III of the ADA.

INTRODUCTION

Over the span of ten days in December 2018 and January 2019, two blind men made headlines for systematically filing suit against dozens of New York City art galleries in alphabetical order, claiming the galleries' websites "were not accessible to people who could not see."¹ To make these websites accessible to vision-impaired plaintiffs, gallery owners could "provid[e] narrated descriptions of what is on the screen," make the websites compatible with software that reads and narrates what appears on a computer screen, or make their websites "compatible with a device that turns [the websites'] text into Braille by raising and lowering arrangements of small dots."² These potential accommodations, however, posed a fundamental challenge for the art galleries. As one gallery owner told the *New York Times*, "We really don't know what we're supposed to do How do you describe a black and white Franz Kline? Or any abstract picture, how do you describe it and to what depth of description does one

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¹ Elizabeth A. Harris, *Galleries from A to Z Sued Over Websites the Blind Can't Use*, N.Y. TIMES (Feb. 18, 2019), <https://www.nytimes.com/2019/02/18/arts/design/blind-lawsuits-art-galleries.html> [<https://perma.cc/QWW3-XHP9>].

² *See id.* For in-depth descriptions of the multitude of barriers disabled people face on the Internet and how technology can address those barriers, see generally Bradley Allan Areheart & Michael Ashley Stein, *Integrating the Internet*, 83 GEO. WASH. L. REV. 449, 457–68 (2015); Nikki D. Kessling, Comment, *Why the Target "Nexus Test" Leaves Disabled Americans Disconnected: A Better Approach to Determine Whether Private Commercial Websites Are "Places of Public Accommodation,"* 45 HOUS. L. REV. 991, 999–1004 (2008).

need to put?”³ Without sufficient, accessible descriptions of their art, gallery owners feared that they would remain open to liability.⁴

These Internet accessibility-related issues extend far beyond art gallery websites. At least 2,258 website accessibility suits were brought in federal court last year, “almost three times the number filed in 2017.”⁵ Defendants in these suits ranged from Playboy.com to SoulCycle to Honey Baked Ham.⁶ Mobile phone applications (apps) also face similar legal challenges: a blind phone-user sued Domino’s in 2016 because its pizza-ordering app was not screen-reader accessible.⁷ The federal law underlying these suits, however, is far from settled.

Website accessibility plaintiffs bring suit under Title III of the Americans with Disabilities Act (ADA),⁸ which prohibits discrimination “on the basis of disability in the full and equal enjoyment of the goods [and] services . . . of any place of public accommodation”⁹ Yet there is currently a circuit split as to whether the term “place of public accommodation” covers nonphysical entities such as websites and apps.¹⁰ The Third, Fifth, Sixth, and Ninth Circuits hold that Title III only applies to nonphysical entities such as websites or apps when they have some nexus to a physical place of public accommodation.¹¹ In contrast, the First and

³ Harris, *supra* note 1 (internal quotation marks omitted).

⁴ *See id.* Some gallery owners also complained that implementing these accommodations could cost significant amounts of money, *see id.*, but accessibility consultants have noted that website owners usually spend as little as one to three percent of total website costs when accessibility is phased in naturally with other website upgrades. *See Areheart & Stein, supra* note 2, at 452 n.19 (2015) (quoting Joe Palazzolo, *Disabled Sue over Web Shopping*, WALL ST. J. (Mar. 21, 2013, 6:54 PM), <https://www.wsj.com/articles/SB10001424127887324373204578374483679498140> [<https://perma.cc/2PZQ-WWTS>] (internal quotation marks omitted)).

⁵ Harris, *supra* note 1.

⁶ *Id.*

⁷ *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898, 902 (9th Cir. 2019), *cert. denied*, No. 18-1539, 2019 WL 4921438, at *1 (Oct. 7, 2019).

⁸ *See* Harris, *supra* note 1.

⁹ 42 U.S.C. § 12182(a) (2018). There are state-law causes of action related to website accessibility. *See, e.g., Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017, 1024–29 (N.D. Cal. 2012). Those causes of action, however, are outside the scope of this Note.

¹⁰ *See infra* Part III.

¹¹ *See infra* Section III.A. The Eleventh Circuit also used a physical nexus approach in *Rendon v. Valleycrest Productions, Ltd.*, 294 F.3d 1279, 1283–86 (11th Cir. 2002) (holding that plaintiffs stated a Title III claim concerning the *Who Wants To Be A Millionaire* television show’s contestant selection telephone hotline), and applied the approach to hold that Title III applied to Dunkin’ Donuts’ website in *Haynes v. Dunkin’ Donuts LLC*, 741 F. App’x 752, 754 (11th Cir. 2018). Despite relying on the physical nexus approach in *Rendon* and *Haynes*, however, the Eleventh Circuit has not explicitly construed Title III to require a physical nexus. *See Gomez v. Bang & Olufsen Am., Inc.*, No. 1:16-cv-23801-LENARD, 2017 WL 1957182, at *3 (S.D. Fla. Feb. 2, 2017). Because the Eleventh Circuit has not explicitly decided this issue, the *Rendon* and *Haynes* decisions are outside the scope of this Note.

Seventh Circuits hold that a “place of public accommodation” is not limited to physical locations.¹² This split has already led to starkly conflicting outcomes in high-stakes cases. For example, over the course of two months in 2012, district courts in the First and Ninth Circuits considered whether Netflix’s video streaming website, which now consumes up to forty percent of the world’s Internet bandwidth at peak viewing hours,¹³ constitutes a place of public accommodation subject to Title III.¹⁴ Applying their respective circuit precedents, the district courts reached diametrically opposite conclusions.¹⁵

Both sides of the circuit split, however, fail to consider two critical, interrelated questions. If nonphysical entities can be places of public accommodation, where exactly are these “places” located? Does Title III then apply to websites and apps that are accessible in the United States but stored in servers abroad?¹⁶ These questions have significant implications for the power of American courts, as broadly construing Title III would empower courts to reach across borders and effectively dictate foreign websites’ content.¹⁷ Such a broad construction would also bring Title III into conflict with the presumption against extraterritoriality, a basic tenet of statutory construction instructing that, absent clearly expressed congressional intent, statutes “apply only within the territorial jurisdiction of the United States.”¹⁸ Given the ever-increasing global demand for Internet connectivity, however, this conflict is inevitable.¹⁹

¹² See *infra* Section III.B. The Second Circuit strongly suggested that it would follow the First and Seventh Circuits’ interpretations of Title III in *Pallozzi v. Allstate Life Insurance Co.*, 198 F.3d 28, 32–33 (2d Cir. 1999). The Second Circuit, however, has never explicitly reached that issue. See *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 391–92 (E.D.N.Y. 2017). Thus, *Pallozzi*, like *Rendon* and *Haynes*, is outside the scope of this Note.

¹³ Chris Morris, *Netflix Consumes 15% of the World’s Internet Bandwidth*, FORTUNE (Oct. 2, 2018), <https://fortune.com/2018/10/02/netflix-consumes-15-percent-of-global-internet-bandwidth/> [https://perma.cc/C5ZU-JHHK].

¹⁴ See *Cullen*, 880 F. Supp. 2d 1017, 1024–29 (N.D. Cal. 2012); Nat’l Ass’n of the Deaf v. Netflix, Inc. (*Netflix*), 869 F. Supp. 2d 196, 201–02 (D. Mass. 2012).

¹⁵ Compare *Cullen*, 880 F. Supp. 2d 1017, 1024–29 (N.D. Cal. 2012) (holding that “[t]he Netflix website is not ‘an actual physical place’ and therefore, under Ninth Circuit law, is not a place of public accommodation” (quoting *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114–15 (9th Cir. 2000)), with *Netflix*, 869 F. Supp. 2d 196, 201–02 (D. Mass. 2012) (“Under the [First Circuit’s] *Carparts* decision, the Watch Instantly web site is a place of public accommodation and Defendant may not discriminate in the provision of the services of that public accommodation—streaming video—even if those services are accessed exclusively in the home.”).

¹⁶ A server is a computer that “provide[s] information or processes to other computers on a network.” Steven R. Swanson, *Google Sets Sail: Ocean-Based Server Farms and International Law*, 43 CONN. L. REV. 709, 714 (2011).

¹⁷ Cf. Harris, *supra* note 1 (highlighting compliance concerns regarding screen-reader compatible descriptions of gallery artwork).

¹⁸ See *Foley Bros. Inc. v. Filardo*, 336 U.S. 281, 285 (1949).

¹⁹ See *Global Analysis on the Telecom Cable Industry (2018–2023): Promising Opportunities in the Telecommunication Infrastructure, CATV, Data Center, and*

This Note proposes to head off the inevitable extraterritoriality conflict and resolve the Title III circuit split by establishing a bright-line rule: data centers—not websites or apps—are places of public accommodation under Title III of the ADA.²⁰ To reach this conclusion, Part I begins by outlining relevant statutes, regulations, and administrative interpretations. Part II then discusses and analyzes the circuit split over defining “place of public accommodation”.²¹ Finally, Part III discusses Title III’s impending extraterritoriality conflict and offers an alternate interpretation of the statute. This Note concludes by arguing that its proposed rule appropriately balances the plain meaning of Title III and the conflicting inferences in the statute’s legislative history and administrative interpretations. Further, because Title III does not apply extraterritorially,²² the proposed interpretation gives appropriate weight to principles of international comity and avoids the significant practical and political problems that haunt applications of extraterritoriality analysis to foreign-stored Internet data.

I. TITLE III, ITS IMPLEMENTING REGULATIONS, AND THE DOJ’S INTERPRETIVE POSITIONS

The ADA, according to President George H.W. Bush, was “the world’s first comprehensive declaration of equality for people with disabilities.”²³ The statute forbade disability discrimination in employment, public services and transportation, and, as relevant here, the provision of goods and services

Computer Networking Markets, PR NEWSWIRE (Nov. 8, 2018, 2:00 PM), <https://www.prnewswire.com/news-releases/global-analysis-on-the-telecom-cable-industry-2018-2023-promising-opportunities-in-the-telecommunication-infrastructure-catv-data-center-and-computer-networking-markets-300746624.html> [<https://perma.cc/3BL3-WBYA>] [hereinafter *Global Analysis*] (noting that demand for Internet connectivity was projected to be a “major growth driver[.]” for the global telecommunications industry); cf. *Microsoft Corp. v. United States*, 829 F.3d 197, 200–01 (2d Cir. 2016) (considering whether Stored Communications Act warrants could reach email data accessible in the United States but stored in servers in Ireland), *vacated as moot*, 138 S. Ct. 1186, 1187–88 (2018).

²⁰ A data center, also known as a “server farm,” is “a group of servers in one location connected by a network.” Swanson, *supra* note 16, at 714.

²¹ Because this Note is focused on addressing this circuit split, this Note will not delve deeply into district court decisions on this issue. There are many well-reasoned district court opinions supporting both sides of the circuit split, *see, e.g.*, *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 391–93 (E.D.N.Y. 2017); *Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 952–53 (N.D. Cal. 2006), but the relevant circuit cases discussed provide ample background and reasoning to resolve the issues highlighted in this Note.

²² *See infra* Section IV.B.

²³ Laura Wolk, Note, *Equal Access in Cyberspace: On Bridging the Digital Divide in Public Accommodations Coverage Through Amendment to the Americans with Disabilities Act*, 91 NOTRE DAME L. REV. 447, 447 (2015) (internal quotation marks omitted) (quoting President George H.W. Bush, Remarks on Signing of the Americans with Disabilities Act of 1990, 2 Pub. Papers 1068 (July 26, 1990)).

by places of public accommodation.²⁴ To provide a basis to explore the Title III circuit split, Part I outlines (A) relevant statutory provisions, (B) applicable implementing regulations, and (C) relevant administrative interpretations of the statute and regulations.

A. THE STATUTE

In passing the ADA, Congress found that “individuals with disabilities continually encounter various forms of discrimination, including . . . the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, [and the] failure to make modifications to existing facilities and practices.”²⁵ Responding to this systemic discrimination, Congress stated that the ADA’s purpose was “to provide a clear and comprehensive national mandate” with “clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.”²⁶

Title III applies the ADA’s broad antidiscrimination mandate to places of public accommodation, stating 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 by any person who owns, leases (or leases to), or operates a place of public accommodation.”²⁷ The statute does not define the term “place,”²⁸ but 42 U.S.C. § 12181(7) lists twelve categories of private entities that qualify as “public accommodations,” covering—among other things—restaurants, movie theaters, galleries, schools, and a variety of professional “service establishment[s].”²⁹ Section 12181(7) does not explicitly mention nonphysical entities like websites or apps, but each category of “public accommodation” contains extremely broad catchall language.³⁰

To supplement its general discrimination prohibition, Title III defines “discrimination” to impose various additional, specific requirements.³¹ As relevant here, the statute requires places of public accommodation to

²⁴ See Areheart & Stein, *supra* note 2, at 451.

²⁵ 42 U.S.C. § 12101(a)(5) (2018).

²⁶ *Id.* § 12101(b)(1)–(b)(2).

²⁷ *Id.* § 12182(a).

²⁸ *Magee v. Coca-Cola Refreshments USA, Inc.*, 833 F.3d 530, 532 (5th Cir. 2016).

²⁹ See 42 U.S.C. § 12181(7).

³⁰ See, e.g., *id.* § 12181(7)(E) (covering “a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment” (emphasis added)); *id.* § 12181(7)(F) (covering “a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment” (emphasis added)).

³¹ *Id.* § 12182(b)(2)(A) (2018); see *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 128 (2005).

provide auxiliary aids and services to disabled persons “as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated, or otherwise treated differently than other individuals because of the absence of auxiliary aids and services.”³² Failing to take these mitigating measures, however, only constitutes discrimination if such measures are not overly burdensome; Title III provides a defense if a place of public accommodation demonstrates that these auxiliary aids and services “would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.”³³

Additionally, the ADA provides a safe harbor for insurance-related issues, instructing that Title III “shall not be construed to prohibit or restrict” persons or organizations from “establishing, sponsoring, observing, or administering the terms of a bona fide benefit plan,” or “underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law.”³⁴ This safe harbor, however, is not available “as a subterfuge to evade the purposes” of Title III.³⁵

B. TITLE III’S IMPLEMENTING REGULATIONS

Title III also delegates to the Department of Justice (DOJ), via the Attorney General, the authority to promulgate regulations that “carry out” the nontransportation-related provisions of the Title.³⁶ The DOJ’s implementing regulations are relevant here for two reasons. First, although the regulations define “place of public accommodation” in terms almost identical to those used in §12181(7), the regulations clarify that a “place” is a “facility” that offers the types of services enumerated in Title III’s statutory categories.³⁷ A “facility,” under the regulations, “means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.”³⁸

Second, the regulations clarify that the ADA’s auxiliary aids and services requirement mandates that places of public accommodation “furnish appropriate auxiliary aids and services where necessary to ensure

³² 42 U.S.C. § 12182(b)(2)(A)(iii).

³³ *Id.*

³⁴ *Id.* § 12201(c).

³⁵ *Id.*

³⁶ *See id.* § 12186(b). Several transportation-related provisions of Title III are delegated instead to the Secretary of Transportation. *See id.* § 12186(a)(1), (b).

³⁷ *Compare* 28 C.F.R. § 36.104 (2018) (defining “place of public accommodation”), *with* 42 U.S.C. § 12181(7) (defining “public accommodation”).

³⁸ 28 C.F.R. § 36.104.

effective communication with individuals with disabilities.”³⁹ Appropriate “auxiliary aids and services” include “accessible electronic and information technology,” such as closed captioning for “individuals who are deaf or hard of hearing” and “audio recordings . . . [and] screen reader software” for “individuals who are blind or have low vision.”⁴⁰

C. ADMINISTRATIVE INTERPRETATIONS OF TITLE III AND ITS IMPLEMENTING REGULATIONS

For over two decades, the DOJ has interpreted Title III and its implementing regulations to cover at least some websites.⁴¹ During the Obama Administration, the DOJ even brought a Title III enforcement action against—and settled with—Peapod, a company that operated an online-only grocery store.⁴² It is not clear, however, whether the DOJ’s current leadership similarly reads the term “place of public accommodation” to cover entities that provide goods and services exclusively over the Internet. Although the DOJ issued an Advanced Notice of Proposed Rulemaking in 2010 that invited comments on amending Title III’s regulations to address “uncertainty regarding the applicability of the ADA to Web sites,”⁴³ the DOJ recently withdrew this proposed rulemaking.⁴⁴ Moreover, the DOJ recently stated that it understood the ADA to cover “public accommodations’ websites,” but that statement begs the question: what is a public accommodation?⁴⁵

II. THE “PLACE OF PUBLIC ACCOMMODATION” CIRCUIT SPLIT

The circuit courts have split into two camps when considering the meaning of the term “place of public accommodation.” The current majority

³⁹ 28 C.F.R. § 36.303(c).

⁴⁰ *Id.* § 36.303(b)(1)–(2).

⁴¹ See Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43,460, 43,464 (proposed July 26, 2010) (citing Letter from Deval L. Patrick, Assistant Att’y Gen., Civil Rights Div., U.S. Dep’t of Justice, to Tom Harkin, U.S. Sen. (Sept. 9, 1996)) [hereinafter DOJ Proposed Rulemaking]; Letter from Stephen Boyd, Assistant Att’y Gen., Off. Legis. Aff., U.S. Dep’t of Justice, to Ted Budd, U.S. Congressman (Sept. 25, 2018), <https://www.adatitleiii.com/wp-content/uploads/sites/121/2018/10/DOJ-letter-to-congress.pdf> [<https://perma.cc/9P39-K9ZN>] [hereinafter DOJ 2018 Position Letter].

⁴² Wolk, *supra* note 23, at 458–59 (citing Settlement Agreement Between the United States of America and Ahold U.S.A., Inc., and Peapod, LLC Under the Americans with Disabilities Act §§ 12(a)–(c), DJ 202-63-169 (Nov. 17, 2014)).

⁴³ DOJ Proposed Rulemaking, *supra* note 41, at 43,464.

⁴⁴ See Wolk, *supra* note 23, at 459; DOJ 2018 Position Letter, *supra* note 41.

⁴⁵ DOJ 2018 Position Letter, *supra* note 41 (emphasis added).

approach—followed by the Third, Fifth, Sixth, and Ninth Circuits—reads “place of public accommodation” to impose a “physical nexus requirement,” where a website or other nonphysical entity must have some connection to a physical location covered by Title III.⁴⁶ In contrast, the minority approach—followed by the First and Seventh Circuits—holds that places of public accommodation are not limited to physical structures, and district courts in several jurisdictions have applied this holding to websites.⁴⁷ This Part outlines both positions and finds that neither position satisfactorily answers whether a website can be a place of public accommodation under Title III.

A. THE MAJORITY APPROACH: IMPOSING A PHYSICAL NEXUS REQUIREMENT

In the Third, Fifth, Sixth, and Ninth Circuits, nonphysical entities are not “places of public accommodation” under Title III. Instead, these circuits hold that Title III only applies to nonphysical entities, including websites, if they have some nexus to a physical place of public accommodation. This section outlines the circuits’ adoption of the physical nexus requirement in chronological order.

1. *Stoutenborough* and *Parker*: The Sixth Circuit Establishes the Physical Nexus Requirement

The Sixth Circuit first adopted a physical nexus requirement in its 1995 decision in *Stoutenborough v. National Football League, Inc.*⁴⁸ In *Stoutenborough*, a hearing-impaired plaintiff brought a class-action disability discrimination suit against the National Football League, the Cleveland Browns Football Club, and several television broadcasting companies.⁴⁹ The complaint claimed the League’s “blackout” rule, “which prohibit[ed] live local broadcasts of home football games that [were] not sold out seventy-two hours before game-time,” violated the ADA because it discriminated against hearing-impaired persons who had “no other means of accessing the game via telecommunication technology.”⁵⁰ Affirming the district court’s dismissal of the suit for failure to state a claim, the Sixth Circuit held that Title III only applied to physical places of public accommodation.⁵¹

Construing the term “place,” the Sixth Circuit emphasized that Title III’s implementing regulations defined the term “place” to mean “facility” and noted that the definition of “facility” discussed only physical locations

⁴⁶ See *infra* Section III.A.

⁴⁷ See *infra* Section III.B.

⁴⁸ See 59 F.3d 580, 583 (6th Cir. 1995).

⁴⁹ *Id.* at 582.

⁵⁰ *Id.* (internal quotation marks omitted).

⁵¹ See *id.* at 582–83.

and structures.⁵² Although the Sixth Circuit acknowledged that football stadiums are places of public accommodation, it agreed with the district court that television broadcasts were not a service provided by the stadium.⁵³ Because Title III covers “all of the services which the public accommodation offers, not all services which the lessor of the public accommodation offers,” the Sixth Circuit concluded, “the plaintiffs’ argument that the prohibitions of Title III are not solely limited to ‘places’ . . . contravenes the plain language of the statute.”⁵⁴

The Sixth Circuit next clarified its physical nexus test in its en banc decision in *Parker v. Metropolitan Life Insurance Co.*⁵⁵ In *Parker*, the plaintiff’s employer, Schering-Plough Corp., offered a long-term disability benefit plan through defendant Metropolitan Life Insurance Company (MetLife).⁵⁶ The plaintiff claimed the benefit plan violated Title III because it provided more generous coverage to physically disabled persons than to mentally disabled persons.⁵⁷ The Sixth Circuit, however, affirmed the district court’s dismissal of the plaintiff’s claims, holding that although insurance offices were places of public accommodation enumerated in 42 U.S.C. § 12181(7), the employer-offered benefit plan was not “a good offered by a place of public accommodation.”⁵⁸

Reaffirming *Stoutenbrough*,⁵⁹ the *Parker* court held that Title III required a “nexus between the disparity in benefits [provided by the challenged plan] and the services which MetLife offer[ed] to the public from its insurance office.”⁶⁰ This understanding, the court argued, was supported by the DOJ appendix to Title III’s implementing regulations, which explained that the DOJ intended the regulations to cover “wholesale establishments” only when such establishments sold goods to the public, as opposed to when they sold goods to other businesses.⁶¹ Because the plaintiff obtained her benefits through her employer rather than through a MetLife insurance office, the Sixth Circuit held that the required nexus to a place of

⁵² See *id.* at 583 (citing 28 C.F.R. § 36.104 (1994)).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ 121 F.3d 1006, 1010–14 (6th Cir. 1997) (en banc).

⁵⁶ *Id.* at 1008.

⁵⁷ See *id.* (explaining that long-term disability benefit plans would provide benefits to individuals with physical disorders until the individuals reached sixty-five years of age, but individuals with mental or nervous disorders could receive benefits for only twenty-four months).

⁵⁸ *Id.* at 1009–10.

⁵⁹ See *id.* at 1010–11, 1014 n.10 (noting that the court did not resort to legislative history in construing Title III because “where the statutory meaning is clear, we do not resort to legislative history”).

⁶⁰ *Id.* at 1011.

⁶¹ *Id.* at 1011–12 (citing 28 C.F.R. pt. 36, app. B at 604 (1996)).

public accommodation was lacking.⁶²

The Sixth Circuit also noted in *Parker* that it disagreed with the First Circuit's decision in *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Association of New England*, discussed in greater detail in section III.B.1.⁶³ Specifically, the Sixth Circuit did not believe that the inclusion of travel and shoe repair "service[s]" in § 12181(7)'s definition of "public accommodation" proved that Congress intended the ADA to cover "providers of services which do not require a person to physically enter an actual physical structure."⁶⁴ The Sixth Circuit argued instead that because "[e]very [other] term listed in § 12181(7) . . . is a physical place open to public access[,] . . . it [was] likely that Congress simply had no better term than 'service' to describe an office where travel agents provide travel services and a place where shoes are repaired."⁶⁵ This understanding was further supported, the Sixth Circuit claimed, because the provision that covered travel and shoe repair services also covered the "office[s]" of other types of service providers.⁶⁶ Thus, the Sixth Circuit argued, a proper application of *noscitur a sociis* foreclosed the First Circuit's interpretation.⁶⁷

2. *Ford*: The Third Circuit Joins the Sixth

Following *Parker* and *Stoutenborough*, the Third Circuit was next to adopt a physical nexus requirement. In *Ford v. Schering-Plough Corp.*, a mentally disabled plaintiff challenged the same Schering-Plough disability benefit plan that was at issue in *Parker*.⁶⁸ The Third Circuit relied on *Parker* and *Stoutenborough* to find that the employer-offered benefit plan was not a public accommodation, holding that the plain meaning of Title III's definition of "public accommodation" required a nexus between the disputed good or service and a physical place of public accommodation.⁶⁹ Though the court acknowledged that its holding was contrary to the First Circuit's position in *Carparts*, the Third Circuit found the *Parker* court's application of *noscitur a sociis* persuasive.⁷⁰

⁶² *Id.* at 1011. Because the benefit plan was not offered by a place of public accommodation, the Sixth Circuit did not address the effect of the ADA's insurance safe harbor provisions on Title III. *See id.* at 1012–13 & n.8.

⁶³ *Id.* at 1013 (citing *Carparts Auto. Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New Eng.*, 37 F.3d 12, 19 (1st Cir. 1994) [hereinafter *Carparts*]).

⁶⁴ *Id.* at 1013 (internal quotation marks omitted) (quoting *Carparts*, 37 F.3d at 19 (citing 42 U.S.C. § 12181(7)(F) (1988))).

⁶⁵ *Id.* at 1014.

⁶⁶ *Id.* (noting that 42 U.S.C. § 12181(7)(F) also covers "[t]he terms . . . office of an accountant or lawyer, insurance office, and professional office of a healthcare provider").

⁶⁷ *Id.*

⁶⁸ *See Ford v. Schering-Plough Corp.*, 145 F.3d 601, 603–04 (3d Cir. 1998).

⁶⁹ *See id.* at 612–13 (quoting *Parker*, 121 F.3d at 1011 (quoting *Stoutenborough v. Nat'l Football League, Inc.*, 59 F.3d 580, 583 (6th Cir. 1995))).

⁷⁰ *Id.* at 613–14.

The Third Circuit further bolstered its position by noting that its reading of Title III was consistent with other circuits' interpretations of Title II of the Civil Rights Act of 1964, a statute that used similar language to prohibit racial discrimination by places of public accommodation.⁷¹ Moreover, the Third Circuit argued, limiting Title III to physical places was consistent with Title III's implementing regulations because the DOJ interpreted the regulations to govern access to goods and services but not the content of goods and services.⁷²

3. *Weyer* and *Robles*: The Ninth Circuit Joins the Majority and Applies the Physical Nexus Requirement to Websites and Apps

In 2000, the Ninth Circuit similarly adopted a physical nexus requirement in *Weyer v. Twentieth Century Fox Film Corp.*⁷³ Like *Parker* and *Ford*, *Weyer* involved a Title III claim concerning an employer-provided disability benefit plan.⁷⁴ To interpret the term "place of public accommodation," the Ninth Circuit cited *Parker*'s application of *noscitur a sociis*, quoted the *Parker* and *Ford* courts' applications of the physical nexus requirement, and agreed with the Sixth and Third Circuits' reasoning.⁷⁵

The Ninth Circuit has subsequently applied *Weyer* to websites and apps. For example, earlier this year in *Robles v. Domino's Pizza, LLC*, the Ninth Circuit held that Title III required Domino's Pizza to "provide auxiliary aids and services to make [its website and pizza ordering app] available to individuals who are blind."⁷⁶ Given that Domino's customers used the website and app to "locate a nearby Domino's restaurant and order pizzas for at-home delivery or in-store pickup," the Ninth Circuit held that the physical nexus requirement was satisfied because "[t]he alleged inaccessibility of Domino's website and app impede[d] access to the goods and services of its physical pizza franchises."⁷⁷ Importantly, the Ninth

⁷¹ *Id.* at 613 (first quoting 42 U.S.C. § 2000(a) (1994); then citing *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1269–75 (7th Cir. 1993); and then citing *Clegg v. Cult Awareness Network*, 18 F.3d 752, 755–56 (9th Cir. 1994)).

⁷² *See id.* at 613 (quoting 28 C.F.R. pt. 36, app. B, at 640 (1997)). Notably, the Third Circuit dismissed other DOJ interpretive documents, which stated that Title III did in fact govern the substance of insurance contracts, as inconsistent with the plain text of the APA. *See id.* at 613 (citing DEP'T OF JUSTICE, TITLE III TECHNICAL ASSISTANCE MANUAL: COVERING PUBLIC ACCOMMODATIONS AND COMMERCIAL FACILITIES § III-3.11000, at 19 (Nov. 1993)).

⁷³ 198 F.3d 1104, 1114–15 (9th Cir. 2000).

⁷⁴ *See id.*

⁷⁵ *See id.*

⁷⁶ *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 905 (9th Cir. 2019).

⁷⁷ *Id.* at 905–06. The Ninth Circuit found this connection to physical pizza franchises "critical," but the court reserved the question of "whether the ADA covers the websites or

Circuit reasoned that even though Domino’s customers “predominantly access [the website and app] away from the physical restaurant,” Title III applied because “[t]he statute applies to the services *of* a place of public accommodation, not services *in* a place of public accommodation. To limit the ADA to discrimination in the provision of services occurring on the premises of a public accommodation would contradict the plain language of the statute.”⁷⁸

4. *Magee*: The Fifth Circuit Follows the Majority Approach

In 2016, the Fifth Circuit became the latest circuit to adopt a physical nexus requirement when it decided *Magee v. Coca-Cola Refreshments USA, Inc.*⁷⁹ The plaintiff in *Magee* brought a nationwide class action claiming that Coca-Cola’s glass-front vending machines violated Title III of the ADA because the machines “lack[ed] any meaningful accommodation for use by the blind.”⁸⁰ Because Title III and its implementing regulations defined “public accommodation” to cover “a bakery, grocery store, . . . shopping center, or other sales or rental establishment,”⁸¹ the plaintiff argued that vending machines constituted “sales establishment[s]” governed by Title III.⁸²

Despite acknowledging that “the term ‘establishment’ could possibly be read expansively to include a vending machine,”⁸³ the Fifth Circuit held that vending machines did not constitute sales establishments under Title III’s “unambiguous” statutory language.⁸⁴ The court analyzed the term “establishment” using dictionary definitions, ordinary meaning, *noscitur a sociis*, and *ejusdem generis*.⁸⁵ Crucially, the Fifth Circuit relied on *Parker, Ford*, and *Weyer* during its application of *noscitur a sociis* and *ejusdem generis*,⁸⁶ and the court argued that “[a]s the Third and Sixth Circuits have

apps of a physical place of public accommodation where their inaccessibility does not impede access to the goods and services of a physical location.” *Id.* at 905 & n.6.

⁷⁸ *Id.* at 905 (internal quotation marks omitted) (emphasis in original) (quoting *Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 953 (N.D. Cal. 2006)).

⁷⁹ See 833 F.3d 530, 534 & n.23 (5th Cir. 2016).

⁸⁰ *Id.* at 531.

⁸¹ 42 U.S.C. § 12181(7)(E) (2012); 28 C.F.R. § 36.104 (2011).

⁸² *Magee*, 833 F.3d at 532–33 (citing 42 U.S.C. § 12181(7)(E); 28 C.F.R. § 36.104). The plaintiff also argued before the district court that the vending machines also qualified as a “restaurant, bar, or *other establishment serving food or drink*,” but he did not renew that argument on appeal. *Id.* at 532 n.8 (quoting 42 U.S.C. § 12181(7)(B)).

⁸³ *Id.* at 534.

⁸⁴ *Id.*

⁸⁵ See *id.* at 533–35. Because the Fifth Circuit held that the statute was “unambiguous,” the court declined to address whether vending machines were “facilities” under Title III’s implementing regulations. *Id.* at 535.

⁸⁶ See *id.* at 534 & n.21 (first quoting *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1014 (6th Cir. 1997); then quoting *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 613–14 (3d Cir. 1998); and then citing *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114–15 (9th Cir. 2000)).

explained, [the First and Seventh Circuits'] interpretation ignores the doctrine of *noscitur a sociis*.”⁸⁷

Additionally, the Fifth Circuit argued that its holding “comport[ed] with the statute’s legislative history and the DOJ’s guidance.”⁸⁸ The court emphasized that both the ADA’s legislative history and the DOJ regulations’ interpretive guidance stated that the statutory and regulatory categories of “public accommodations” were “exhaustive.”⁸⁹ And although the legislative history instructed that “42 U.S.C. § 12181(7)’s categories . . . ‘should be construed liberally,’”⁹⁰ the Fifth Circuit highlighted that every example of a “sales establishment” mentioned in the legislative history and interpretive guidance was an “actual,” physical store.⁹¹

Just because vending machines were not themselves places of public accommodation, however, did not mean that the machines were totally exempt from Title III.⁹² Rather, the Fifth Circuit noted that “vending machines may very well be subject to various requirements under the ADA by virtue of their being located in a hospital or a bus station, both of which are indisputably places of public accommodation.”⁹³ Because Coca-Cola did not “own, lease[,] . . . or operate” the places of public accommodation where its vending machines were located, however, the Fifth Circuit held that the district court properly dismissed the *Magee* plaintiff’s claims.⁹⁴

B. THE MINORITY APPROACH: DEFINING “PLACE OF PUBLIC ACCOMMODATION” TO INCLUDE NON-PHYSICAL ENTITIES

Unlike the majority approach, the First and Seventh Circuits hold that Title III’s term “place of public accommodation” is broad enough to cover nonphysical entities. Both the First and Seventh Circuits addressed this interpretive issue in the context of health and retirement benefit plans,⁹⁵ but district courts in several jurisdictions have applied these precedents to hold that websites are places of public accommodation under Title III.⁹⁶ This

⁸⁷ *Id.* at 534 n.23 (citations omitted).

⁸⁸ *Id.* at 535.

⁸⁹ *Id.* (quoting H.R. REP. No. 101-485, pt. 2, at 100 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 383).

⁹⁰ *Id.*

⁹¹ See *id.* at 535-36 (first quoting H.R. Rep. No. 101-485, pt. 3, at 54 (1990), as reprinted in 1990 U.S.C.C.A.N. 445, 477; then quoting U.S. DEP’T OF JUSTICE, TITLE III TECHNICAL ASSISTANCE MANUAL COVERING PUBLIC ACCOMMODATIONS AND COMMERCIAL FACILITIES, § III-1.2000, <https://www.ada.gov/taman3.html> [<https://perma.cc/A7R5-XCGT>]).

⁹² *Id.* at 536.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See *infra* Sections III.B.1-B.2.

⁹⁶ See, e.g., *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 393 (E.D.N.Y. 2017); *Nat’l Fed’n of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565, 575-76 (D. Vt. 2015);

section outlines both circuits' decisions in chronological order.

1. *Carparts*: The First Circuit Takes an Expansive Approach

In *Carparts*, the First Circuit considered whether a plaintiff could state a Title III claim based on allegations that a health benefit plan imposed a disproportionately low lifetime benefit cap for illnesses related to Acquired Immune Deficiency Syndrome (AIDS).⁹⁷ The First Circuit concluded that the plaintiff could state such a claim because Title III was not limited to physical places of public accommodation.⁹⁸

Because the “illustrative list” in Title III’s definition of “public accommodation” mentioned “a ‘travel service,’ a ‘shoe repair service,’ an ‘office of an accountant or lawyer,’ an ‘insurance office,’ a ‘professional office of a healthcare provider,’ and ‘other service establishment[s],” the First Circuit reasoned that the plain meaning of the statute “d[id] not require ‘public accommodations’ to have physical structures for persons to enter.”⁹⁹ Even if the term “public accommodation” was ambiguous, however, the First Circuit argued that “[t]his ambiguity, considered together with agency regulations and public policy concerns, [indicates] that the phrase is not limited to actual physical structures.”¹⁰⁰ In particular, the First Circuit highlighted Congress’s use of the terms “travel service” and “other service establishment”:

Many travel services conduct business by telephone or correspondence without requiring their customers to enter an office in order to obtain their services. Likewise, one can easily imagine the existence of other service establishments conducting business by mail and phone without providing facilities for their customers to enter in order to utilize their services.¹⁰¹

In light of this language, the First Circuit reasoned, “[i]t would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not.”¹⁰²

Although the First Circuit acknowledged that the ADA’s legislative history could be read as indicating that Congress was primarily concerned

Nat’l Ass’n of the Deaf v. Netflix, Inc. (*Netflix*), 869 F. Supp. 2d, 196, 200–02 (D. Mass 2012).

⁹⁷ See 37 F.3d 12, 14–15 (1st Cir. 1994).

⁹⁸ *Id.* at 20.

⁹⁹ *Id.* at 19 (quoting 42 U.S.C. § 12181(7)(F) (1988)).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

with access to goods and services provided by physical places of public accommodation, the court argued that its interpretation of Title III was supported by the ADA's legislative history.¹⁰³ The First Circuit noted that nothing in the statute, legislative history, or implementing regulations precluded application of Title III beyond issues of physical accessibility.¹⁰⁴ Further, the court emphasized the broad remedial purpose described in the statute and congressional committee reports.¹⁰⁵ Limiting Title III to physical places, the court found, would exclude from the statute's coverage phone- and mail-order services, "severely frustrat[ing] Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public."¹⁰⁶

Additionally, the First Circuit noted that the insurance safe harbor provision further indicated that Title III could cover the substance of public accommodations' goods and services, as Congress stated that it added the safe harbor because "there [was] some uncertainty over the possible interpretations of the language contained in [T]itles I, II, and III as it applies to insurance . . ."¹⁰⁷ Due to the dearth of factual allegations in the *Carparts* complaint, however, the First Circuit did not analyze the relationship between the safe harbor and Title III.¹⁰⁸ The court only noted that the safe harbor indicated that the plaintiff could have a potentially valid Title III claim.¹⁰⁹

2. *Mutual of Omaha and Morgan*: The Seventh Circuit Joins the First, and Indicates that Title III Applies to the Internet

In *Doe v. Mutual of Omaha Insurance Corp.*, the Seventh Circuit, like the First Circuit in *Carparts*, considered whether Title III applied to AIDS-related health insurance benefit caps.¹¹⁰ Relying on *Carparts*, the Seventh Circuit held:

The core meaning of [Title III], plainly enough, is that the owner or operator of a store, hotel, restaurant, dentist's office, travel agency, theater, *Web site*, or other facility (*whether in physical space or in electronic space*) that is

¹⁰³ *Id.* at 19–20.

¹⁰⁴ *See id.* (first quoting 42 U.S.C. § 12101(b); then quoting H.R. Rep. No. 101-485, pt. 2, at 99 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 382; and then citing S. Rep. No. 101-116, at 58 (1989)).

¹⁰⁵ *See id.*

¹⁰⁶ *Id.* at 20.

¹⁰⁷ *Id.* (quoting S. Rep. No. 101-116, at 84).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 558 (7th Cir. 1999) (describing the AIDS-related benefit cap at issue in the case).

open to the public cannot exclude disabled persons from entering the facility and . . . using the facility in the same way that the nondisabled do.¹¹¹

Even though insurance companies would violate Title III by refusing to sell policies to people with AIDS, the Seventh Circuit concluded that Title III did not apply to the AIDS caps at issue because the statute “does not regulate the content of products or services sold in places of public accommodation.”¹¹² This distinction between availability and content, the Seventh Circuit believed, was compelled by “[t]he common sense of the statute,” the legislative history, and the DOJ’s interpretive guidance.¹¹³

Two years after *Mutual of Omaha*, the Seventh Circuit reaffirmed its interpretation of “place of public accommodation.”¹¹⁴ In *Morgan*, the Seventh Circuit considered whether Title III applied to an employer-provided retirement plan, and the court again declined “to interpret ‘public accommodation’ literally.”¹¹⁵ Under *Mutual of Omaha*, the Seventh Circuit instructed, “[t]he site of the sale is irrelevant to Congress’s goal of granting the disabled equal access to sellers of goods and services. What matters is that the good or service be offered to the public.”¹¹⁶ Given that the retirement plan at issue was offered through an employer, however, the *Morgan* plaintiffs could not state a Title III claim because “[n]o one could walk off the street and ask to become a plan participant.”¹¹⁷

C. ANALYZING THE SPLIT AS APPLIED TO WEBSITES: NEITHER SIDE PROVIDES A SATISFACTORY ANSWER

Neither side of the circuit split persuasively answers whether Title III can cover websites, as Title III is ambiguous as to whether a nonphysical entity can be a “place of public accommodation.” Courts on both sides of the circuit split claim to base their decisions on Title III’s plain text, and there is significant force to the arguments on both sides.¹¹⁸ Given the strength of these textual arguments, the circuit split itself is evidence of Title

¹¹¹ *Id.* at 559 (emphasis added) (citation omitted) (citing *Carparts*, 37 F.3d 12, 19 (1st Cir. 1994)).

¹¹² *See id.* at 559, 564.

¹¹³ *See id.* at 560, 562–63.

¹¹⁴ *Morgan v. Joint Admin. Bd.*, 268 F.3d 456, 459 (7th Cir. 2001).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Compare Magee v. Coca-Cola Refreshments USA, Inc.*, 833 F.3d 530, 534–35 (5th Cir. 2016) (applying *noscitur a sociis* and *eiusdem generis*), and *Parker v. Metro. Life Ins. Co.* 121 F.3d 1006, 1014 (6th Cir. 1997) (applying *noscitur a sociis*), with *Carparts*, 37 F.3d 12, 19–20 (1st Cir. 1994) (discussing the nature of the services enumerated in 42 U.S.C. § 12181(7)(F) (1988), as well as insurance safe harbor provisions).

III's ambiguity.¹¹⁹ Moreover, the statute's ambiguity is confirmed because courts on both sides of the split admit that the statute is more ambiguous than their holdings suggest.¹²⁰

Title III's legislative history also fails to provide clarifying guidance, notwithstanding the First and Fifth Circuits' claims. Although the legislative history emphasizes that 42 U.S.C. § 12181(7)'s "public accommodation" categories should be construed liberally, even the *Carparts* court recognized that the legislative history focuses almost exclusively on access to physical places of public accommodation.¹²¹ This focus is unsurprising given that "[w]hen the ADA was enacted in 1990, the Internet as we know it today—the ubiquitous infrastructure for information and commerce—did not exist."¹²² Because Congress could not have contemplated whether a website was a "place" under the statute, the legislative history cannot conclusively answer whether the phrase "place of public accommodation" covers websites.

Moreover, despite the claims of the Third, Fifth, Sixth, and Seventh Circuits, the DOJ's implementing regulations and interpretive guidance are similarly inconclusive. As the Sixth Circuit suggested, the implementing regulations define "place" to mean a "facility," which could suggest that Title III only covers physical places of public accommodation.¹²³ That inference, however, is undercut by the DOJ's past statutory and regulatory interpretive guidance, as well as the agency's past enforcement actions against website-only businesses.¹²⁴ Yet even these prior administrative interpretations are undeserving of deference, as the DOJ seems to have recently changed its interpretive position.¹²⁵

¹¹⁹ See *McCreary v. Offner*, 172 F.3d 76, 82–83 (D.C. Cir. 1999) ("Although all four circuits found the statutes sufficiently clear to preclude *Chevron* deference, they were not unanimous about the meaning of the supposedly unambiguous scheme. . . . The plausibility of these competing interpretations simply confirms our view that the [statute] is ambiguous."); *cf. de Osorio v. Mayorkas*, 695 F.3d 1003, 1016 n.1 (9th Cir. 2012) (Smith, J., dissenting) ("I do not state or imply that a circuit split is evidence that a statute is ambiguous I merely point out the common sense proposition that if the intent of Congress were truly clear, it would be surprising that so many courts misread the statute.").

¹²⁰ See, e.g., *Magee*, 833 F.3d at 533; *Carparts*, 37 F.3d at 19.

¹²¹ See *Carparts*, 37 F.3d at 19–20.

¹²² See DOJ Proposed Rulemaking, *supra* note 41, at 43,461.

¹²³ See 28 C.F.R. § 36.104 (2018); *Stoutenborough v. Nat'l Football League, Inc.*, 59 F.3d 580, 583 (6th Cir. 1995).

¹²⁴ See, e.g., DOJ Proposed Rulemaking, *supra* note 41, at 43,464–65; Wolk, *supra* note 23, at 458–59.

¹²⁵ See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2418 (2019) ("We have . . . rarely given *Auer* deference to an agency construction 'conflict[ing] with a prior' one." (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994)); *Christopher v. Smithkline Beecham Corp.*, 567 U.S. 142, 155 (2012) (noting that *Auer* deference is unwarranted "when the agency's interpretation [of an ambiguous regulation] conflicts with a prior interpretation"); *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (noting that statutory interpretations in policy statements and agency manuals receive *Skidmore* deference and not *Chevron*

Thus, almost all of the interpretive tools used by both sides of the circuit split fail to resolve whether Title III covers websites. One interpretive tool, however, ultimately points to an appropriate, if unexpected, resolution. Even though Congress did not consider whether a website could be a “place,” *Morgan* validly points out that “[t]he site of the sale is irrelevant to Congress’s goal of granting the disabled equal access to sellers of goods and services.”¹²⁶ Given that “the vast majority of commercial websites are inaccessible to people with certain disabilities,”¹²⁷ excluding websites from Title III would undermine this goal. But although the exact site of sale may be irrelevant to Congress’s goal of providing the disabled with equal access to goods and services, it certainly is relevant to Congress’s and the courts’ ability to exercise power over that sale.¹²⁸

III. ADDRESSING AN OVERLOOKED ISSUE: THE LOCATION OF NONPHYSICAL “PLACES OF PUBLIC ACCOMMODATION” AND THE PRESUMPTION AGAINST EXTRATERRITORIALITY

One can understand why the *Carparts*, *Mutual of Omaha*, and *Morgan* courts failed to determine where their supposed nonphysical “places of public accommodation” were located. The courts in all three cases considered the meaning of “place of public accommodation” in the context of insurance policies sold by businesses with some physical presence in the United States.¹²⁹ It is less clear why the district courts that follow these precedents fail to consider where websites are located, as these courts treat websites as “places” wholly unconnected to any physical location.¹³⁰

Modern technological trends, however, will soon force these courts to engage in the quixotic task of determining where nonphysical “places of public accommodation” are located, placing further tension on the Title III circuit split. Cloud computing, which allows computers to use the Internet to access data and programs “stored ‘in the cloud’ or in remote data centers around the world,”¹³¹ now “underpins a vast number of services,” including

deference); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (noting that the amount of persuasive weight given to an agency’s statutory interpretation depends in part on the interpretation’s “consistency with earlier and later pronouncements”); DOJ 2018 Position Letter, *supra* note 41 (noting that the DOJ believed that the ADA extended to “public accommodations’ websites” without defining “public accommodation”).

¹²⁶ See *Morgan v. Joint Admin. Bd.*, 268 F.3d 456, 459 (7th Cir. 2001).

¹²⁷ *Areheart & Stein*, *supra* note 2, at 451–52 (2015).

¹²⁸ Cf. *Spector v. Norwegian Cruise Lines, Ltd.*, 545 U.S. 119, 125–37 (2005) (considering “whether Title III . . . applie[d] to foreign-flag cruise ships in United States waters”).

¹²⁹ See *Morgan*, 268 F.3d at 459; *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 558 (7th Cir. 1999); *Carparts*, 37 F.3d 12, 14–15 (1st Cir. 1994).

¹³⁰ See, e.g., *Nat’l Fed’n of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565, 572–74 (D. Vt. 2015); *Nat’l Ass’n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 201–02 (D. Ma. 2012).

¹³¹ *Optical Soc’y, Optimizing Data Center Placement, Network Design to Strengthen Cloud Computing*, SCIENCE DAILY (Feb. 14, 2017),

Gmail and Netflix.¹³² Due to the inherently diffuse structure of cloud computing networks, the data underlying websites and apps “could be fragmented and . . . [spread across servers] located in many places around the world.”¹³³ Assembling that data into recognizable form “could occur anywhere at the direction of someone who could be located anywhere else.”¹³⁴ Cloud computing’s data-decentralizing trend is only gaining speed; one trade association estimated in 2017 that “the amount of data stored in the cloud . . . will quintuple” by 2022.¹³⁵ At the same time, various nations’ efforts to regulate the Internet have created distinct regional networks, often because these nations require companies to host certain kinds of data and services on local servers.¹³⁶ Given the continuing demand for global telecommunications,¹³⁷ however, “sooner or later the United States is going to have to plug in to [foreign] networks,”¹³⁸ and U.S. courts will then have to confront whether websites and apps stored in servers abroad are “places of public accommodation” under Title III.¹³⁹

This Part addresses these extraterritoriality-related issues in two steps. Section A analyzes Title III and outlines the significant practical and political problems posed by the potential application of Title III to foreign-stored websites. Section B proposes an alternative interpretation of Title III that would avoid most of the issues identified in section A.

A. TITLE III, THE PRESUMPTION AGAINST EXTRATERRITORIALITY AND INTERNATIONAL COMITY

<https://www.sciencedaily.com/releases/2017/02/170214130514.htm>

[<https://perma.cc/MQN8-NNKH>]; see also Eric Griffith, *What Is Cloud Computing?*, PCMag (May 3, 2016, 12:01 AM), <https://www.pcmag.com/article/256563/what-is-cloud-computing> [<https://perma.cc/6MDC-45M2>].

¹³² Steve Ranger, *What Is Cloud Computing? Everything You Need to Know About the Cloud, Explained*, ZDNET (Dec. 13, 2018, 7:24 PM), <https://www.zdnet.com/article/what-is-cloud-computing-everything-you-need-to-know-from-public-and-private-cloud-to-software-as-a/> [<https://perma.cc/Y83X-KPYS>].

¹³³ Orrin S. Kerr, *The Next Generation Communications Privacy Act*, 162 U. PA. L. REV. 373, 408 (2014).

¹³⁴ *Id.*

¹³⁵ Optical Soc’y, *supra* note 131 (internal quotation marks omitted).

¹³⁶ See Sreenidhi Srinivasan, *The Emerging Trend of Data Localization*, COLUM. SCI. & TECH. L. REV. (March 1, 2018), <http://stlr.org/2018/03/01/the-emerging-trend-of-data-localization/> [<https://perma.cc/TB36-NDC6>]; *The Daily: Why Controlling 5G Could Mean Controlling the World*, N.Y. TIMES (Feb. 25, 2019), <https://www.nytimes.com/2019/02/25/podcasts/the-daily/5g-technology-huawei-china-us.html> [hereinafter *Daily*]; *The Economist Explains: What Is the Splinternet?*, ECONOMIST (Nov. 22, 2016), <https://www.economist.com/the-economist-explains/2016/11/22/what-is-the-splinternet> [<https://perma.cc/6ANZ-CCXN>].

¹³⁷ See *Global Analysis*, *supra* note 19.

¹³⁸ *Daily*, *supra* note 136.

¹³⁹ *Cf.* Microsoft Corp. v. United States, 829 F.3d 197, 200–01 (2d Cir. 2016) (considering whether Stored Communications Act (SCA) warrants could reach email data accessible in the United States but stored in servers in Ireland), *vacated as moot*, 138 S. Ct. 1186, 1187–88 (2018).

When faced with extraterritoriality-related issues—including whether a statute applies to data that is accessible in the United States but stored abroad—courts employ a two-step analytical framework.¹⁴⁰ First, courts determine whether the statute rebuts the presumption against extraterritoriality by asking “whether the statute gives a clear, affirmative indication that it applies extraterritorially.”¹⁴¹ Absent such a clear indication, the statute does not apply extraterritorially.¹⁴² Second, courts “look[] to the statute’s ‘focus’” to “determine whether the case involves a domestic application of the statute . . . even if other conduct occurred abroad.”¹⁴³

1. Addressing the Presumption Against Extraterritoriality

Title III does not provide the clear indication required to rebut the presumption against extraterritoriality. Even though Title III prohibits discrimination in the provision of goods and services by places of public accommodation, the statute does not say anything about whether it covers “places” in foreign countries.¹⁴⁴ That silence is conspicuous in light of Congress’s response to *EEOC v. Arabian American Oil Co. (Aramco)*, a Supreme Court decision issued only one year after the ADA’s passage.¹⁴⁵ In *Aramco*, the Supreme Court held that the “boilerplate” employment discrimination prohibition in Title VII of the Civil Rights Act of 1964 did not rebut the presumption against extraterritoriality.¹⁴⁶ In reaching this conclusion, the Court explicitly likened Title VII to the ADA.¹⁴⁷ Congress immediately amended the ADA to state that Title I’s employment discrimination prohibition applied extraterritorially.¹⁴⁸ Yet even after *Aramco*, Congress failed to amend Title III’s similarly broad, boilerplate language to clarify the territorial reach of the statute’s ban against discrimination by owners, lessees, and operators of public accommodations.¹⁴⁹

Moreover, the Supreme Court’s plurality decision in *Spector v.*

¹⁴⁰ See *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016); *Microsoft*, 829 F.3d at 209.

¹⁴¹ *RJR Nabisco*, 136 S. Ct. at 2101.

¹⁴² See *id.*

¹⁴³ *Id.*

¹⁴⁴ See 42 U.S.C. § 121812(a) (2018); Melody Kubo, Recent Development, *Extraterritorial Application of the Americans with Disabilities Act*, 2 ASIAN-PAC. L. & POL’Y J. 259, 288 (2001).

¹⁴⁵ 499 U.S. 244, 250–51 (1991); see Kubo, *supra* note 144, at 274–75.

¹⁴⁶ 499 U.S. at 250–51.

¹⁴⁷ See *id.*

¹⁴⁸ See Kubo, *supra* note 144, at 274–76 (describing the “Protection of Extraterritorial Employment Amendments” in the Civil Rights Act of 1991, Pub. L. No. 102-166, § 109, 105 Stat. 1071 (1991) (codified at 42 U.S.C. §§ 12111(4), 12112(c), 2000e-1(c))).

¹⁴⁹ See *id.* at 288.

Norwegian Cruise Line, Ltd. confirms that Title III lacks the clear statement required to rebut the presumption against extraterritoriality.¹⁵⁰ *Spector* concerned the application of Title III to foreign-flag cruise ships in U.S. waters, a question that required consideration of the presumption that, “[a]bsent a clear statement of congressional intent, general statutes may not apply to foreign-flag vessels insofar as they regulate matters that involve only the internal order and discipline of the vessel, rather than the peace of the port.”¹⁵¹ This “internal affairs clear statement rule,” the *Spector* plurality explained, “operates much like the principle that general statutes are construed not to apply extraterritorially.”¹⁵² The plurality held that Title III lacked the requisite clear congressional statement regarding foreign-flag vessels’ internal affairs, which strongly suggests that Title III’s broad, boilerplate language similarly fails to rebut the presumption against extraterritoriality.¹⁵³ Thus, Title III does not apply extraterritorially and can apply only to conduct focused in the United States.¹⁵⁴

2. The Statutory Focus Test’s Internet Problem

The statutory focus test, however, is unworkable in the context of foreign-stored, U.S.-accessible Internet data. The focus test cannot be satisfied purely because a website is accessible in the United States, given that a website’s accessibility in a particular jurisdiction cannot even establish personal jurisdiction over the website’s operator.¹⁵⁵ Further, from a technological standpoint, how can there be a single “focus” when a website’s underlying data “could be fragmented and . . . located in many places around the world[?]”¹⁵⁶ As one Second Circuit judge noted in *Microsoft Corp. v. United States*, determining the location of a statute’s focus “may be impossible” when “content is stored . . . in the ‘cloud.’”¹⁵⁷

Moreover, applying statutory focus analysis to foreign-stored Internet data is politically contentious. For example, when *Microsoft* reached the Supreme Court, a wide range of nations and international business groups filed amicus briefs strongly urging the Court to consider principles of international comity when deciding whether warrants under the Stored Communications Act could reach U.S.-accessible email data stored in

¹⁵⁰ See 545 U.S. 119, 132, 139 (2005) (plurality opinion).

¹⁵¹ *Id.* at 130.

¹⁵² *Id.* at 139 (citing *Aramco*, 499 U.S. at 260).

¹⁵³ See *id.* at 132.

¹⁵⁴ See *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016).

¹⁵⁵ See, e.g., *Plixer Int’l, Inc. v. Scrutinizer GmbH*, 905 F.3d 1, 10 (1st Cir. 2018); *Advanced Tactical Ordinance Sys. v. Real Action Paintball, LLC*, 751 F.3d 796, 803–04 (7th Cir. 2014); cf. *Microsoft Corp. v. United States*, 829 F.3d 197, 221 (2d Cir. 2016) (holding that SCA warrants could not reach email data accessible in the United States but stored in servers abroad).

¹⁵⁶ See Kerr, *supra* note 133, at 408.

¹⁵⁷ *Microsoft*, 829 F.3d at 230 n.7 (Lynch, J., concurring).

Ireland.¹⁵⁸ Given that domestic businesses have already voiced concerns over how Title III can be used to dictate websites' content, it is easily imaginable that Title III would spark a *Microsoft*-like political firestorm when applied to a website stored abroad.¹⁵⁹

In light of these significant practical and political concerns, defining the ambiguous phrase “place of public accommodation” as broadly and uncritically including websites is undesirable. Instead, principles of international comity counsel a narrower interpretation.¹⁶⁰ Yet, given that the Internet is now indispensable to daily life in the modern world,¹⁶¹ excluding websites from Title III would undeniably frustrate the ADA's effort to comprehensively address disability discrimination.¹⁶² Fortunately, there is a construction of Title III that balances these concerns—an appropriately modified physical nexus test.

B. AN ALTERNATIVE METHOD OF APPLYING TITLE III TO WEBSITES

A physical nexus test could effectively address Title III's significant extraterritoriality-related challenges without excluding disabled people from website-only businesses. Unlike the current majority approach, however, a proper physical nexus test looks for more than just storefronts.¹⁶³ Rather, a physical nexus test should also look to the data centers where websites and apps are hosted. Such a test complies with Title III's text and legislative purpose, effectively addresses Internet accessibility, and avoids the most complex extraterritoriality issues.

1. Data Centers and Title III

If a data center hosts a publicly accessible website or app that offers services comparable to those offered by entities enumerated in 42 U.S.C. § 12181(7), then the data center should be a “place of public accommodation” under Title III.¹⁶⁴ By hosting publicly accessible websites and apps, data centers are physical buildings that provide services to the public via the

¹⁵⁸ See, e.g., Brief for Bundesverband der Deutschen Industrie E.V. et al. as Amici Curiae in Support of Respondent at 3–4, *United States v. Microsoft Corp.*, 138 S. Ct. 1186 (2018) (No. 17-2); Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Neither Party at 1–3, *United States v. Microsoft Corp.*, 138 S. Ct. 1186 (2018) (No. 17-2).

¹⁵⁹ See Harris, *supra* note 1.

¹⁶⁰ Cf. *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 135–37 (2005) (considering issues of international law when determining whether structural modifications are “readily achievable” under Title III).

¹⁶¹ See Areheart & Stein, *supra* note 2, at 457.

¹⁶² See 42 U.S.C. § 12101(b)(1) (2018).

¹⁶³ See, e.g., *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 905 (9th Cir. 2019); *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017, 1024 (N.D. Cal. 2012).

¹⁶⁴ To date, there does not appear to be a single Title III case concerning whether data centers are places of public accommodation.

Internet.¹⁶⁵ These buildings are certainly “places” within the plain meaning of the term, and they qualify as “facilities” under Title III’s implementing regulations.¹⁶⁶ Through the websites and apps stored on their servers, data centers provide the public with services explicitly mentioned in 42 U.S.C. § 12181(7).¹⁶⁷ Thus, as physical buildings that provide types of services already covered by Title III, data centers should be considered places of public accommodation. Such a construction heeds Congress’s command to broadly construe § 12181(7) while respecting that Congress did not appear to contemplate Title III’s applicability beyond physical places of public accommodation.¹⁶⁸

2. Reaching Websites Through Data Centers

By construing “place of public accommodation” to cover data centers, courts would impose accessibility requirements on the websites and apps hosted on data centers’ servers. If a data center is a place of public accommodation, then its owners, operators, and lessees must provide auxiliary aids and services, such as screen readers and closed captioning, “to ensure that no individual with a disability is excluded [or] denied services . . . because of the absence of auxiliary aids and services.”¹⁶⁹ Given

¹⁶⁵ See *Microsoft Corp. v. United States*, 829 F.3d 197, 202–03 (2d Cir. 2016) (“As of 2014, Microsoft manage[d] over one million server computers in [its] datacenters worldwide, in over 100 *discrete leased and owned datacenter facilities*, spread over 40 countries. These facilities . . . host more than 200 online services, used by over 1 billion customers and over 20 million businesses worldwide.” (emphasis added) (internal quotation marks omitted)).

¹⁶⁶ See *Magee v. Coca-Cola Refreshments USA, Inc.*, 83 F.3d 530, 534–35 (5th Cir. 2016) (collecting dictionary definitions); 28 C.F.R. § 36.104 (2018). Under the regulatory definition of “facility,” it is possible that each server inside a data center could be a “place of public accommodation.” See 28 C.F.R. § 36.104 (noting that “facilit[ies]” include “all or any portion of . . . equipment . . . or other . . . personal property”).

¹⁶⁷ See, e.g., *Nat’l Ass’n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 201 (D. Mass. 2012) (describing the services provided via Netflix’s website).

¹⁶⁸ See *Robles*, 913 F.3d at 905 (“The statute applies to the services *of* a place of public accommodation, not services *in* a place of public accommodation.”); *Magee*, 83 F.3d at 535 (quoting H.R. REP. NO. 101–485, pt. 2, at 100 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 383); *Carparts*, 37 F.3d 12, 19–20 (1st Cir. 1994).

¹⁶⁹ See 42 U.S.C. § 12182(a), (b)(2)(A)(iii) (2018); 28 C.F.R. § 36.303(b)–(c) (2018). Because Title III covers “any person who . . . leases . . . a place of public accommodation,” a small business that hosts its website on a third-party server would remain subject to Title III. 42 U.S.C. § 12182(a); *What is Website Hosting?*, GODADDY, <https://www.godaddy.com/help/what-is-website-hosting-20275> [<https://perma.cc/Z2XA-7F4E>] (last visited Apr. 29, 2019) (“[W]ebsite hosting companies enable you to *lease space on their web servers* where you can store your website files and make them available for visitors to view on the Internet.” (emphasis added)).

To the extent that this Note’s proposed rule requires website hosting companies to ensure that their clients’ websites are ADA-compliant, that burden is justified. Hosting companies often provide their clients with website-building tools. See, e.g., GODADDY, <https://www.godaddy.com/websites/website-builder> [<https://perma.cc/G6X6-Y76U>] (last visited Sep. 15, 2019) (advertising the company’s “Website Builder” tool); SQUARESPACE, <https://www.squarespace.com/> [<https://perma.cc/NDA7-TGWG>] (last visited Aug. 18,

that data centers' services are provided to the public via websites and apps, these auxiliary aids and services naturally must relate to websites' and apps' accessibility.¹⁷⁰ And although there is understandable discomfort over the content-related nature of website and app accessibility measures, the ADA was passed to address disability discrimination in the form of "communication barriers."¹⁷¹ Once a place of public accommodation has chosen to communicate its services to the general public via the Internet, Title III prohibits the place from discriminating against the disabled by communicating those services in an inaccessible manner.¹⁷²

3. Avoiding the Impending Extraterritoriality Crisis

Additionally, a proper physical nexus test mitigates the most complex extraterritoriality issues. Because Title III does not apply extraterritorially, the statute's applicability depends on whether a physical place of public accommodation in the United States discriminates against the disabled.¹⁷³ If the data underlying a discriminatorily inaccessible website or app are stored in data centers within the United States, the data centers easily satisfy this territorial requirement.¹⁷⁴ And if, for example, a restaurant in the United States accepts online orders via a discriminatorily inaccessible website or app stored on foreign servers, the requirement is still met. Regardless of where the website or app is stored, the restaurant is a physical place of public accommodation within the United States that violates the ADA by using an exclusionary mode of communication to transmit its remote ordering service.¹⁷⁵ Thus, whether the physical place of public

2019) (noting that the company provided hosting services and templates that customers could use to build websites). Building accessibility measures into these tools is the most cost-effective way to ensure that a hosting company client's website is accessible, making hosting companies the least cost avoider. *See* Areheart & Stein, *supra* note 2, at 452 n.19 (noting the relatively insignificant cost of phasing in accessibility with website updates); *id.* at 465–66 ("[T]he cost of removing barriers to Internet accessibility is relatively small when compared to the potential benefits. Accessibility is cheaper still when built directly into new website construction." (footnotes omitted)). Moreover, any burden placed on website hosting companies is naturally limited by the ADA's "undue burden" defense. *See* 42 U.S.C. § 12182(b)(2)(A)(iii).

¹⁷⁰ *See, e.g., Netflix*, 869 F. Supp. 2d at 201; *cf. Microsoft*, 829 F.3d at 202–03 (noting that Microsoft's data centers "host more than 200 online services").

¹⁷¹ *See* 42 U.S.C. § 12101(a)(5).

¹⁷² *See id.* § 12182(b)(2)(A)(iii); *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 905–06 (9th Cir. 2019).

¹⁷³ *Cf. EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248–49 (1991) (holding that Title VII, as written at the time, only covered employment discrimination within the United States' territorial borders).

¹⁷⁴ *Cf. id.; Microsoft*, 829 F.3d at 221 (holding that the SCA did not rebut the presumption against extraterritoriality and thus only permitted courts to authorize SCA warrants for data stored on servers in the United States).

¹⁷⁵ *See Robles*, 913 F.3d at 905. Further, even if an online business stores its website in foreign data centers, the business could still be subject to Title III if it stores its goods in warehouses within the United States. There does not appear to be any case law addressing whether a warehouse is a place of public accommodation if it ships goods to members of

accommodation at issue is a data center or a storefront, an appropriately modified physical nexus requirement satisfies statutory focus analysis in most cases.

Data fragmentation may make it difficult at times to determine whether a website or app's underlying data are stored in the United States,¹⁷⁶ but the reality is that the underlying data must be stored somewhere.¹⁷⁷ Because a physical nexus requirement would provide companies with notice that Title III applies to websites and apps stored in data centers within the United States, companies could then make accessible to people with disabilities any underlying data that could possibly enter a data center in the United States.¹⁷⁸ Further, given that long distances between servers and users can slow service delivery speeds, there are significant economic incentives to keep website and app data within the United States and thus subject to Title III's requirements.¹⁷⁹ Thus, including data centers in the physical nexus test

the public. But such a situation seems analogous to that of a data center or another place of public accommodation that provides services to the public remotely. *Cf. id.* ("The statute applies to the services of a place of public accommodation, not services in a place of public accommodation."). Thus, to avoid Title III, an online business would likely have to store its website and its goods abroad.

¹⁷⁶ See Kerr, *supra* note 133, at 408.

¹⁷⁷ See *Microsoft*, 829 F.3d at 202–03.

¹⁷⁸ *Cf. Wolk*, *supra* note 23, at 474 (arguing that "a lack of clear standards . . . negatively impacts businesses subject to the ADA's provisions by providing them with inadequate notice of their legal responsibilities").

¹⁷⁹ See Swanson, *supra* note 16, at 715. Moreover, it would likely be significantly less expensive to comply with Title III than it would be to attempt to skirt the statute by investing in speeding up international Internet delivery times. Improving international Internet speeds could be achieved by laying new undersea cables, but—even ignoring the cost of developing newer, faster cable connection technology—the cost of laying just one cable can run between \$100 million and \$500 million. See Arwen Ambrecht, *How Does the Internet Cross the Ocean*, WORLD ECONOMIC FORUM (Jan. 15, 2016), <https://www.weforum.org/agenda/2016/01/how-does-the-internet-cross-the-ocean/> [<https://perma.cc/K6VG-7UDJ>] (noting that ninety-nine percent of global internet traffic runs via undersea cables); Ping Zhu, *How Are Major Undersea Cables Laid in the Ocean*, INDEPENDENT (Jan. 24, 2015), <https://www.independent.co.uk/news/science/how-are-major-undersea-cables-laid-in-the-ocean-9993232.html> [<https://perma.cc/QX73-LP9B>] (describing the process of submarine cable-laying and the possible associated costs). In contrast, adding accessibility measures during the website updating process can cost as little as one to three percent of total website costs. Areheart & Stein, *supra* note 2, at 452 n.19 (quoting Palazzolo, *supra* note 4). For the vast majority of websites, one to three percent of total website costs is significantly less than \$100 million. See *How Much Should a Website Cost in 2019?*, WEBFX, <https://www.webfx.com/How-much-should-web-site-cost.html> [<https://perma.cc/339R-M96F>] (last visited Aug. 13, 2019) (estimating that "the upfront cost of a site, which includes launching and designing [the site]," ranges from \$12,000 to \$150,000 and "routine website maintenance" costs range from \$400 to \$60,000 per year). To the extent that 5G wireless Internet could replace cable connections, the economics remain the same. See Macy Bayern, *Why a 5G Rollout Requires \$2.7T Investment by 2020*, TECHREPUBLIC (Feb. 25, 2019, 8:34 AM), <https://www.techrepublic.com/article/why-a-5g-rollout-requires-2-7t-investment-by-2020/> [<https://perma.cc/X43G-Z77D>] (noting that enterprise spending on 5G wireless Internet infrastructure will reach \$2.7 trillion by 2020). Thus, a physical nexus test that

is not only workable, but it also furthers Title III's remedial purpose.

CONCLUSION

It is safe to say that when passing the ADA in 1990, Congress never considered how Title III applied to websites.¹⁸⁰ Because this issue did not cross its mind, Congress decided that Title III should cover “places,” a seemingly simple term that has posed significant, intractable challenges for over two decades.¹⁸¹ These challenges will only get worse as cloud computing continues to spread and courts continue considering whether websites—amalgamations of data drawn from across the world—are “places” too.¹⁸² Looking behind websites to the physical data centers where they are stored, however, provides a workable solution. Given that this solution also avoids injecting courts into the heart of significant international disputes, adding data centers to Title III's physical nexus test is the most prudent path forward.

includes data centers will incentivize compliance with the ADA rather than the exploitation of any loopholes in the ADA.

¹⁸⁰ See DOJ Proposed Rulemaking, *supra* note 41, at 43,461 (noting that the Internet infrastructure which exists today did not exist when the ADA was enacted).

¹⁸¹ See *id.*

¹⁸² See Kerr, *supra* note 133, at 408.