WEBSITE ACCESS FOR CUSTOMERS WITH DISABILITIES: CAN WE GET THERE FROM HERE?

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Abstract

Two pending federal cases ask the courts to decide whether commercial websites must be designed to be accessible to people with disabilities under Title III of the Americans With Disabilities Act. The debate centers on the scope of Title III and whether it covers virtual as well as physical facilities. Businesses argue commercial websites are not covered by Title III. People with disabilities disagree -- arguing full and equal access to commercial facilities includes accessible website design to enable their access to online marketplaces. This article analyzes the arguments in the pending cases that involve websites operated by commercial airlines. It also discusses application of Title III to websites operated by businesses in other industries. A comparative law analysis is provided and the technical feasibility of designing accessible websites is explored. It concludes that a proper construction of Title III includes at least some commercial websites.

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I. INTRODUCTION

Two cases pending in federal courts demand that commercial websites provided by airlines for their customers be made accessible to people with disabilities.[2] In these cases, the plaintiffs, a disability rights group and a visually impaired individual representing the class, argue that Title III of the Americans With Disabilities Act of 1990 (ADA)[3] requires commercial airlines to make their websites compatible with screen reading programs that enable the visually disabled to access webpage content.[4] The crux

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[2] Access Now, Inc. v. Southwest Airlines, Co., 227 F. Supp. 2d 1312 (S.D. Fla. 2002) (granting defendant's motion to dismiss); *appeal docketed*, No. 02-16163-BB (11th Cir. Nov. 11, 2002) (case scheduled for oral argument on the Eleventh Circuit's Nov. 2003 calendar), *available at* http://pacer.ca11.uscourts.gov.; Access Now., Inc. v. Am. Airlines, Inc., No. 02-22076 (S.D. Fla., filed July 16, 2002) (motion to dismiss filed by defendant; proceedings stayed by the trial court pending appellate decision in Access Now, Inc. v. Southwest Airlines Co., No. 02-16163-BB). The term "commercial websites" is used in this paper to describe websites offered by businesses for the use of their customers who are members of the public. It encompasses the full scope of business operations that affect commerce:

> [t]he use of the phrase "operations affect commerce" applies the full scope of coverage of the Commerce Clause of the Constitution in enforcing the ADA … including the activities of local business enterprises (e.g. a physician's office, a neighborhood restaurant, a laundromat, or a bakery) that affect interstate commerce through the purchase or sale of products manufactured in other States, or by providing services to individuals from other states. Because of the integrated nature of the national economy, the ADA and this final rule will have extremely broad application.

NonDiscrimination On The Basis of Disability By Public Accommodations And In Commercial Facilities (Published July 26, 1991), 28 C.F.R. Pt. 36, App. B, at 672 (2003). This paper focuses on the accessibility requirements for places of public accommodation as opposed to the separate regulatory requirements for the construction of new commercial facilities or the alternation of existing commercial facilities. *See id.* (discussing the differences in meaning between the term "commerce" as used in the regulatory definition of "place of public accommodation" and the use of the term "commerce" in the definition of "commercial facility").

[3] 42 U.S.C. §§12101-02. (2003) [hereinafter the Americans With Disabilities Act or ADA]; 42 U.S.C. §§12181-89 (2003) [hereinafter Title III of the ADA or Title III].

[4] *See Southwest Airlines*, 227 F. Supp. 2d at 1312; *Am. Airlines, Inc.*, No. 02-22076. Website accessibility means:

> development of information systems flexible enough to accommodate the needs of the broadest range of users…regardless of age or disability . . . Unless a web site is designed in an accessible format, significant populations will be locked out as the World Wide Web rapidly advances from a text based communication format to a robust, graphical format embracing audio and video clip tools . . . [T]he benefits of accessible web design extend beyond the community of people with disabilities and an aging population since it enables low technology to access high technology.

See Cynthia D. Waddell, *Applying the ADA to the Internet: A Web Accessibility Standard*, American Bar Association, Annual Meeting (June 16, 1998), *available at* http://www.rit.edu/~easi/law/weblaw.htm (last visited Sep. 26, 2003). Accessibility of websites to people with disabilities refers to the "extent to which the

of these cases is whether websites operated by commercial enterprises and open to the public are "place[s] of public accommodation," required by Title III of the ADA to be accessible to persons with disabilities.[5] At issue is whether private businesses that operate websites must comply with ADA accessibility mandates for public accommodations, a potentially costly and technically challenging obligation for e-commerce businesses. For people with disabilities, access to websites in order to conduct business via the Internet is critical to achieving "full and equal"[6] enjoyment of an important component of contemporary society: the ability to participate in commerce via the Internet.[7] Central to

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sites incorporate certain objective features or design principles that allow their content to be accessed by persons who interface with the Web in different ways, typically with the use of assistive technology." NATIONAL COUNCIL ON DISABILITY, WHEN THE AMERICANS WITH DISABILITIES ACT GOES ONLINE 3 (2003) [hereinafter NCD Position Paper], *available at* http://www.ncd.gov/newsroom/publications/adainternet.html (last visited Sep. 26, 2003). The National Council on Disability is an independent agency working with the President and Congress to increase the inclusion, independence, and empowerment of all Americans with Disabilities. *See id*. The NCD Position Paper analyzes whether the Americans With Disabilities Act applies to commercial and other private sector websites, and if so, what it requires. *See id.*

[5] 42 U.S.C. §12182(a) (2003) (prohibiting discrimination "on the basis of disability in the full and equal enjoyment of services … of any place of public accommodation"); 42 U.S.C. §12181(7) (2003) (defining public accommodation as a private entity that falls into one or more of twelve listed categories).

[6] The ADA's general prohibition against disability discrimination in Title III provides 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." 42 U.S.C. §12182(a) (2003) (emphasis added).

[7] Internet Software Consortium, *Internet Domain Survey* (July 2002), *available at* http://www.isc.org/ds/WWW-200207/dist-bynum.html (last visited October 1, 2003) (reporting that there are over 100 million websites in the United States that have chosen a domain name ending with ".com," ".net," or ".org"). Presumably these websites are sponsored by businesses or have ties to businesses. *See* Brief Of The Equal Employment Advisory Council And The Chamber of Commerce Of The United States As Amici Curiae Supporting Defendant-Appellee And In Support of Affirmance at 23, *Southwest Airlines*, No. 02-16163-BB. Approximately 10 million people in the U.S. have vision impairments; however, only an estimated 1.5 million people in the U.S. with vision impairments use the Internet. *See* Brief For the Appellants at 3, *Southwest Airlines*, No. 02-16163-BB; *Southwest Airlines*, 227 F. Supp. 2d at 1314 (finding that the Internet provides great benefits for the vast majority of Internet users but that individuals who suffer from various physical disabilities may be unable to access the goods and services offered on many Internet websites).

the debate surrounding how Title III of the ADA applies to commercial websites is whether places of public accommodation are restricted to physical places.[8]

This article examines whether Title III of the ADA applies to websites operated by private businesses that offer goods and services to the public on the Internet. First, the paper provides an overview of the coverage of Title III, including statutory provisions, regulations, and cases that define the scope of Title III. Second, the paper discusses two pending cases that test the application of the ADA's public accommodation provisions to websites operated by commercial airlines for online ticketing and other customer services. The third section analyzes the strengths and weaknesses of the two test cases, including arguments specific to websites operated by the commercial airline industry. The fourth section examines the broader arguments related to access by disabled customers to commercial websites, including arguments that go beyond the context of the commercial airlines test cases. In addition, this section applies principles of statutory construction to Title III, analyzes recent developments on the meaning of place of public

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[8] *See* Mark A. Lemley, *Place and Cyberspace*, 91 CALIF. L. REV. 521, 523-24 (2003). Lemley discusses the technology of the Internet and the World Wide Web, concluding that each is not a physical place but rather a communications medium.

> We speak of the Internet in spatial terms, and in certain respects users may experience some aspects of the Internet as a physical place. But even a moment's reflection will reveal that the analogy between the Internet and a physical place is not particularly strong. As a technical matter, of course, the idea that the Internet is literally a place in which people travel is not only wrong but faintly ludicrous. No one is "in" cyberspace. The Internet is merely a simple computer protocol, a piece of code that permits computer users to transmit data between their computers using existing communications networks. There were computer networks before the Internet that similarly relied on telephonic exchange of data…. The idea of cyberspace as a physical place is all the more curious because the instantiation that most resembles travel to the casual user, the World Wide Web, is in fact much more like a traditional communications medium….

Id. at 523-34. On the other hand, some contend that the issue of whether a website itself might exist in a physical space is a factual question that turns on a full evaluation of the nature and characteristics of the Internet. *See* Brief of Amici Curiae, American Association of People With Disabilities Et Al., In Support of the Plaintiffs-Appellants And In Support of Reversal at 3, n.1, *Southwest Airlines*, No. 02-16163-BB. Understanding the nature of the Internet and the World Wide Web is relevant to one of the central debates

accommodation, provides an international law perspective, and explores the technical feasibility of making commercial websites accessible to people with disabilities. Finally, the article concludes that the correct answer to the question of whether Title III should be construed to cover at least some commercial websites offering goods and services to the public is "yes".

II. THE SCOPE OF TITLE III:

ACCESS BY PEOPLE WITH DISABILITIES TO PLACES OF PUBLIC ACCOMMODATION

Title III of the ADA prohibits discrimination 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 owners, lessors, lessees, or operators of a place of public accommodation."[9] As Congress stated in "findings of fact"

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discussed in this paper: whether a public accommodation as the term is used in Title III is limited to physical places and thus excludes the Internet and websites.

[9] 42 U.S.C. §12182 (2003); 42 U.S.C. §12182(a) (2003) (emphasis added) (stating the general rule prohibiting disability discrimination by public accommodations); *see also* 42 U.S.C. §12182(b) (2003) (outlining general and specific activities that are prohibited as forms of disability discrimination). This article focuses on the scope of Title III: whether a business with a website for customers is governed by Title III's disability access provisions with respect to accessibility of the content of the website. Detailed analysis of the nondiscrimination obligations of a covered business is beyond the scope of this article. Several commentators have analyzed the nondiscrimination obligations of a business under Title III and speculated about what those obligations would entail if Title III is found to govern non-physical places such as websites. *See, e.g.,* Cassandra Burke Robertson, *Providing Access to the Future: How the Americans With Disabilities Act Can Remove Barriers in Cyberspace*, 79 DEN. U. L. REV. 199, 217-22 (2001). Assuming Title III is applicable to websites, Robertson discusses obligations a website operator may have with respect to access for the disabled under the general obligation to provide auxiliary aids and services. *See id*.; s*ee also* Kelly E. Konkright, Comment, *An Analysis of the Applicability of Title III of the Americans With Disabilities Act to Private Internet Access Providers*, 37 IDAHO L. REV. 713, 739-45 (2001). Konkright argues that the application of Title III to internet service providers may turn on whether the provider's office or website is found to be the place of public accommodation; if the office is found to be the place of public accommodation, she speculates that the website may not need to be accessible if disabled individuals have equal access to the office through the telephone. *See id*. at 740; *see also* Justin D. Petruzzelli, *Adjust Your Font Size: Websites Are Public Accommodations Under the Americans With Disabilities Act*, 53 RUTGERS L. REV. 1063, 1063-88 (2001). Petruzzelli analyzes the Title III regulations requiring provision of auxiliary aids and services. *See id*. He argues that a review of existing website

included in the ADA: "[I]ndividuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, [and] the discriminatory effects of architectural, transportation, and communication barriers.[10] Some of the more subtle forms of disability discrimination addressed by Title III include: "…overprotective rules and policies, failure to make modification to existing facilities and practices, and relegation to lesser services, programs, activities, benefits, jobs, and other opportunities."[11] The ADA seeks to prevent and remedy these very sorts of discrimination.[12]

The meaning of two terms, "public accommodation" and "place of public accommodation," are key to determining coverage of Title III.[13] A place of public

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accessibility standards should assist in determining what compliance with the ADA requires, including accessibility standards imposed by the federal government for federal websites and web content accessibility guidelines created by the World Wide Web Consortium (W3C). *See id.*; s*ee also* Adam M. Schloss, *Web-Sight For Visually Disabled People: Does Title III Of The Americans With Disabilities Act Apply To Internet Websites*, 35 COLUM. J.L. & SOC. PROBS. 35, 50-57 (2001). Schloss discusses the concept of reasonable modifications required by Title III and reasons that many of the modifications to web pages that disability advocates seek do not fundamentally alter the nature of web pages or create an undue burden for the website. *See id*.

[10] 42 U.S.C. §12101(a)(5) (2003).

[11] John A. Bourdeau, Annotation, *Validity, Construction, and Application of §302 of Americans With Disabilities Act (42 U.S.C.A. §12182), Prohibiting Discrimination on Basis of Disability By Owners Or Operators of Places of Public Accommodation*, 136 A.L.R. FED. 1, 1 (1997).

[12] Rendon v. Valleycrest Productions, Ltd., 294 F.3d 1279, 1281-83 (11th Cir. 2002).

[13] 42 U.S.C. §12181(7) (2003). The Section by Section Analysis and Response to Comments on the final regulations implementing Title III of the ADA discusses the distinction between "public accommodation" and "place of public accommodation":

> [t]he term "place of public accommodation" is an adaptation of the statutory definition of "public accommodation in section 301(7) of the ADA and appears as an element of the regulatory definition of public accommodation. The final rule defines "place of public accommodation" as a facility, operated by a private entity, whose operations affect commerce and fall within at least one of 12 specified categories. The term "public accommodation," on the other hand, is reserved by the final rule for the private entity that owns, leases (or leases to), or operates a place of public accommodation. It is the public accommodation that is subject to the regulation's nondiscrimination requirements. Placing the obligation not to discriminate on the public accommodation, as defined in the rule, is consistent with section 302(a) of the ADA, which places the obligation not to discriminate on any person who owns, leases (or leases to), or operates a place of public accommodation.

accommodation is a facility, operated by a private entity, whose operations affect commerce and fall within at least one of twelve categories listed in the statute.[14] The examples of facilities listed in each category in the statute are only examples and are not intended to identify all covered facilities.[15] A public accommodation, on the other hand, is the private entity that owns, leases, leases to, or operates a place of public accommodation.[16] A business that operates a place of public accommodation is governed by the nondiscrimination rules in Title III only to the extent that it is operating a place of

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See NonDiscrimination On The Basis of Disability By Public Accommodations And In Commercial Facilities (Published July 26, 1991), 28 C.F.R. Pt. 36, App. B, p. 677 (2003).

[14] *See* 42 U.S.C. §12181(7) (2003). Twelve categories of "public accommodation" are listed in the statute:

> (A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor; (B) a restaurant, bar or other establishment serving food or drink; (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment; (D) an auditorium, convention center, lecture hall, or other place of public gathering; (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment; (F) 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; (G) a terminal, depot, or other station used for specified public transportation; (H) a museum, library, gallery, or other place of public display or collection; (I) a park, zoo, amusement park, or other place of recreation; (J) a nursery, elementary, secondary, undergraduate or postgraduate private school, or other place of education; (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and (L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

Southwest Airlines, 227 F. Supp. 2d at 1317; *see also* 28 C.F.R. §36.104 (2003) (defining "place" as a facility operated by a private entity, whose operations affect commerce and falls within one of twelve categories, and "facility" as 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).

[15] As summarized by the U.S. Department of Justice:

> [t]he definition of place of public accommodation incorporates the 12 categories of facilities represented in the statutory definition of public accommodation in §301(7) of the ADA: 1. Places of lodging. 2. Establishments serving food or drink. 3. Places of exhibition or entertainment. 4. Places of public gathering. 5. Sales or rental establishments. 6. Service establishments. 7. Stations used for specified public transportation. 8. Places of public display or collection. 9. Places of recreation. 10. Places of education. 11. Social service center establishments. 12. Places of exercise or recreation.

See 28 C.F.R. Pt. 36, App. B, p. 677 (2003). According to the U.S. Department of Justice, the list of categories is exhaustive; however, the examples of facilities within each category are not exhaustive. *See id*. at 678.

[16] *See* 28 C.F.R. Pt. 36, App. B, p.677-78 (2003) (discussing the distinction between the terms "public accommodation" and "place of public accommodation" as used in the statute and regulations); *see also supra* note 13 and accompanying text.

public accommodation.[17] Not all businesses are public accommodations. For example, a wholesaler that sells only to other businesses and does not serve the public, is not public accommodations under Title III.[18] So, when a business grows food produce and supplies its crops exclusively to food processing corporations on a wholesale basis, it is not a public accommodation because it does not serve the public.[19] However, if that wholesaler also operates a roadside stand where its crops are sold to the public, the roadside stand is a "sales establishment" that is open to the public; it is a category of "place of public accommodation" that is expressly covered by the ADA.[20] In this example, the wholesale business that operates the roadside stand is a public accommodation and is covered by Title III's nondiscrimination rules to the extent of its operation of the roadside stand.[21] But the wholesale business's other business operations, which are not open to the public, are not covered by Title III.[22]

Are "place[s] of public accommodation" limited to physical facilities? Courts have been split on this issue.[23] These cases are the foundation for the inevitable cases that will consider whether Title III applies to goods and services offered to the public via the

[17] *See* 28 C.F.R. §36.102(b)(2) (2003).
[18] *See* 28 C.F.R. Pt. 36, App. B, p. 678 (2003) (discussing the inapplicability of Title III to businesses that restrict their business to wholesale operations and do not serve the public).
[19] *See id.*
[20] *See id.* (recognizing the application of Title III to wholesalers who operate roadside produce stands that serve the public).
[21] *See id*.
[22] *See id.*
[23] *See* Bourdeau, *supra* note 11, at §§12(a) and 12(b) (collecting cases that have determined whether a place is a public accommodation as the term is used in Title III of the ADA).

Internet, including the two current cases involving websites operated by commercial airlines for their customers.[24]

A. *Places of Public Accommodation Are Limited to Physical Places*

Three federal Circuit Courts have expressly or impliedly held "place[s] of public accommodation" are limited to physical places. In *Stoutenborough v. National Football League*, the Sixth Circuit Court of Appeals held the National Football League and broadcasters did not violate Title III of the ADA by refusing to provide televised access for hearing impaired persons to "blacked out" football games.[25] In *Stoutenborough*, the Sixth Circuit held Title III of the ADA only applies to access to "places" of public accommodation, based on the plain language of the statute and regulations. [26] The court noted that these regulations further define "place" as a "facility" operated by a private entity, and define "facility" in terms of buildings, structures, and other real or personal property, [27] implying that "place of accommodation" is limited to physical places.[28] Also

[24] The two current cases involving websites operated by commercial airlines for their customers are discussed in the next section of this paper. *See infra* note 63 and accompanying text.
[25] Stoutenborough v. National Football League, Inc., 59 F.3d 580 (6th Cir. 1995). The Sixth Circuit affirmed the district court's dismissal of plaintiffs' Title III claim seeking "auxiliary aids or services." *See id.* at 581. The auxiliary aid or service sought in this case some form of telecommunication of the affected football games, which plaintiffs' claimed was required by Title III in order for them to achieve substantially equal access to televised "blacked-out" home football games. *See id.* at 581-82. The NFL's "blackout rule" prohibits the live local broadcast of home football games that are not sold out seventy-two hours before game-time. *See id.* at 582. The Sixth Circuit held that defendant National Football League did not discriminate against hearing impaired persons because the blackout rule prevents televised broadcast of the games to both hearing and hearing impaired; that the availability of radio broadcast of the games was irrelevant because the rule did not apply to radio broadcasts nor prevent them. *See id.* The court also held that the defendants did not operate a place of public accommodation as they do not fall within one of the twelve statutory categories; nor was the service sought by the plaintiffs (televised broadcast of blacked out games) a service of a public accommodation. *See id.* at 583.
[26] *See id.*
[27] *See id.*
[28] *Stoutenborough* did not expressly hold that Title III is limited to discriminatory access to physical structures. *See id.*; *see also* Parker v. Metropolitan Life Insurance Co., 121 F.3d 1006, 1019 (6th Cir. 1997)

in *Parker v. Metropolitan Life Insurance Co.*, the Sixth Circuit held an employee benefit plan was not covered by Title III where the plan was not available to the public through the insurer's offices, but rather was offered as an employee benefit.[29] *Parker* stated: "The clear connotation of the words in Section 12181(7) is that a public accommodation is a physical place. Every term listed in Section 12181(7) and subsection (F) is a physical place open to public access."[30] Likewise the Third and Ninth Circuits have held Title III of the ADA only refers to physical "place[s] of public accommodation."[31]

A close examination of these cases reveals that these circuit courts reached the issue of whether the scope of Title III is limited to physical places only after deciding Title III was inapplicable to these cases for other reasons. *Stoutenborough* was resolved when the court found a TV broadcast of a football game was not a "service" offered by the football stadium. It is the only place of public accommodation in the case and it is

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(Martin, B., dissenting) (stating that the majority in *Parker* erroneously interpreted *Stoutenborough* to hold that Title III's mandates are limited to physical structures, when in fact *Stoutenborough* did not so hold, but rather correctly applied the statutory definition of "place" under Title III to exclude coverage of the defendants because the NHL and the other defendants in the case did not fall within one of the twelve categories in the statute).

[29] *See Parker*, 121 F.3d at 1011 (holding "only that a long-term disability plan obtained through an employer is not a public accommodation under Title III"). *Parker* expressed "no opinion as to whether plaintiffs must physically enter a public accommodation to bring suit under Title III as opposed to merely accessing by some other means, a service or good provided by a public accommodation." *See id.* at 1011 n.3. "The public cannot enter the office of [the defendant insurance company or defendant employer in Parker] and obtain the long-term disability policy that plaintiff obtained [from her employer]." *Id.* at 1011.

[30] *See id.* at 1014 (citations omitted).

[31] Ford v. Schering-Plough Corp., 145 F.3d 601, 612-14 (3rd Cir. 1998). *Ford* held an employee's claim of discriminatory disability benefits in plan provided by her employer was not covered by Title III. *Id.* at 613. The plan in *Ford* included a disparity between disability benefits for mental and physical disabilities. *Id.* at 603-04. According to *Ford*, "[t]he plain meaning of Title III is that a public accommodation is a place," and does not include an employee benefit plans. *Id.* at 612; *see also* Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114-15 (9th Cir. 2000). *Weyer* held an insurance company that administers a group disability insurance plan for an employer that covered its employees was not covered by Title III: "[t]he dispute in this case, over terms of a contract that the insurer markets through an employer, is not what Congress addressed in the public accommodations provisions." *Id.* at 1114. *Weyer* also held that even if the insurance administrator was a place of public accommodation in the context of this case, the terms of an insurance contract sold by an insurance office are not covered by Title III because Title III does not require

not the defendant.[32] The other three circuit court cases involved employee disability insurance benefit plans that were marketed by insurance companies to employers rather than the public.[33] In two of these insurance cases, the court held employee benefit plans are covered by Title I of the ADA, which covers disability discrimination by private employers, rather than Title III of the ADA.[34] In the third insurance case, the Ninth Circuit noted that neither party in the case had raised the question of whether the plaintiff had the ability to bring a claim regarding an employment relationship under Title III, which the court said was doubtful in light of its decision in a recent case.[35]

These cases are meaningful for another reason. Several of the cases have been cited as authority that Title III does not apply unless there is a "nexus" between a physical place of public accommodation and the good or service that the individual with a disability desires to access.[36] The requirement of a nexus is discussed in a later section of this paper. [37]

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provision of different goods or services to the disabled, it just requires nondiscriminatory enjoyment of the goods and services provided by a public accommodation. *Id.* at 1115.

[32] *See id.* at 1114-15*; see also Stoutenborough,* 59 F.3d at 583.

[33] *See Parker*, 121 F.3d at 1008; *Ford*, 145 F.3d. at 603; *Weyer*, 198 F.3d at 1107.

[34] S*ee Parker*, 121 F.3d at 1009; *Ford*, 145 F.3d. at 607.

[35] *See Weyer*, 198 F.3d at 1114 (citing Zimmerman v. State Dept. of Justice, 170 F.3d 1169 (1999)).

[36] *See* Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28, 33 (1999). *Pallozzi* explained that the Sixth Circuit's decision in *Parker* and the Third Circuit's decision in *Ford* were based on reasoning that a plaintiff in a Title III case must have a "nexus" to a place of public accommodation in order to claim the protections of Title III from disability discrimination. *See id*. *Pallozzi* said the nexus that was missing in these two cases was that the plaintiffs did not access their insurance policies from an insurance office, but rather from their employers, and therefore were not discrimination against in connection with a public accommodation. *See id*. *Pallozzi* said that although *Ford* may have implied it, neither *Parker* nor *Ford* held that Title III ensures only physical access to places of public accommodation. *See id.; see also Parker*, 121 F.3d at 1010-14; *Ford*, 145 F.3d at 612-13. This nexus did not exist in *Parker* or *Ford* because the plaintiffs in the cases obtained their insurance plans from their employers, not from a place of public accommodation such as an insurance office. *See Palozzi*, F.3d 28 at 33.

[37] *See infra,* notes 217-223 and accompanying text for a discussion of the nexus requirement.

Because the decisions involving the meaning of "place of public accommodation" were initially resolved on other grounds and do not involve e-business activities, they are weak authority to exclude e-business facilities from the scope of Title III on the basis that Title III only applies to physical places.

B. *Places of Public Accommodation Include Physical and Non-Physical Places*

In *Carparts Distribution Ctr. v. Automotive Wholesaler's Ass'n*, the First Circuit Court of Appeals held "place[s] of public accommodation" may include *non-physical* places.[38] *Carparts* held Title III mandates nondiscriminatory access for the disabled to businesses that offer their goods and services to customers by communications services such as phone, mail or even the Internet; even if the business does not have physical facility that is open to the public.[39] *Carparts* held the trial court erred when it interpreted the term "public accommodation" under Title III to be limited to "actual physical structures with physical boundaries which a person physically enters for the purpose of utilizing the facilities or obtaining services therein."[40] *Carparts* concluded that the plain meaning of the terms in the statute do not require "public accommodations" to have physical structures for persons to enter:

[38] *See* Carparts Distribution Ctr. v. Automotive Wholesaler's Ass'n, 37 F.3d 12, 18-19 (lst Cir. 1994).
[39] *See id*. at 18-19. In *Carparts,* the First Circuit reversed the trial court's dismissal of the case for failure to state a claim. The trial court dismissed the case based on its finding that neither of the defendants, a sponsor of a health plan and a trust that administered the health insurance plan, was a place of "public accommodation" under Title III. *See id*.
[40] *See id*, at 18 (holding establishments of "public accommodation" under Title II are not limited to actual physical structures, based on the plain meaning of the statute and examples of places of public accommodation found in the text of the statute).

> [B]y including "travel service" among the list of services considered "public accommodations," Congress clearly contemplated that "service establishments" include providers of services which do not require a person to physically enter an actual physical structure. Many travel services conduct business by telephone or correspondence without requiring their customers to enter an office in order to obtain their services… It would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result.[41]

According to the First Circuit: "[e]ven if the meaning of 'public accommodations' is not plain, it is, at worst, ambiguous. This ambiguity, considered together with agency regulations and public policy concerns, persuades us that the phrase is not limited to actual physical structures."[42] The court concluded its analysis of the scope of Title III as follows:

> Neither Title III nor its implementing regulations make any mention of physical boundaries or physical entry. Many goods and services are sold over the telephone or by mail with customers never physically entering the premises of a commercial entity to purchase the goods or services. To exclude this broad

[41] *See id* at 19. C*arparts*' discussion of the scope of travel services as a public accommodation could be viewed as dicta since the case involved the meaning of a different category of public accommodations, "insurance offices," rather than "travel services." *See id.* The trial court in *Carparts* held that neither of the defendants possessed the characteristics of being an "actual physical structure with definite physical boundaries which a person enters for the purpose of using the facilities or obtaining the services therein." *See id*. at 18. The First Circuit's opinion does not indicate how the defendants' insurance services were distributed, for example, whether by phone or mail. *See id.*

> category of businesses from the reach of Title III and limit the application of Title III to physical structures which persons must enter to obtain goods and services would run afoul of the purposes of the ADA and would severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges, and advantages, available to other members of the general public.[43]

The Seventh Circuit also takes the position that "place of public accommodation" include non-physical places.[44] In *Doe v. Mutual of Omaha Ins. Co.*, Judge Posner, examined the scope of Title III and concluded:

> Title III of the Act, in [S]ection 302(a), provides that "no 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 the owner, lessee, or operator of such a place. The core meaning of this provision, 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 open to the

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[42] *See id.* at 19.

[43] *See id.* at 20. The First Circuit did not rule on the merits of the plaintiffs' claim that defendant*s* violated Title III by discriminating based on disability in the health insurance benefits under the plan. *See id.* at 20-21. The health insurance plan included a much smaller cap on lifetime benefits for Acquired Immune Deficiency Syndrome (AIDS) related illnesses than the cap on lifetime benefits that applied to other illnesses. *See id.* at 414. Rather, it remanded the case to the trial court for further proceedings, finding that it would be unwise for the appellate court to go beyond the possibility that if the case is remanded for further proceedings in the trial court that the plaintiff may be able to develop some kind of claim under Title III. S*ee id*. at 20.

[44] *See* Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557 (7th Cir. 1999).

> public cannot exclude disabled persons from entering the facility, and once in, from using the facility in the same way that the nondisabled do.[45]

Commentators have labeled this statement "dicta" to the extent that it provides an opinion that the plain meaning of place of public accommodation includes websites and other facilities in physical space or electronic space that are open to the public.[46]

In yet another insurance case, the Second Circuit also followed *Carparts*:

> Title III's mandate that the disabled be accorded "full and equal enjoyment of the goods, [and] services … of any place of public accommodation," suggests to us that the statute was meant to guarantee them more than mere physical access…. We believe an entity covered by Title III is not only obligated by the statute to provide disabled persons with physical access, but is also prohibited from refusing to sell them its merchandise by reason of discrimination against their disability. … We find no merit in Allstate's contention that, because insurance policies are not used in places of public accommodation, they do not qualify as goods or services "of a place of public accommodation." The term "of" generally does not

[45] *See id*. at 558-59 (citations omitted) (following *Carparts,* 37 F.3d at 19). The Seventh Circuit found Mutual of Omaha did not refuse to sell insurance policies to people who have AIDS, which would have violated 302(a) of the ADA. *See id*. Rather, Mutual of Omaha imposed AIDS caps on the policies, arguably rendering them of less value to persons with AIDS than the policy would provide to persons with other, equally expensive diseases or disabilities. *See id*. at 559. Judge Posner held the AIDS caps in the policies were not a violation of Title III of the ADA because Title III does not govern the content or goods or services offered by a place of public accommodation, including the terms of an insurance policy. *See id*. at 560.

[46] *See e.g*., Paul Taylor, *The Americans With Disabilities Act and the Internet*, 7 B.U. J. SCI. & TECH. L. 26, 43 (2001) (explaining the court's holding that Title III does not require a seller to alter his product to make

mean "in," and there is no indication that Congress intended to employ the term in such an unorthodox manner in Section 302(a) of Title III.[47]

All the cases discussed above involve insurance policies with different terms for disabled persons than provided for non-disabled persons.[48] Only *Carparts* states that it involves insurance sales that were not offered to the public through a physical insurance office, although this could well have been the case in *Doe* and *Pallozzi* as the facts are not included in the reported decisions.[49] Although these cases generally support the inclusion of e-business websites within the scope of Title III, they were not decided based on this issue. Thus, these cases leave unresolved the question of Title III's application to private businesses that sell products or services to customers over the Internet or via other intangible facilities such as the telephone.[50]

C. *Title III Covers Off-Site and On Premises Barriers That Limit Access to Tangible Places*

The Eleventh Circuit Court of Appeals adopted a third view of the scope of Title III that falls somewhere between the views of Title III described in Sections A and B previously. In *Rendon v. Valleycrest Productions, Ltd.*., the Eleventh Circuit held Title III applied to a communications barrier that discriminatorily excluded disabled persons from

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it equally valuable to the disabled and the nondisabled, in the context of insurance policies with different caps for people with AIDS than for those with other conditions).

[47] *Pallozzi*, 190 F3d at 32-33 (2nd Cir. 2000) (citations omitted) (holding that Title III does regulate the sale of insurance policies in insurance offices including underwriting of those policies, subject to the limitations of the insurance safe harbor provision also found in the ADA). *See also* Carparts, 37 F.3d at 20.

[48] *See Carparts*, 37 F.3d at 14; *Doe*, 179 F.3d at 558; *Pallozzi*, 190 F.3d at 29.

[49] *See Carparts*, 37 F.3d at 14, 19-20; *Doe*, 179 F.3d at 558; *Pallozzi*, 190 F.3d at 29, 33.

being contestants on a televised game show. [51] The communications barrier in *Rendon* was an automatic telephone communications system that used a "fast finger process" to initially select members of the public who called into the phone system seeking to be contestants on the televised quiz show.[52] The plaintiffs in *Rendon* included persons with hearing or mobility impairments who were effectively screened out from the contestant selection process by the automatic telephone selection process.[53] The defendants in *Rendon* included the producers of the network television quiz show, "Who Wants to be a Millionaire."[54] *Rendon* held the defendants violated the ADA by maintaining a communication barrier to the disabled in the form of an inaccessible telephone selection process for the show's contestants.[55] According to the court:

> A reading of the plain and unambiguous statutory language at issue reveals that the definition of discrimination provided in Title III covers both tangible barriers … and intangible barriers … that restrict a disabled person's ability to enjoy the defendant entity's goods, services and privileges.[56]

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[50] *See Carparts*, 37 F.3d at 14, 19-20; *Doe*, 179 F.3d at 558; *Pallozzi*, 190 F.3d at 29, 33.
[51] Rendon v. Valleycrest Prods. Ltd., 294 F.3d 1279, 1280 (11th Cir. 2002).
[52] *See id*. at 1280. The fast finger process is the first step of the selection process that is followed by a random drawing and then a second round of trivia questions. *See id.*
[53] Plaintiffs claimed they were screened out by the automatic telephone selection process either because they were deaf, and could not hear the questions on the automated system or because they had upper-body mobility impairments and could not move their fingers rapidly to record their answers on their telephone key pads. *See id*. at 1280-81.
[54] *See id*.
[55] *See id.* at 1283-84.
[56] *See id.* at 1283.

Unlike *Carparts*, *Rendon* did not hold that the definition of "place of public accommodation" in Title III includes non-physical places.[57] In fact, *Rendon* expressly stated that "this appeal involves only the question of whether Title III encompasses a claim involving telephonic procedures that, in this case, tend to screen out disabled persons from participation in a competition held in a *tangible* public accommodation."[58] However, the Eleventh Circuit's decision is important because the court expressly concluded that the communication or other barriers need not be tangible, and that they may be located off-site from a tangible place of public accommodation.[59] Thus, *Rendon* provides a much broader view of the scope of the public accommodation provisions of Title III than circuit courts that have construed the scope of Title III to be limited to issues involving physical access to physical places.[60] However, even the circuit cases that favor an interpretation of Title III to include physical and non-physical places provide only weak authority for the applicability of Title III to commercial websites, as discussed previously.

The U.S. Supreme Court has not yet decided a case involving a claim that the public accommodation provisions of Title III govern access to goods, services, privileges and other advantages that are offered to the public over the phone, through the mail, or on

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[57] *See id*. at 1282. *See also Carparts*, 37 F.3d at 19. In *Rendon* the inaccessible phone selection process excluded persons with disabilities from the defendants' game show, which is held in a television studio. *Rendon*, 294 F.3d at 1283. A television studio is clearly a physical place that falls within the category of "theater" under the statutory definition of place of public accommodation. *Id.* So, under the narrow holding of *Rendon*, an intangible barrier that was the exclusive way to become a contestant on the game show was effectively a form of disability discrimination by a physical place of accommodation. *Id* at 185-86.

[58] *See Rendon,* 294 F.3d at 1282 (emphasis added).

[59] *See id.* at 1283-85. *Rendon* discusses the view of some courts that Title III requires a "nexus" between the communications or other access barrier and a physical place of public accommodation. *See also supra* notes 36-37 and accompanying text.

the Internet. However, the U.S. Supreme Court recently interpreted Title III of the ADA in *PGA Tour, Inc. v. Martin*, a case involving accessibility of professional golf tournaments in light of rules that operated as a barrier to exclude a golfer with a physical impairment.[61] *PGA Tour, Inc*. is discussed later in this paper for the insights it offers into the scope of Title III, particularly as it relates to statutory construction of the term "place of public accommodation."[62]

III. RECENT LITIGATION AGAINST AIRLINE COMPANIES: WEB CUSTOMERS DEMAND ACCESSIBLE WEBSITE DESIGN

Two pending federal cases directly raise the issue of the application of the ADA's public accommodation provisions to websites, and provide a factual context for analyzing the applicability of Title III to websites offering goods or services to the public.[63] Thus the cases can be viewed as "test" cases, testing the scope of Title III. The facts of these cases are nearly identical, involving claims of inaccessible websites operated by Southwest Airlines and American Airlines for their customers.[64] In both cases, the

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[60] *See Rendon,* 294 F.3d at 1283-84. *See also supra* notes 218-224 for a discussion of the nexus theory and its limitations.

[61] PGA Tour, Inc. v. Martin, 532 U.S. 661, 677 (2001). In this case, Casey Martin, a disabled golfer with a circulatory impairment, sued the non-profit sponsor of professional golf tournaments claiming the sponsor's rule prohibiting the use of golf carts in certain of its tournaments violated the ADA. *See id*. at 669. *See also*, Christopher James Hudson, Note, *PGA Tour, Inc. v. Martin*, 53 MERCER L. REV. 1717 (2002).

[62] *See PGA Tour, Inc*., 532 U.S. at 661; *see also infra* notes 189-216 and accompanying text.

[63] *See American Airlines* (No. 02-22076)*; Southwest Airlines,* 227 F.Supp.2d at 1312.

[64] American Airlines' Motion To Submit Memorandum For Use By The Court In Determining Southwest Airlines' Motion To Dismiss And Incorporated Memorandum Of Law at 1, Access Now, Inc. v. Southwest Airlines, Co., 227 F.Supp.2d 1312 (S.D.Fla. Oct. 18, 2002) (No. 02-21734) (on file with author).

plaintiffs are Robert Gumson, a blind individual who uses a screen reader[65] to "read" information on websites, and Access Now, Inc., a non-profit advocacy organization for disabled individuals.[66] The plaintiffs sued the commercial airline companies under Title III claiming the airlines operated websites that were not accessible to visually disabled customers who use screen readers.[67]

The plaintiffs argue that Title III of the ADA applies to the websites operated by Southwest Airlines and American Airlines for their customers and it requires defendants to modify customer websites to enable access by screen readers.[68] Through the use of screen readers, software programs that enable visually impaired persons to listen to the web in lieu of reading web pages or viewing web images, plaintiffs seek to make online airline and hotel reservations, purchase e-tickets at the lowest discounted rates offered only online, and access other travel related goods and services offered on the sites.[69]

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[65] A "screen reader," or screen access software program, "converts the content of websites into synthesized speech." *See* Complaint at 1, *Southwest Airlines* (on file with author). It is a form of assistive technology used by people with disabilities.

> Assistive technology is "software or hardware that has been specifically designed to assist people with disabilities in carrying out daily activities…. In the area of Web Accessibility, common software-based assistive technologies include screen readers, screen magnifiers, speech synthesizers, and voice input software that operate in conjunction with graphical desktop browsers (among other user agents). Hardware assistive technologies include alternative keyboards and pointing devices."

Web Content Accessibility Guidelines 1.0 (WCOG 1.0), app. B (Assistive technology), *available at* http://www.w3.org/TR/WCAG10/ (last visited October 27, 2003).

[66] *See American Airlines,* No. 02-22076*; Southwest Airlines,* 227 F.Supp.2d at 1312. For convenience, the term "plaintiffs" is used in this paper to refer to Robert Gumson and Access Now, Inc. and refers to these parties in litigation against Southwest Airlines and American Airlines in both the district court and the Eleventh Circuit Court of Appeals.

[67] *See American Airlines,* No. 02-22076*; Southwest Airlines,* 227 F.Supp.2d at 1315-16.

[68] Plaintiffs in these two test cases seek declaratory and injunctive relief under the ADA, not damages, which are generally not available in Title III suits. *See* Complaint at 1, *Southwest Airlines* (No. 02-21734) (on file with author); 42 U.S.C. §12188(a) (2003) (Title III provides for money damages and civil penalties only when the Attorney General files suit against a company). Attorney's fees and costs are also sought. *See, e.g., Southwest Airlines*, 227 F.Supp.2d at 1316.

[69] *See* Complaint at 5, *Southwest Airlines* (No. 02-21734); Brief For the Appellants at 4-6, *Southwest Airlines* (No. 02-16163-BB). Services available on the Southwest.com website include a:

Plaintiffs claim Southwest Airline's website is inaccessible to screen readers in four specific ways:

1) Failing to label graphics by providing "alternative text" (alternative text enables screen reader programs to communicate via synthesized speech that is visually displayed on websites);
2) Inadequately labeling data tables with headers for rows and columns;
3) Failing to provide online forms that can be readily filled out by visually disabled customers; and
4) Failing to provide a "skip navigation link" that facilitates access for blind consumers by permitting them to bypass the navigation bars on a website and to proceed to the main content.[70]

Plaintiffs claim these design defects in Southwest Airlines' website violate four different provisions of Title III of the ADA:

1) The communication barriers removal provision (Count I);[71]

> Reservation system permitting customers to book and pay for not only airline flights, but also hotel rooms and rental cars throughout the United States … "click and save Internet Specials," and the "rapid rewards" program. The "click and save" program … permits its [I]nternet users to take advantage of weekly discounted tickets, hotel rooms, rental cars and vacation packages. These discounted offerings are available only on the [I]nternet site and customers are notified of the specials through e-mail. Likewise, Southwest's "rapid reward" program offers customers incentives for purchases made exclusively on Southwest's [I]nternet website (citations omitted).

Id.

[70] *See* Complaint at 5-6, *Southwest Airlines* (No. 02-21734); Brief For The Appellants at 7, *Southwest Airlines* (No. 02-16163-BB).

2) The auxiliary aids and services provision (Count II);[72]

3) The reasonable modifications provisions (Count III);[73]and

4) The full and equal enjoyment and participation provisions (Count IV).[74]

To date, a trial has not been held in either of the test cases. In the federal district court for the Southern District of Florida, Southwest Airlines filed a motion to dismiss the case, claiming Title III does not apply to its website, Southwest.com.[75] After a hearing on the motion, the district court granted the motion and dismissed the plaintiffs' case for failure to state a legal claim.[76] Judge Seitz held the question of whether Title III of the ADA mandates that Internet websites operators modify their sites so as to provide complete access to visually impaired individuals was a question of first impression in the Eleventh Circuit, namely:

> Whether Southwest's Internet website, [S]outhwest.com, is a place of public accommodation as defined by the ADA, and if so, whether Title III of the ADA

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[71] *See Southwest Airlines*, 227 F.Supp.2d at 1316. Plaintiffs claim these inaccessible design features of Southwest.com are "communications barriers" that do not allow screen readers to effectively monitor the computer screen and to fully convert the information into synthesized speech for disabled customers. *See* Complaint at 1-2, 6, *Southwest Airlines*, (No. 02-21734). Plaintiffs ask the courts to require Southwest Airlines to remove those barriers from Southwest.com that deny independent access to the sites by the blind. *See id*. Plaintiffs claim these barriers to access are a violation of Title III of the ADA. *See id.* at 1-2.
[72] *Southwest Airlines*, 227 F.Supp.2d at 1316.
[73] *Id.*
[74] *Id.*
[75] Defendant Southwest Airlines, Co.'s Motion To Dismiss Plaintiffs' Complaint And Supporting Memorandum Of Law, *Southwest Airlines* (No. 02-21734) (on file with author).
[76] Transcript, Hearing: Motion To Dismiss, Before The Hon. Patricia A. Seitz, J., United States District Judge, *Southwest Airlines* (No. 02-21734) (hearing Oct. 16, 2002) (on file with author); *see also Southwest Airlines*, 227 F.Supp.2d at 1314.

> requires Southwest to make the goods and services available at its "virtual ticket counters" accessible to visually impaired persons.[77]

Judge Seitz granted Southwest Airlines' motion to dismiss, ruling that plaintiffs failed to state a claim upon which relief can be granted under Title III of the ADA:

> [B]ecause the Internet website, [S]outhwest.com, does not exist in any particular geographic location, Plaintiffs are unable to demonstrate that Southwest's website impedes their access to a specific, physical, concrete space such as a particular airline ticket counter or travel agency. Having failed to establish a nexus between [S]outhwest.com and a physical, concrete place of public accommodation, Plaintiffs have failed to state a claim upon which relief can be granted under Title III of the ADA.[78]

Having dismissed the *Southwest Airlines* case for failure to state a claim, the trial court did not address the specific counts of discrimination in the complaint.[79]

In the *American Airlines* case, American Airlines also filed a motion to dismiss the case on grounds nearly identical to the defendant's motion to dismiss in *Southwest Airlines*.; however, the court has stayed the action pending the outcome of the appeal in

[77] *Southwest Airlines*, 227 F.Supp.2d at 1315.
[78] *Southwest Airlines*, 227 F.Supp.2d at 1321 (citations omitted).
[79] *See id.*

the *Southwest Airlines* case.[80] This paper now focuses on the appeal of the trial court's decision in the *Southwest Airlines* case.

Following dismissal of the *Southwest Airlines* case, Plaintiffs appealed to the Eleventh Circuit Court of Appeals.[81] Currently, the parties and amici curiae have filed appellate briefs in *Southwest Airlines* with the Eleventh Circuit.[82] Oral arguments will be made in the case in on November 6, 2003.[83] For the first time since the ADA was enacted in 1990, a federal Circuit Court may soon decide whether Title III of the ADA applies to a commercial website.[84] Even if a settlement is eventually reached and no decision

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[80] *See* American Airlines' Motion To Submit Memorandum For Use By The Court In Determining Southwest Airlines' Motion To Dismiss And Incorporated Memorandum Of Law at 1, *Southwest Airlines* (No. 02-21734) (on file with author). Due to the similarity of the two cases, the *American Airlines* case was stayed by the district court pending the outcome of the appeal of the order dismissing the *Southwest Airlines* case. *See* i*d.*

[81] *See Southwest Airlines*, 227 F.Supp.2d at 1312; *appeal docketed*, (No. 02-16163-BB) (11th Cir. Nov. 11, 2002) (joint motion to stay proceedings to complete settlement granted; case being held for tentative Nov. 2003 calendar, *available at* http://pacer.ca11.uscourts.gov.)

[82] *See id;* Brief For The Appellants [Southwest Airlines, Inc.]; Answer Brief Of Appellee Southwest Airlines Co.; Reply Brief For The Appellants; Brief Of Amici Curiae American Association of People with Disabilities, et al., In Support Of Reversal; Brief Of The Equal Employment Advisory Council And The Chamber of Commerce of the United States as Amici Curiae Supporting Defendant-Appellee And In Support Of Affirmance; Brief Of Air Transport Association Of American, Inc., As Amicus Curiae In Support of Defendant-Appellee, *Southwest Airlines* (No. 02-21734), *appeal docketed*, No. 02-16163-BB, *available at* http://pacer.ca11.uscourts.gov.

[83] Docket, *Southwest Airlines*, 227 F.Supp.2d at 1312; *appeal docketed*, No. 02-16163-BB (11th Cir. Nov. 11, 2002), *available at* http://pacer.ca11.uscourts.gov (last visited September 29, 2003). A joint motion to stay the proceeding for the parties to pursue settlement was granted through September 3, 2003. The stay of the proceedings expired without the parties reaching a settlement; plaintiffs filed their reply brief, and oral argument in the case has been scheduled for November 6, 2003.

[84] *See id*. Other cases raising this issue have been filed previously, however these cases either were settled prior to a reported decision, or having been dismissed for failure to state a claim, were affirmed without a reported decision by a federal Circuit Court of Appeals. *See* Robertson, *supra* note 9, at 203-04. *See also* NCD Position Paper, *supra* note 4, at 15-16 (summarizing the history of reported ADA litigation on electronic access including a lawsuit filed against America Online, Inc. that was subsequently settled). *See also National Federation of the Blind et al. v. America Online, Inc*., 99CV12303EFH (D. Mass. 1999) (alleging America Online Internet service is covered by Title III of the ADA and that it is not in compliance with the ADA). For a description of the subsequent efforts of AOL to make its services accessible to people with disabilities, see Curtis Chong, *America Online: Is It Accessible Now? available at* http://www.nfb.org/bm/bm03/bm0305/bm030509.htm (last visited September 29, 2003). In another Title III Internet case, *Hooks v. OKBridge, Inc.*, 232 F.3d 208 (5th Cir. 2000) (unpublished table decision) (cited in NCD Position Paper, *supra* note 4, at 15-16), the plaintiff claimed he was barred from an online bridge tournament and online bulletin boards because of his disability. *See* NCD Position Paper, *supra* note 4, at

rendered, the briefs filed by the parties and amici curiae provide fascinating insight into the arguments for and against construing Title III to cover commercial websites.

The sole issue on appeal in the *Southwest Airlines* case is the scope of Title III. Plaintiffs argue Southwest, not merely Southwest.com, is a public accommodation that is prohibited by Title III of the ADA from discriminating against people with disabilities in the provision of services offered on its website.[85] They seek to reverse the federal district court's decision that dismissed this case for failure to state a claim and remand this case for further proceedings.[86]

The primary argument on appeal is that Southwest Airlines Co. is a "travel service" and a public accommodation under the definition of "place of public accommodation" in Title III.[87] To support their contention, plaintiffs state that Southwest Airlines:

> [O]ffers ticketing information/reservations and purchasing of airline, hotel and car-rental services, and many other services exclusively through its website …. Southwest's website permits sighted consumers to take advantage of the

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15-16 (clarifying that there was no issue of technical barriers to access by the disabled to the defendant's website in the case). The federal district court in *Hooks* granted summary judgment to the defendant and dismissing the case upon ruling that the online bridge club was a private membership organization that was exempt from Title III and that its website was not a place of public accommodation as defined in Title III. *See id.* The U.S. Department of Justice filed an amicus brief in the appeal of the case to the Fifth Circuit Court of Appeals setting out many of the reasons that Title III should not have been construed as narrowly as the lower court had done. *See id; see also* Brief of Amicus Curiae United States Department of Justice (on file with author). However, the Fifth Circuit affirmed the decision of the trial court without a reported opinion. *See Hooks v. OKBridge, Inc*., 232 F.3d 208 (5th Cir. 2000); s*ee also* Robertson, *supra* note 9, at 211.

[85] Brief For The Appellants at 10, *Southwest Airlines* (No. 02-16163-BB).

[86] *Id*. at 30.

[87] *Id.* at 12-13.

company's internet only discounted sales and promotions by accessing its "click 'n save" and "rapids rewards" travel related programs (citations omitted).[88]

Plaintiffs offer the dictionary definition of "travel agency" to explain the meaning of the statutory term "travel service," arguing that the primary service offered by a travel agency/service is information about travel and reservations.[89] Plaintiffs also argue that Southwest, via its website, does not simply offer information and reservations for travel on its own airplanes; rather it "permits the booking of reservations and payment for a host of hotel and rental car facilities throughout the United States."[90] Plaintiffs claim "travel services, such as Southwest, have a duty to ensure that they take such steps as may be necessary to ensure that persons who are blind are not treated differently than the able bodied in the provision of appropriate information and services."[91]

There are three prongs to Plaintiffs' argument that their complaints are within the scope of Title III covers their complaints against Southwest Airlines:

1) Title III applies to services of a public accommodation that are offered off-site and through the Internet.[92]

[88] *Id*. at 13.
[89] *Id*.
[90] *Id*. at 14.
[91] *Id*. at 16.
[92] *Id*. at 12-16. Plaintiffs claim Southwest's internet site is an off-site screening process that excludes individuals with vision impairments from Southwest's travel services and special promotion programs that are offered exclusively through the Internet site. *Id.* at 19. In support for this argument, plaintiffs claim Southwest's website is a communications barrier that is analogous to the discriminatory telephone

2) Southwest's Internet website has a nexus with a physical facility that is a place of public accommodation and therefore the travel services provided by Southwest on its website may not be provided in a discriminatory fashion.[93]

3) The fact that the ADA does not specifically mention services provided off-site through the Internet in the statutory definition of "place of public accommodation" does not restrict the ADA's coverage.[94]

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screening process in *Rendon* that excluded hearing and mobility impaired persons from becoming contestants on the "Who Wants to be a Millionaire" quiz show. *Id.* at 19-20.

[93] *Id.* at 21-23. Plaintiffs claim that Southwest maintains many physical locations at which it provides travel services and that there is a nexus between the services provided by Southwest on its website and these physical locations. *Id*. at 21. Plaintiffs admit that Title III does not cover privately operated airports or the airplanes themselves, but argue that other places located in airports are covered by Title III as they are places of public accommodation. *Id*. at 22. In support of the argument that Southwest operates travel services at airports that are not exempt from Title III's coverage, plaintiffs reference administrative regulations that interpret Title III. *Id*. (quoting 28 C.F.R. Part 36., App. B, p. 673 (2003): "Places of public accommodation located within airports, such as restaurants, shops, lounges, or conference centers, however, are covered by subparts B and C of this part.") These regulations state there are other places within airports that are places of public accommodation and covered by Title III, which include restaurants, shops, lounges, or conference centers. *Id*. Plaintiffs argue that if shops, lounges, or conference centers operated or leased by an airline are places of public accommodation, then the provision of travel services by Southwest at an airport qualifies as a public accommodation as well. *Id*. So, plaintiffs argue, there is a sufficient nexus between Southwest's physical "facilities" that offer travel service and its use of an off site Internet communication device to provide its travel service, such that nondiscrimination by the website is required by Title III. *Id*. Plaintiffs argue that the plain language of Title III and the use of the word "place" in the statute do not restrict the scope of the statute to services provided on the physical premises of a place of public accommodation. *Id*. at 23. In the words of the statute, the Act covers discrimination "in the full and equal enjoyment of the …services [or] privileges of any place of public accommodation." *Id*. Plaintiffs argue the statute does not restrict the ADA to covering services provided on the premises of a place of public accommodation. *Id*. Plaintiffs argue this is the plain meaning of the statute, there is no legislative history to the contrary, and that if Congress had intended to limit Title III to services provided only at a business's physical premises, it presumably would have used the word "at" or "in" rather than "of." *Id*.

[94] *Id.* at 24-30. Plaintiffs argue that similar to most travel service companies, Southwest conducts most of its business through off-site contact, by telephone or other means and in fact derives almost half of its revenue from bookings made through its Internet site. *Id*. at 24. Although Southwest has public facilities in airports where it handles reservations and provides information to its customers, these services pale in comparison to the comprehensive nature of its website including the offering of discounted tickets and vacation packages. *Id*. Plaintiffs argue that Title III's plain language does not refer to access to concrete geographical places and that the District Court was wrong to interpret Title III to be limited to access to concrete geographical spaces as a basis for dismissing this case. *Id*. Plaintiffs argue that a limitation of Title III to a public accommodation's providing services solely from a physical place/structure runs counter to the broad purpose of the ADA. *Id*. at 25. In support of this argument, plaintiffs point to the broad purpose of the ADA as stated in the statute, the fact that there is nothing in the ADA or its legislative history which suggests or permits such a physical limitation, and the fact that the Department of Justice has not suggested such a limitation. *Id*. Further, plaintiffs argue the District Court also erred in its application of the rules of

On appeal, Southwest Airlines denies that plaintiffs have stated a claim for relief under Title III, arguing that neither Southwest.com, nor Southwest Airlines Co. "in its entirety" is a place of public accommodation.[95] Southwest Airlines offers three reasons why its website, Southwest.com, is not a place of public accommodation under Title III: [96]

1) The plain language of the ADA and its regulations define twelve categories of "place[s] of public accommodation," which limits places of public accommodation to physical, concrete facilities.[97] Accordingly, the district court correctly held that Southwest.com, a website, does not fall into any of the categories of "place of public accommodation" because it is not a physical, concrete "facility."[98]

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statutory construction to limit the ADA to prohibit discrimination only at defined, physical locations and facilities. *Id*. at 28. The plaintiffs argue that applying the doctrine of "ejusdem generis" to the statute does not require the court to:

> [A]ccord words and phrases embodied in the statute a definition or interpretation different from their **common and ordinary meaning**; or … to interpret the statute in such a narrow fashion as to defeat what we conceive to be its obvious and dominating general purpose.

Id. at 28-29 (quoting *Miller v. Amusement Enters. Inc*., 394 F.2d 342, 350 (5th Cir. 1968)).

[95] Answer Brief Of Appellee Southwest Airlines Co. at 10-43, *Southwest Airlines* (No. 02-16163-BB).

[96] *Id*. at 10-31.

[97] I*d*. at 10-13. Southwest Airlines argues that the district court properly construed the ADA, rejecting plaintiffs' proposed new category of an "exhibition, display and a sales establishment," which are a combination of three separate categories of public accommodation under the definition, and instead reading these general terms in the specific context in which Congress placed each of them. *Id.* at 14. Southwest Airlines argues that the plaintiffs' interpretation of the ADA would give an extraordinary meaning to the statutory language because Internet websites are not within the common and ordinary meaning of the definitional terms in Title III for a "public accommodation." *Id*.

[98] *Id*. at 14-15; Southwest Airlines analyzed the district court's opinion in this case, and cases from other circuits, and concluded that the district court's application of the statutory definition of "public accommodation" is correct and is consistent with the decisions of the Third, Sixth and Ninth Circuit Courts. *See id.* at 22; *see also supra* notes 25-31 and accompanying text discussing these circuit court decisions.

2) Plaintiffs cannot show that Southwest.com is a means of accessing the services of a physical, concrete space that is a public accommodation under Title III. In making this argument, Southwest Airlines distinguishes the Eleventh Circuit's holding in *Rendon,* noting the off site telephone selection process that *Rendon* found violated the ADA limited access to a television studio, a physical place.[99]

3) Plaintiffs have failed to claim that they were denied access to services of a concrete, physical public accommodation as required under Title III, claiming instead that they were denied access to services offered exclusively on Southwest.com.[100]

Southwest Airlines also argues that Southwest Airlines Co. "in its entirety" is not a place of public accommodation for the following reasons:[101]

1) Plaintiffs' newly asserted claim that Southwest Airlines, Inc. "in its entirety" is a place of public accommodation as a "travel service" is not properly before the court because it was raised for the first time on appeal.[102]

These circuit courts specifically addressed whether a place of "public accommodation" needed to be a physical place and held that it did. *See supra* notes 25-31 and accompanying text.

[99] Southwest Airlines also analyzed the district court's decision in light of the Eleventh Circuit's decision in *Rendon*, finding the district court's decision is consistent with *Rendon's* holding that a nexus is required between the challenged service and the premises of a physical public accommodation. *See* Answer Brief Of Appellee Southwest Airlines Co. at 22-26, *Southwest Airlines* (No. 02-16163-BB); *see also Rendon*, 294 F.3d at 1283, 1284 n. 12.

[100] *Rendon*, 294 F.3d at 1283, 1284 n. 12; *see also* Answer Brief Of Appellee Southwest Airlines Co. at 25, *Southwest Airlines* (No. 02-16163-BB) ("Plaintiffs here seek access to Southwest.com as an end in itself – to make travel reservations <u>on it</u> and obtain information <u>from it</u> – not as a "means of access" to a "public accommodation.").

2) It does not matter whether the court considers plaintiffs' claims to be based on Southwest.com or Southwest "in its entirety," the claims fail because they are not based upon the services of a physical, concrete place of public accommodation that is owned or operated by Southwest and subject to the ADA.[103] There are three separate parts to this argument:

a) Neither Southwest.com, nor Southwest, "in its entirety," is a "travel service" within the statutory definition of "place of public accommodation."[104] A "travel service" is nothing more than a short-hand reference to "travel agency facilities," and is not some intangible service that is unrelated to any physical location.[105]

b) Plaintiffs' claims are not subject to the ADA because the ADA specifically excludes coverage of any airline-owned facilities that are the

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[101] Answer Brief Of Appellee Southwest Airlines Co. at 31-43, *Southwest Airlines* (No. 02-16163-BB).
[102] *Id*. Southwest Airlines claims Plaintiffs are asserting for the first time on appeal that the district court "erred by focusing solely on the website…rather than the scope of this public accommodation, i.e., Southwest, in its entirety." *Id*. at 31. Southwest Airlines argues that the district court properly focused "on the website" because that was the only claim alleged by the plaintiffs in the district court. *Id*. Southwest Airlines also argues that plaintiffs now claim for the first time on appeal that Southwest Airlines in its entirety is a 'travel service," and thus a covered public accommodation, based in part on having numerous physical locations at airports around the U.S. *Id*. Southwest Airlines acknowledges that plaintiffs argued in the district court that Southwest.com was a "travel service" and therefore a public accommodation, but claims at no time did it assert that Southwest, in its entirety, was a "travel service" or a "place of public accommodation." *Id*. at 31-32.
[103] *See* Answer Brief Of Appellee Southwest Airlines Co. at 32, *Southwest Airlines* (No. 02-16163-BB). Southwest Airlines also claims Souhwest Airlines Co., "in its entirety," cannot be a "public accommodation," because it is not a facility or a place, it is a corporation. Southwest Airlines contends that under Title III an explicit distinction is drawn between a place of public accommodation and the place of public accommodation itself and that an entire corporation, the owner and operator of numerous physical locations, cannot also be designated as a "place of public accommodation." *Id.* at 32-33.
[104] *Id.* at 33.
[105] *Id*. at 33-34.

basis of plaintiffs' Title III claims. [106] The Air Carrier Access Act (ACAA), not the ADA, prohibits disability discrimination by air carriers.[107] Thus, plaintiffs' claims that ticket counters and kiosks at airports operated by Southwest Airlines are "place[s] of public accommodation" under the ADA fails because ACAA, not the ADA, applies to these transportation-related services.[108]

c) Finally, plaintiffs' claims of denial of the services of Southwest.com to access travel services from *third-party* rental car facilities and hotels also fail as a matter of law.[109] Only owners, operators, lessors and lessees of the "place of public accommodation" are covered by Title III of the ADA.[110] Southwest Airlines does not own, operate, or lease the third-party rental car and hotel facilities, so it is not a public accommodation with respect to access of third-party services.[111]

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[106] *Id*. at 35-42. The ADA's statutory exclusion for transportation "by aircraft" is found in two sections of the ADA: the ADA's definition of "specified public transportation," and the section of the ADA that prohibits disability-based discrimination in "specified public transportation" by private entities. *Id*. at 37-39; 42 U.S.C. § 12181(10); § 12184 (2003).
[107] *See* Answer Brief Of Appellee Southwest Airlines Co. at 36-39, *Southwest Airlines* (No. 02-16163-BB); The Air Carrier Access Act of 1986, 49 U.S.C. § 41705 (2003) [hereinafter ACAA] (prohibiting disability discrimination by air carriers); *see also* 14 C.F.R. §382.5 (2003); Love v. Delta Airlines, 179 F. Supp.2d 1313, 1323-24 (summarizing legislative history from Congressional reports stating that 'transportation by air' was 'excluded' from the ADA because the ACAA was designed to address the problem of discrimination by air carriers).
[108] *See* Answer Brief Of Appellee Southwest Airlines Co. at 42, *Southwest Airlines* (No. 02-16163-BB).
[109] *Id*. at 42-43.
[110] *See id*.; *see also* 42 U.S.C. § 12182(a) (2003).
[111] *See* Answer Brief Of Appellee Southwest Airlines Co. at 42-43, *Southwest Airlines* (No. 02-16163-BB).

With this background on the arguments made by the parties on appeal, this paper now analyzes the strengths and weaknesses of the arguments on two critical issues before the appellate court.

IV. WHY THE PENDING LITIGATION AGAINST AIRLINE COMPANIES MAY NOT SUCCEED UNDER TITLE III

With the appeal of the *Southwest Airlines* case, a circuit court is finally poised to establish that determine whether Title III of the ADA covers e-businesses that market their goods and services on the Internet.[112] But what is the likelihood that the plaintiffs in *Southwest Airlines* will succeed in their effort to extend the coverage of Title III to the Internet? This section of the paper analyzes the strengths and weaknesses of the *Southwest Airlines* case, focusing on two fundamental arguments specific to this case - including an argument that relates only to websites operated for customers by businesses in the airline industry. Analysis of these two fundamental arguments explains why the plaintiffs in the *Southwest Airlines* case face some difficult challenges in their efforts to convince an appellate court that Title III applies to websites provided for customers of commercial airlines.

[112] *See supra* note 84 for a discussion of other cases that have raised this issue previously but have not resulted in a reported decision by a federal Circuit Court of Appeals.

A. *Procedural Weakness*

First, the appeal has a procedural weakness. The Eleventh Circuit may refuse to listen to plaintiffs' arguments by the plaintiffs that were not presented in the district court.[113] On appeal, plaintiffs claim Southwest Airlines is a "place of public accommodation" in the form of a "travel service," an extension of its argument in the trial court that Southwest.com is a public accommodation in the form of a travel service.[114] Essentially plaintiffs have refocused their Title III coverage argument from Southwest.com, a website, to the larger entity of Southwest Airlines Co.[115] Southwest Airlines argues the district court did not have an opportunity to address plaintiffs' specific arguments now being made for the first time on appeal and it would be improper for the Eleventh Circuit to do so now.[116]

In situations where arguments have been "reframed" during the appeals process, it is within the discretion of the court to consider them for the first time on appeal when the arguments they are related to important issues.[117] For example, in *PGA Tour, Inc*., petitioner was allowed to reframe its argument related to the coverage of Title III at the U.S. Supreme Court level, even though respondent objected that the specific argumentit

[113] *See* Answer Brief Of Appellee Southwest Airlines Co. at 31, *Southwest Airlines* (No. 02-16163-BB).
[114] *Id*.
[115] *Id*.
[116] Answer Brief of Appellee Southwest Airlines Co. at 31, *Southwest Airlines* (No. 02-16163-BB). Southwest Airlines cites no authority in support of its argument. *Id.* Southwest Airlines acknowledges that plaintiffs argued in the District Court that Southwest.com was a "travel service" and hence a public accommodation. *Id*.
[117] *See PGA Tour, Inc*., 532 U.S. at 678, n. 61.

had not been made in the lower courts.[118] The record from the district court includes a transcript of oral argument on Southwest Airlines' motion to dismiss, so the Eleventh Circuit will be able to evaluate whether these arguments were sufficiently raised in the complaint or in oral argument.[119]

Additionally, prevailing in this lawsuit on this procedural issue would be a hollow victory for the airline industry because the *American Airlines* case is still pending in the district court. [120] The *American Airlines* case was brought by the same plaintiffs who filed *Southwest Airlines*, and raises the same Title III claims.[121] If the Eleventh Circuit rules in favor of Southwest on this issue, presumably there will be an opportunity for plaintiffs in the *American Airlines* case to amend their complaint and reframe their arguments in the district court to avoid this procedural problem.

B. *The ADA's Air Carrier Exemption*

A second hurdle for plaintiffs in the *Southwest Airlines* case relates specifically to the fact that this case involves disability discrimination claims by customers against an airline carrier, as opposed to disability discrimination claims against a business in some other industry that provides a website for its customers.[122] Because Southwest Airlines is in the airline transportation industry, Southwest Airlines argues that the Air Carrier

[118] *Id*. (holding that "Given the importance of the issue, we exercise our discretion to consider it."). The U.S. Supreme Court noted the Title III coverage issue was raised in the lower courts, petitioner advanced this particular argument in support of its position on the issue in its petition for certiorari, and the argument was fully briefed on the merits by both parties. *Id*.
[119] *See supra* note 76.
[120] *See supra* note 2.
[121] S*ee id.*
[122] *See* Answer Brief Of Appellee Southwest Airlines Co. at 37-41, *Southwest Airlines* (No. 02-16163-BB).

Access Act (ACAA), not the Title III of the ADA, governs plaintiffs' claims of disability discrimination.[123]

Essentially Southwest Airlines is asking the Eleventh Circuit to address the scope of the ADA's exemption for air carriers.[124] If the plaintiffs' claims in *Southwest Airlines* are covered by ACAA, but not the ADA (because they are exempt under the ADA due to coverage by ACAA), then the plaintiffs will not be successful in their efforts to overturn the district court's dismissal of the case for failure to state a claim. However, a holding that Southwest Airlines' websites are covered by ACAA and exempt from the ADA would leave unresolved the much more significant question that is the ultimate focus of this paper. That question is whether the scope of Title III covers websites for customers offered by businesses in the vast majority of industries that are clearly within the purview of Title III. This question is discussed in the next section of this paper.

The ACAA and the ADA exemption for air carriers that Southwest Airlines claims could defeat the plaintiffs' claims in the case. The "air carrier" exemption in the ADA is found in the definition section of Title III. The definition of public accommodation includes "a terminal, depot, or other station used for *specified public*

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[123] *Id.*; *see also supra* notes 106-108 and accompanying text. Only a few scholarly articles discuss disability discrimination and the application of the ADA and ACAA, however they provide limited insight into the scope of the ADA's exemption for air carriers. *See* Harry A. Rissetto, *Age Discrimination Act And Americans With Disabilities Act Issues Affecting Airline Employees*, SH094 ALI-ABA 1419, 1452 (2003) (discussing the Airline Deregulation Act and Air Carrier Access Act; stating "the ADA does not cover accommodations for air travel passengers, who are covered by the Air Carrier Access Act"); Fran L. Tetunic, *Accommodating Individuals With Disabilities: Travel and Tourism Industry Obligations Under the Air Carrier Access Act and Title III of the Americans With Disabilities Act*, 790 PLI/COMM 539 (1999) (providing a summary of nondiscrimination service requirements under ACAA and ADA; not addressing the air carrier exemption under the ADA); Erin M. Kinahan, *Despite the ACAA, Turbulence Is Not Just In*

transportation."[125] The statute also provides a definition of "specified public transportation;" it "means transportation by bus, rail, or any other conveyance (other than by aircraft)" that is provided to the general public.[126]

Plaintiffs argue that Title III covers the provision of travel services at an airport because these services are analogous to other places of accommodation that have been found to be public accommodations in airports and covered by Title III. [127] Plaintiffs quote from the Preamble to the Title IIII regulations in support this view of the scope of Title III.[128] The Preamble to the Title III regulations states:

> Privately operated airports are also included in the category of commercial facilities. They are not, however places of public accommodation because they are not terminals used for "specified public transportation." (Transportation by aircraft is specifically excluded from the statutory definition of "specified public transportation.") Thus, privately operated airports are subject to the new construction and alteration requirements of this rule (subpart D) but not to subparts B and C. (Airports operated by public entities are covered by title III of the Act.) *Places of public accommodation located within airports, such as*

The Sky For Disabled Travelers, 4 DEPAUL J. HEALTH CARE L. 397 (2001) (providing an overview of the history and evolution of ACAA).
[124] *See* Answer Brief Of Appellee Southwest Airlines Co. at 37-41, *Southwest Airlines* (No. 02-16163-BB).
[125] 42 U.S.C. § 12181(7)(g) (2003).
[126] 42 U.S.C. § 12181(10) (2003).
[127] Plaintiffs claim Southwest is introducing self-service physical kiosks at physical airport facilities in which it operates and that there is a sufficient nexus between Southwest's physical facilities and their off site Internet use to prohibit discrimination on the Internet site under the public accommodation provisions of Title III. Brief of The Appellants at 22, *Southwest Airlines* (No. 02-16163-BB).
[128] *Id.*; *see also* Nondiscrimination On The Basis Of Disability By Public Accommodations And In Commercial Facilities (published July 26, 1991), 28 C.F.R. Pt. 36, App. B, p. 671-733 (2003).

restaurants, shops, lounges, or conference centers, however, are covered by subparts B and C of this part.[129]

In support of its argument that plaintiffs' disability discrimination claims are not covered by Title III because they are expressly exempt from Title III, Southwest Airlines points to discussion in the Preamble to the Title III regulations on the meaning of "specified public transportation":

> The definition of "specified transportation" is identical to the statutory definition in Section 301(1)) of the ADA. The term means transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis. It is used in category (7) of the definition of "place of public accommodation," which includes stations used for specified public transportation.
>
> The effect of this definition, which excludes transportation by aircraft, is that it excludes privately operated airports from coverage as places of public accommodation. However, places of public accommodation located within airports would be covered by this part. Airports that are operated by public entities are covered by Title II of the ADA and, if they are operated as a part of a program receiving Federal financial assistance, by Section 504 of the Rehabilitation Act. Privately operated airports are similarly covered by Section

[129] 28 C.F.R. Part 36, App. B, p. 673 (2003) (emphasis added). Plaintiffs emphasize the language in the preamble that has been italicized by the author in the quoted material. *See* Brief Of The Appellants at 22,

504 if they are operated as a part of a program receiving Federal financial assistance. *The operations of any portion of any airport that are under the control of an air carrier are covered by the Air Carrier Access Act.* In addition, airports are covered as commercial facilities under this rule.[130]

In *Love v. Delta Airlines,* the District Court examined the legislative history related to the air carrier exemption under Title III. [131] Senate and House Committee Reports support the view that Congress excluded transportation by air from Title III because ACAA had recently been enacted and was designed to address the problem of discrimination by air carriers against disabled individuals.[132] The District Court in *Love* held "Congress did not prohibit air carriers from discriminating against disabled individuals under the ADA because Congress considered that air carriers were already prohibited from doing so by the ACAA."[133] Although the District Court's examination of the legislative history of the airline carrier exemption under the ADA is helpful in understanding the scope of the ADA and ACAA, *Love* was reversed by the Eleventh

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Southwest Airlines (No. 02-16163-BB).

[130] *See* 28 C.F.R. Pt. 36, App. B, p.682 (2003) (emphasis added). Southwest Airlines emphasizes the language in the preamble that has been italicized by the author in the quoted material. *See* Answer Brief Of Appellee Southwest Airlines Co. at 37, *Southwest Airlines* (No. 02-16163-BB).

[131] *See* Love v. Delta Airlines, 179 F. Supp.2d 1313, 1323-24 (M.D.Ala. 2001), *rev'd on other grounds*, 310 F.3d 1347 (11th Cir. 2002). Love's disability claims involved accessibility issues related an airline flight including failure to provide a call button, the size and privacy of the on-board restroom, failure to provide an on-board aisle chair, and the adequacy of training received by flight personnel. *Love*, 310 F.3d at 1350. On summary judgment, the district court held "Love could not maintain a claim under the ADA because the relevant portion of that Act expressly excludes aircraft from its coverage." *Id*. The district court also found that ACAA implies a private right of action that is limited to injunctive and declaratory relief. *Id*. at 1351. The Eleventh Circuit reversed the district court, holding Congress did not intend to imply a private right of action under ACAA for disability-based discrimination on the part of air carriers. *Id.* at 1359.

[132] *Love*, 179 F.Supp.2d at 1323 (referencing and quoting committee reports from the Senate Committee on Labor and Human Resource, the House Committee on Public Works and Transportation, and the House Committee on Education and Labor regarding the exclusion of air carriers from the coverage of Title III of the ADA).

[133] *Id*. at 1324.

Circuit. [134] The Eleventh Circuit held ACAA does not provide a private right of action for claims of disability discrimination by air carriers and Love's claims should be dismissed.[135] Additionally, *Love* involved only claims of disability discrimination related to accessibility of the services and equipment onboard an aircraft, as opposed to the broader claims of the plaintiffs in *Southwest Airlines* related to communications with customers via the Internet that are not related to accessibility of the aircraft itself.[136]

ACAA and Department of Transportation (DOT) regulations interpreting ACAA by the Department of Transportation's (DOT) arguably cover disability-based discrimination related to communications between an air carrier and passengers about air transportation.[137] According to the DOT regulations, a qualified individual with a disability:

> [M]eans an individual with a disability who – (a) With respect to accompanying or meeting a traveler, use of ground transportation, using terminal facilities, or obtaining *information about schedules, fares or policies*, takes those actions necessary to avail himself or herself of facilities or *services offered by an air carrier to the general public*, with reasonable accommodations, as needed,

[134] *See Love*, 310 F.3d at 1360.
[135] *See id*. Other courts have found there is a private rights of action for disability discrimination under ACAA. *See* Tetunic, *supra* note 123, at 553.
[136] *See Love*, 310 F.3d at 1350.
[137] ACAA's nondiscrimination prohibitions cover denial of the "benefit of any air transportation or related services." *See* U.S. Department of Transportation, Nondiscrimination on the Basis of Disability in Air Travel, 14 C.F.R. § 382.7(a)(3) (2003). ACCA covers "telephone reservation and information service[s]" provided by an air carrier for the public. *See* 14 C.F.R. § 382.47 (2003). ACAA covers "all terminal facilities and services owned, leased, or operated on any basis by an air carrier at a commercial service airport, including parking and ground transportation facilities." 14 C.F.R. § 382.23 (a) (2003) (arguably covering ticket counters and kiosks at airports).

> provided by the carrier; (b) With respect to *obtaining a ticket for air transportation* on an air carrier, offers, or makes a good faith attempt to offer, to purchase or otherwise validly to obtain such a ticket; (c) with respect to obtaining air transportation, or other services or accommodations required by this part ….[138]

The Air Transport Association of America, Inc. (ATA) provides insight into this argument through a brief as amicus curiae in the *Southwest Airlines* case.[139] ATA asserts that the ADA is poorly suited for the air transportation industry:

> Unlike the ACAA, which was designed to address disability discrimination in the specific context of air travel, the ADA is general in scope and applies to a variety of public accommodations…. [T]he ACAA and its implementing regulations take into account considerations unique to the air transportation industry, such as Federal Aviation Administration requirements and air passenger safety.[140]

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[138] 14 C.F.R.§ 382.5 (2003) (emphasis added). Southwest Airlines emphasizes the language that has been italicized by the author in the quoted material. *See* Answer Brief Of Appellee Southwest Airlines Co. at 39, *Southwest Airlines* (No. 02-16163-BB).

[139] The Air Transport Association of America (ATA) is a non-profit corporation that represents the airline industry and is the principal trade and service organization of the major U.S. air carriers including Southwest Airlines and American Airlines. Brief Of Air Transport Association Of American, Inc., As Amicus Curiae In Support of Defendant-Appellee at vii, *Southwest Airlines (*No. 02-21734) appeal docketed (No. 02-16163-BB). The ATA argues that the outcome of the appeal of the Southwest Airlines case will directly and materially affect ATA's members if it results in a holding that Title III of the ADA applies to airlines and their websites, and could render them subject to regulation under both the ADA and ACAA, two overlapping but inconsistent disability discrimination statutes. *See id*.

[140] *See id*. at 19-21 (citations omitted).

According to the ATA, regulations under ACAA cover "virtually all aspects of an air carrier's operations and physical facilities – but not websites."[141] ATA points out that the ACAA regulations require provision of certain passenger services for the disabled, such as making its telephone reservation and information system available for persons with hearing impairments through the use of a telecommunications device for the deaf service.[142]

When plaintiffs' claims in *Southwest Airlines* are viewed as claims of discriminatory communications services for passengers, Southwest Airlines has the stronger argument on the issue of whether ACAA, not the ADA, covers plaintiffs' claims. This is because the regulation of airline transportation already covers at least some communications services for disabled passengers, including access to telephone reservation systems. [143] Surely the courts will find that ACAA, not the ADA, governs communications services for the disabled in the airline industry, rather than holding communications services for the disabled should be characterized broadly as "travel services" covered by Title III and not ACAA. Additionally, the air passenger safety argument is a strong public policy argument for specialized regulation under ACAA for the airline transportation industry, at least to the extent of recognizing the expertise of the Federal Aviation Administration and Department of Transportation in regulating airline passenger safety.[144] The exemption in the ADA of "air carriers" from "specified public

[141] Brief Of Air Transport Association Of American, Inc., As Amicus Curiae In Support of Defendant-Appellee at 19, *Southwest Airlines* (No. 02-21734), appeal docketed (No. 02-16163-BB). *See also* 14 C.F.R. §§ 382.1-382.65 (2003).
[142] Brief Of Air Transport Association Of American, Inc., As Amicus Curiae In Support of Defendant-Appellee at 17-18, *Southwest Airlines* (No. 02-21734) appeal docketed (No. 02-16163-BB).
[143] *See supra* notes 137-139 and accompanying text.
[144] *See supra* note 142 at 19-21.

transportation" that is covered by Title III, together with the guidance provided by Department of Justice in the Preamble to the Title III regulations and legislative history under the ADA, support the view that air carriers like Southwest Airlines are not covered under Title III as owners or operators of "place[s] of public accommodation."[145] In other words, Southwest Airlines cannot be a public accommodation without operating a "place of public accommodation," and Southwest Airlines is excluded from coverage because it has no facilities (physical or intangible) that are included in the definition of "specified public transportation".[146]

Additionally, if the Eleventh Circuit finds places of public accommodation are limited to physical places or to offsite communication barriers that are a nexus to physical places, plaintiffs are unlikely to prevail on their ADA claims. In this situation, plaintiffs' ADA claims may depend on showing that the ADA's air carrier exemption does not apply to the kiosks and ticket counters in airports operated by Southwest that offer travel services to the public, because these are the only tangible facilities that plaintiffs have

[145] 42 U.S.C. §12181(7)(g) (2003); 42 U.S.C. §12181(10) (2003); 28 C.F.R. § 36, App. B, 677 (2003).
[146] *See supra* notes 125-26 and accompanying text. Of course, this conclusion depends on rejection of plaintiffs' argument that Southwest Airlines is operating a separate place of public accommodation, a travel service that is not dependent on operation of "specified public transportation" and not excluded under the "air carrier" exemption from "specified public accommodation." *See* Reply Brief for the Appellants, Southwest Airlines (No. 02-21734) at 8-9; Brief of *Amici Curiae*, American Association of People With Disabilities Et Al., In Support of the Plaintiffs-Appellants and in Support of Reversal at 8-9, *Southwest Airlines* (No. 02-16163-BB). It seems unlikely to the author that the court will find that Southwest Airlines operates a travel service apart from its activities as an airline carrier in the airline transportation industry. However, in fairness to Plaintiffs, this appears to be a factual question that has not yet been decided, one that should be remanded to the district court for further proceedings if the Eleventh Circuit finds the scope of Title III encompasses intangible facilities. *See* discussion at *infra* note 147. It seems likely that a determination of the scope of the ADA exclusion for air carriers and inclusion of only "specified public transportation" will be critical to resolving the *Southwest Airlines* case. It is clearly an issue that the Eleventh Circuit Court of Appeals should address.

alleged are places of public accommodation operated by Southwest.[147] It seems likely that the Eleventh Circuit will hold that the air carrier exemption covers Southwest Airlines operation of its kiosks and ticket counters in airports that offer travel services to the public. A narrow reading of the "aircraft carrier" exemption in light of the Preamble to the Title III regulations would extend the Title III aircraft carrier exemption only to services and facilities by an airline that are offered at an airport.[148] This conclusion is reached by starting with the Preamble and viewing all of plaintiffs' allegations in plaintiffs' favor. If, as the Preamble states: "[t]he operations of any portion of any airport that are under the control of an air carrier are covered by the Air Carrier Access Act," then the kiosks and ticket counters operated by Southwest Airlines in airports are covered by ACAA, and are not covered by the ADA.[149] The ticket counters and kiosks operated by Southwest Airlines are the only physical "nexus" that Plaintiffs have identified that ties the services on Southwest.com to a physical facility owned or operated by Southwest

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[147] Plaintiffs could also win this case if the Eleventh Circuit holds that Title III claims can be based on Internet websites that offer travel services to the public that are unconnected with any physical place of public accommodation and determines that Southwest.com, an Internet site, is a place of public accommodation. Given the Eleventh Circuit's holding in *Rendon,* which is expressly limited to facts that include a nexus to a tangible facility, it will be up to the Eleventh Circuit Court of Appeals to decide whether Title III claims may be based on websites that offer travel services to the public but are unconnected with a physical place of public accommodation. *See Rendon v. Valleycrest Prods. Ltd.,,* 294 F.3d 1279, 1282-83; *see also* NCD Position Paper, *supra* note 4, at 18 (commenting: "[i]f asked to state the central point of the Eleventh Circuit's *Rendon* decision, it would have to be that 'nexus' is the test of Title III's application to off-site, nonphysical actions and procedures"). However, *Rendon* did not directly address this question; the case involved a communications barrier where there was a nexus to a physical place of public accommodation. *See Rendon,* 294 F.3d at 1282-83. Thus the court in *Rendon* did not need to decide the limits of the scope of Title III where no nexus existed and/or the place of public accommodation involved an intangible facility. *See id*. The Eleventh Circuit in *Southwest Airlines* could distinguish its holding in *Rendon* and hold places of public accommodation are not limited to physical facilities or that no nexus is required between an offsite communication barrier and a physical place of public accommodation. *See Rendon,* 294 F.3d at 1282-83*; see also* NCD Position Paper, *supra* note 4, at 25 (advocating rejection of the nexus approach to define the limits of the scope of Title III on the basis that it may "result in far more havoc than even the most sweeping and inclusive requirement for across-the-board commercial Web site accessibility ever could"). The NCD argues the nexus test for the scope of Title III would make some commercial websites subject to the ADA while leaving other similar companies outside the coverage of the law. *See* NCD Position Paper, *supra* note 4, at 25.

[148] 28 C.F.R. Part 36, App. B, p. 682 (2003).

Airlines.[150] Therefore, if places of public accommodation are limited to physical places, or alternatively if a nexus between the services of a physical place of public accommodation and an offsite communication barrier is required for a Title III claim, it appears that plaintiffs will not prevail on this claim as a matter of law.[151]

Thus, the outcome of the *Southwest Airlines* case may or may not resolve the important issue of whether Title III applies to commercial websites that offer their services to the public. As a test case for this issue, the *Southwest Airlines* case is problematic for reasons specific to the defendant's status as an air carrier. We now turn to the ultimate focus of this paper, whether Title III requires commercial websites operated by businesses *in other industries* to be accessible to people with disabilities.

V. OUTSIDE THE AIRLINE TRANSPORTATION INDUSTRY: APPLYING TITLE III TO CUSTOMER WEBSITE DESIGN

This section of the paper examines the broader arguments related to access by disabled customers to commercial websites provided for customers that go beyond the context of the test cases involving websites operated by commercial airlines. This section applies principles of statutory construction to Title III, discusses recent developments

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[149] *See id.*
[150] *See* Brief for the Appellants at 21-22, *Southwest Airlines (* No. 02-16163-BB).
[151] Most Circuit Courts have held that the scope of Title III is limited to access claims involving physical places of public accommodation; some include access claims involving intangible barriers when there is a nexus between the intangible barrier and a physical place of public accommodation. *See supra* notes 24-36, 50-60 and accompanying text. *But see supra* notes 37-49 and accompanying text which discusses Circuit Court decisions that do not so limit the scope of Title III. *See also infra* notes 189- 291. and accompanying text for arguments supporting a broader construction of Title III to include commercial websites offering goods and services to the public.

related to other analogous civil rights laws, provides an international perspective, and explores the technical feasibility of making commercial websites accessible to people with disabilities. The analysis of the broader arguments included in this section leads to a conclusion that Title III covers commercial websites.

A. *Applying Principles of Statutory Construction to the ADA's Public Accommodation Provisions*

The first step in construing a statute is to look at the language of the statute to determine whether it has a plain and unambiguous meaning.[152] Courts have applied two canons of statutory construction to find that the plain meaning of "place of public accommodation" is limited to physical places.[153] They are the canons of *noscitur a sociis* and *ejusdem generis.*[154] "The canon of *noscitur a sociis* instructs that a term is interpreted within the context of accompanying words to avoid giving of unintended breadth to the Act of Congress."[155] "The canon of *ejusdem generis* instructs that when general words

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[152] *See* Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997); *Rendon*, 294 F.3d at 1284 n.6; Access Now, Inc. v. Southwest Airlines, 227 F.Supp.2d 1312 ,1317 (2002). *See also* Patrick Maroney, *The Wrong Tool for the Right Job: Are Commercial Websites Places of Public Accommodation Under the Americans With Disabilities Act of 1990*?, 2 VAND. J. ENT. L. & PRAC. 191, 195 (2000).

[153] *See* Maroney, *supra* note 152, at 196-98.

[154] *See id.*

[155] *See id.* at 196 (internal quotations omitted); Parker v. Metropolitan Life Ins. Co*,* 121 F.3d 1006, 1014 (1997) stated:

> The clear connotation of the words in Section 12181(7) is that a public accommodation is a physical place. Every term listed in Section 12181(7) and subsection (F) is a physical place open to public access. The terms travel service, shoe repair service, office of an accountant or lawyer, insurance office, and professional office of a healthcare provider do not suggest otherwise…. To interpret these terms as permitting a place of accommodation to constitute something other than a physical place is to ignore the text of the statute and the principle of *noscitur a sociis*.

follow an enumeration of specific words, the general words are to be read as applying only to the same general kind or class as the specific words."[156]

Because the Attorney General has the authority to issue regulations that implement the ADA, courts may be required to defer to statutory constructions of the ADA by the Department of Justice.[157] Under the rules that govern agency deference, where Congressional intent is unambiguously expressed regarding the issue before the court, the agency's construction receives no deference.[158] However "if the statute is silent or ambiguous regarding an issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[159]

The extent and weight that courts should give legislative history when construing a statute has not yet been resolved by the U.S. Supreme Court and is a subject of academic debate.[160] Some courts, including the First Circuit, have used legislative history

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[156] *See* Maroney, *supra* note 152, at 198; *Southwest Airlines*, 227 F.Supp.2d 1312, 1318. The district court in *Southwest Airlines* held:

> Here, the general terms, "exhibition," "display," and "sales establishment," are limited to their corresponding specifically enumerated terms, all of which are physical, concrete structures, namely; "motion picture house, theater, concert hall, stadium"; and "museum, library, gallery"; and "bakery, grocery store, clothing store, hardware store, shopping center," respectively. Thus this Court cannot properly construe "a place of public accommodation" to include Southwest's Internet website, [S]outhwest.com.

See Southwest Airlines, 227 F.Supp.2d at 1318-19 (citations omitted).

[157] *See* Petruzzelli, *supra* note 9, at 1087 (citing Chevron v. Natural Resources Defense Council, 467 U.S. 837, 842-44 (1984)).

[158] *See id*. at 1088.

[159] *See id*. at 1087 (providing examples from the Sixth and Third Circuits where the courts rejected Department of Justice interpretations allowing the ADA to regulate the content of insurance policies); *see also Chevron*, 467 U.S. at 843.

[160] *See* Jeffrey Scott Ranen, Note, *Was Blind But Now I See: The Argument For ADA Applicability To The Internet*, 22 B.C. THIRD WORLD L.J. 389, 403-04 (2002) (citing WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 743 (2d ed. 1995)).

to justify a broad interpretation of "place of public accommodation."[161] Other courts have found it is improper to examine legislative history when the plain meaning of the statute is apparent after applying canons of statutory construction like *noscitur a sociis* and there is no ambiguity to resolve.[162]

The courts have disagreed over whether the term "place of public accommodation" is ambiguous. The First Circuit found the meaning of "place of public accommodation" may be ambiguous.[163] Other courts have found the plain meaning of "place of public accommodation" in the statute,[164] including whether it is limited to physical places or is not limited to physical places, often examining the same statutory text to reach contrary conclusions.[165]

Commentators also disagree about whether the term "place of public accommodation" is ambiguous and whether it is appropriate to use legislative history to construe the meaning of the term. Several commentators agree with the courts that have held the plain meaning of "place of public accommodation" is evident from the text of

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[161] *See id.*; Carparts Distrib. Ctr. v. Automotive Wholesaler's Ass'n, 37 F.3d 12,19-20 (1984); Konkright, *supra* note 9, at 722-23 (analyzing cases that have discussed the legislative history of Title III in construing place of public accommodation and summarizing the legislative history on "place of public accommodation" as used in Title III).

[162] In *Parker* the Sixth Circuit said the plain meaning of the statute was clear after applying the cannon of *noscitur a sociis*, so no assessment of legislative history was warranted. Parker v. Metropolitan Life Ins. Co.*,* 121 F.3d 1006, 1014 (6th Cir. 1997).

[163] *Carparts,* 37 F.3d at 19.

[164] Ford v. Schering-Plough Corp.*,* 145 F.3d 601, 613 (3rd Cir. 1998) (finding the plain meaning of public accommodation to be clear to be limited to physical places); Doe v. Mutual Omaha Ins. Co.,179 F.3d 557, 559 (7th Cir. 1999) (finding the plain meaning of public accommodation to include physical and electronic space).

[165] *See Parker*, 121 F.3d at 1014; *Carparts*, 37 F.3d at 19. Both courts examined the meaning of travel service. *Parker* concluded travel service was limited to physical places, however *Carparts* came to the opposite conclusion.

the statute, and that the term is limited to physical places as described in the examples and categories in the statute.[166] As one such commentator stated:

> [T]he text of Title III does not include websites as places of public accommodation. *Noscitur a sociis* and *ejusdem generis* dictate places of public accommodation must be physical facilities. The cannons also sufficiently resolve any alleged statutory ambiguities, thereby foreclosing the opportunity for contrary agency interpretations. Although the intentionally broad purpose and design of the ADA encourage advocates of online expansion, the same purpose and design limit Title III exclusively to physical facilities.[167]

Other commentators argue the meaning of "place of public accommodation" is not ambiguous in the statute, that congressional intent is apparent in the text of the statute, and the term is not limited to physical places.[168] Still other commentators argue the term is ambiguous in the text of the statute,[169] urging courts to resolve the ambiguity by looking at administrative interpretations and legislative history that supports a conclusion that Title III should be construed to cover nonphysical places where goods

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[166] *See, e.g.,* Jonathan Bick, *Americans With Disabilities Act And The Internet*, 10 ALB.L.J. SCI. & TECH. 205, 215 (2000) (rejecting arguments that the prohibitions of Title III extend to nonphysical places of public accommodation as contravening the plain language of the statute); Maroney, *supra* note 152, at 202.

[167] Maroney, *supra* note 152, at 202.

[168] *See, e.g.,* Ranen, *supra* note 160, at 399. Ranen advocated the view of the First and Seventh Circuits, which held the plain language of Title III did not limit place of public accommodation to physical places:

> [T]he plain language of the statute . . . does not provide a clear definition of public accommodation in Title III of the ADA. In a literal reading, the statute is at best ambiguous. However, the simple reasoning and logic of both the First and Seventh Circuits support the conclusion that Congress likely meant for the public accommodations provision to be defined broadly, rather than strictly limited to physical structures.

See id.; *see also Parker*, 121 F.3d at 1020 (Martin, B., dissenting).

and services are offered to the public including commercial websites.[170] Some commentators have not analyzed whether the statute is ambiguous, but also urge courts to conclude that places of public accommodation are not limited to physical places.[171]

Commentators offer various arguments for construing Title III broadly to include non-physical places as "place[s] of public accommodation" within the scope of Title III:

1. Title III does not expressly state that places of public accommodation are limited to *physical* places, so courts should look to the purpose of the statute to construe its meaning.[172] Requiring a place of public accommodation to be a physical structure is contrary to clear Congressional intent "to bring individuals with disabilities into the

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[169] *See e.g.*, Matthew A. Stowe, Note, *Interpreting "Place Of Public Accommodation" Under Title III of the ADA: A Technical Determination With Potentially Broad Civil Rights Implications*, 50 DUKE L.J. 297, 319-20 (2000).

[170] *See id.*; *see also* Schloss, *supra* note 9, at 43-45.

[171] *See* Petruzzelli, *supra* note 9, at 1082-86 (commenting that public accommodations are not limited to places that accept "walk-in" customers, such as a mail order catalog company that operates via mail and telephone orders only); Schloss, *supra* note 9, at 50, 57 (concluding that no sound policy reasons exist to exclude the World Wide Web from Title III, but that a government subsidy may be needed to aid many non-profit sites to compensate for litigation costs).

[172] The text of Title III does not expressly state that it only applies to physical places of public accommodation that people can physically enter. Robertson*, supra* note 9, at 207; Schloss, *supra* note 9, at 43. On the other hand, Title III of the ADA does not expressly mention the Internet, websites or other intangible places of public accommodation. *See* Schloss, *supra* note 9*,* at 43; Maroney, *supra* note 152, at 199. Some courts and commentators contend that all of the terms that Title III lists as a public accommodation are physical places. *See supra* notes 25-37 and accompanying text (cases requiring a physical place); Schloss, *supra* note 9, at 43. As one commentator stated:

> [E]ven if one concedes that all of the examples of "place of public accommodation" listed in the statute…are physical places, that still does not mean that "places of public accommodation" are necessarily limited to physical places. Precedent exists for using the law's purpose to guide its application rather than strictly adhering to a textual list of terms.

Stowe, *supra* note 169, at 324.

economic and social mainstream of American life…. in a clear, balanced, and reasonable manner."[173]

2. Title III applies to facilities that are open to the public, whether "in physical space or electronic space."[174] In *Doe*, Chief Judge Posner correctly identified that the primary characteristic of a "place of public accommodation" is *whether it is open to the public*, not whether it is a physical or an electronic space.[175] Therefore the non-discrimination obligations of a public accommodation apply to physical and electronic entities that are open to the public.[176]

3. Title III does not require a public accommodation to have walk-in facilities.[177] If a business is otherwise a public accommodation, it maintains a *physical space for administrative purposes*, and it offers its goods and services exclusively through non-

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[173] *Parker*, 121 F.3d at 1020 (Martin, B., dissenting) (referencing *Carparts*, 37 F.3d at 19 and H.R.Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 99 (1990) reprinted in 1990 U.S.C.C.A.N. 303, 382). As Judge Martin said:

> By limiting Title III's applicability to physical structures, the majority interprets Title III in a manner completely at odds with clear congressional intent. In recent years, the economic and social mainstream of American life has experienced significant change due to technological advances. An increasing array of products and services are becoming available for purchase by telephone order, through the mail, via the Internet, and other communications media. Unfortunately, under the majority view, the same technological advances that have offered disabled individuals unprecedented freedom may now operate to deprive them of rights that Title III would otherwise guarantee. As the modern economy increases the percentage of goods and services available through a marketplace that does not consist of physical structures, the protections of Title III will become increasingly diluted.

Id. (Martin, B., dissenting).

[174] Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999).

[175] *See* Petruzzelli, *supra* note 9, at 1084-85.

[176] *See id.*

[177] *See* Konkright, *supra* note 9, at 725-26. Konkright discusses the First Circuit's observation in *Carparts* that "many travel agencies and insurance offices offer their services strictly through a non-physical medium" such as the telephone, yet both travel agencies and insurance offices are listed as examples of places of public accommodation. *Id.* Konkright argues there is room to argue that Internet Access Providers that maintain physical facilities for administrative purposes, but do not offer their services through "walk-in" facilities, are places of public accommodation.) *Id. at 726.*

physical media, like the Internet or the telephone, it is arguably a "place of public accommodation."[178] So access to goods and services offered by telephone, mail, or Internet to the public by a business with a physical administrative facility is covered by Title III.[179]

4. Websites are not intangible facilities.[180] Websites are just like telephones – both are means of accessing goods and services.[181] One cannot walk into a telephone or a website, but both telephones and websites are tied to physical places that the public accesses to utilize the entity's goods and services.[182]

5. The regulatory definition of "place of public accommodation" that limits the term to a facility and further limits facility to physical places is entitled to no deference by the courts because it is manifestly contrary to the statute.[183]

6. There is a fundamental difference between the issues in the insurance cases, where the terms of policies were often the focus, and applying Title III to access barriers by

[178] Robertson argues that websites owned or operated by a "brick and mortar" company may still fall under Title III. Robertson, *supra* note 9, at 211.
[179] *See id*. at 211-12.
[180] *See* Petruzzelli, *supra* note 9, at 1084-85 ("One should not characterize a website as ethereal, arguing that individuals cannot walk into a website, and therefore, it is not a physical place of public accommodation . . .").
[181] *Id*.
[182] *Id*.
[183] "The Attorney General has the authority to issue regulations that implement the ADA. Therefore the Department of Justice's statutory constructions of the ADA may be entitled to deference when reviewed by the courts. . . If the intent of Congress is unambiguously expressed regarding the issue before the reviewing court, the agency's construction receives no deference." *Id*. at 1087-88. "[A]pplicable DOJ regulations define 'place of public accommodation' as a 'facility' and further define 'facility' by listing undoubtedly physical places." Stowe, *supra* note 169, at 325. "[T]he regulatory definition [of 'place of public accommodation'] is manifestly contrary to the statute and merits no *Chevron* deference." *Id*.

e-businesses that prevent disabled customers from even entering virtual facilities.[184] As one commentator explained:

> [M]ost of the cases examining the requirement for a physical structure occur in the insurance context. Several of these cases look at the actual insurance product itself, and focus on whether the benefits offered can differ based on disability alone. While a number of courts have been reluctant to apply a Title III analysis to the insurance product itself, cases arising in the Internet context may be treated differently. Logging on to a website can be seen as analogous to traveling to a store; browsing the pages is much like browsing the shelves . . . The issue with websites, unlike the issue with insurance policies, is providing access to the bookstore itself – Amazon.com, for instance – and not about changing the nature of the products offered.[185]

B. Contemporary Insights on the Meaning of Place of Public Accommodation

Several recent developments provide insight into the scope of Title III and were not considered by courts and other commentators discussed in the previous section. These new developments that provide a contemporary insights include: 1) the U.S. Supreme Court's decision in *PGA Tour, Inc.* that broadly construed Title III to include competitors in PGA golf tournaments;[186] 2) the Eleventh Circuit's decision in *Rendon* that expressly

[184] *See* Robertson, *supra* note 9, at 210-11.
[185] *Id*.
[186] PGA Tour, Inc. v. Martin, 532 U.S. 661, 677 (2001).

addressed off-site communication barriers to physical places of public accommodation;[187] and 3) the interpretations of courts and administrative agencies concerning website accessibility under analogous civil rights laws and other Titles of the ADA.[188] These recent developments provide current input in the debate about the scope of Title III and the correct statutory construction of "place of public accommodation." These recent developments further support the conclusion of this paper that Title III is applicable to least some commercial websites.

1. The U.S. Supreme Court's Decision in *PGA Tour, Inc. v. Martin*

In *PGA Tour, Inc. v. Martin,* the U.S. Supreme Court held Title III protects access to professional golf tournaments by a qualified *competitor* with a disability, rejecting the arguments of the defendants that Title III only covers spectators at its tournaments.[189] The Court's analysis of the statutory construction of the meaning of "place of public accommodation" in *PGA Tour, Inc*. is the Court's most recent guidance on the scope of Title III.[190] It strongly supports a conclusion that Title III should be broadly construed to provide access for the disabled to commercial facilities.

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[187] *See* Rendon v. Valleycrest Productions, Ltd., 294 F.3d 1279, 1284-86 (11th Cir. 2002).
[188] *See* cases and administrative interpretations cited at *infra* notes 226-43.
[189] *PGA Tour, Inc*., 532 U.S. at 681 (holding competitors in the PGA sponsored golf tournaments were within the class protected from non-discrimination in Title III and entitled to equal access to golf tournaments sponsored by the PGA). *PGA Tour, Inc*. does more than decide that the dispute is within the scope of Title III; it also decides that denial of the modification requested by Martin (the right to use a golf cart in competition despite the no-cart rule) would violate Title III. *Id*. at 682. So, in addition to analysis of the scope of Title III, the case gives rare insight into the U.S. Supreme Court's analysis of the nondiscrimination obligations of a public accommodation under Title III to make reasonable modifications for an individual with a disability. See *id.at 681; see also* Bragdon v. Abbott, 524 U.S. 624, 655 (1998) (remanding to determine whether it would pose a direct threat to a dentist to treat an HIV (human immunodeficiency virus) positive patient in his office rather than in a hospital) remanded to 163 F.3d 87 (1st Cir. 1998).
[190] *See PGA Tour, Inc*., 532 U.S. at 676-81.

In *PGA Tour, Inc*., the Court began its analysis of the scope of Title III by discussing the purpose of the ADA:

> Congress enacted the ADA in 1990 to remedy widespread discrimination against disabled individuals. In studying the need for such legislation, Congress found that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem … see § 12101(a)(3) ("Discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations…). Congress noted that the many forms such discrimination takes include "outright intentional exclusion" as well as the "failure to make modifications to existing facilities and practices." After thoroughly investigating the problem, Congress concluded there was a "compelling need" for a "clear and comprehensive national mandate" to eliminate discrimination against disabled individuals, and to integrate them "into the economic and social mainstream of American life."[191]

Summarizing the Congressional purpose of the ADA, the Court stated:

> In the ADA, Congress provided that broad mandate. In fact, one of the Act's "most impressive strengths" has been identified as its "comprehensive

> character"…. To effectuate its sweeping purpose, the ADA forbids discrimination against disabled individuals in major areas of public life, among them … public accommodations (Title III).[192]

The Court then turned to Title III of the ADA and the construction of the phrase "public accommodation."[193] According to the Court: "The phrase 'public accommodation' is defined in terms of 12 extensive categories, which the legislative history indicates 'should be construed liberally' to afford people with disabilities 'equal access' to the wide variety of establishments available to the nondisabled."[194] The Court characterized the definition of public accommodation as "comprehensive," finding the ADA covered Martin as a competitor and covered the golf tours:

> It seems apparent, from both the [ADA's] general rule and the comprehensive definition of "public accommodation," that petitioner's golf tours and their qualifying rounds fit comfortably within the coverage of Title III, and Martin within its protection."[195]

The Court commented that the petitioner in the case "leases" and "operates" golf courses to conduct its tours.[196] "As a lessor and operator of golf course, then, petitioner must not discriminate against any 'individual' in the 'full and equal enjoyment of the goods,

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[191] *Id.* at 674-675 (citations omitted).
[192] *Id*. at 675 (citations omitted).
[193] *Id*. at 676. The Court did not make a distinction between "public accommodation" as the owner or operator or lessor of a place of public accommodation and the "place of public accommodation." *See id*.
[194] *Id*. at 676-77.
[195] *Id.* at 677 (citations omitted).
[196] *Id.*

services, facilities, privileges, advantages, or accommodations' of those courses."[197] The court stated that among the 'privileges' offered by petitioner on the courses is playing in the golf tours, holding "Title III of the ADA, by its plain terms, prohibits petitioner from denying Martin equal access to its tours on the basis of disability."[198]

By express language in *PGA Tours, Inc*., the Court states that the scope of Title III is to be construed by reading the general non-discrimination rule in Title III and the definition of "public accommodation" *together*, in light of the broad mandate Congress provided to remedy disability discrimination in all major areas of public life, including public accommodations.[199]

However, *PGA Tour, Inc.* did not address the question of whether Title III is applicable to entities that operate without physical facilities, such as virtual places of business that solicit customers via the Internet, phone or mail communications. [200] Unlike these virtual places, golf courses are physical places, and are specifically listed as a "place of public accommodation" under the ADA.[201] Also, because the petitioners in *PGA Tour, Inc*. admitted that their professional golf tournaments were held on golf courses that they leased or operated, the Court was not obligated to decide whether defendants were owners or operators of public accommodations under the ADA. [202]

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[197] *Id.*
[198] *Id.* As authority for this plain meaning interpretation of Title III, the Court cited Pennsylvania Dept. of Corrections v. Yeskey, 524 U.S. 206, 209 (1998).
[199] *See PGA Tour, Inc*., 532 U.S. at 677.
[200] *See id.* (stating "The events occur on 'golf course[s],' a type of place specifically identified by the Act as a public accommodation.").
[201] *Id*.; 42 U.S.C. §12181(7)(L) (2003).

Are the decisions from Circuit Courts that have construed Title III to apply only to physical places inconsistent with the Title III analysis in *PGA Tour, Inc*.?[203] The answer to this question is yes. These cases narrowly construed Title III to hold that only physical places are within the statutory definition of "public accommodation."[204] They did not examine the scope of "public accommodation" or "place of public accommodation" within the context of the broad Congressional intent that the Court in *PGA Tour, Inc.* said had been articulated by Congress in the ADA and in Title III's general nondiscrimination rule.[205] Furthermore, these Circuit Court cases did not involve websites offering their goods or services to the public on the Internet, and were initially resolved on different grounds.[206] For all of these reasons, these Circuit Court cases provide weak authority for the current discussion of whether Title III covers customer websites and should be broadly read to include websites consistent with the analysis of Congressional intent in *PGA Tour, Inc*.

The U.S. Supreme Court's recent analysis of cases interpreting the scope of other Title II of the ADA also supports a broad interpretation of the scope of Title III. In *PGA Tour, Inc*., the Court discussed *Pennsylvania Dept. of Corrections v. Yeskey*, where the Court held that Title II of the ADA's prohibition of discrimination against disabled individuals "unmistakably includes state prisons and prisoners within its coverage."[207]

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[202] *PGA Tour, Inc.,* 532 U.S. at 677.
[203] *See supra* note 25 and accompanying text for circuit court cases holding physical place is required.
[204] *See supra* note 25; *see also Weyer, 198 F.3d at 1114; Ford, 145 F.3d at 612-13; Stoutenborough*, 59 F.3d at 583.
[205] *PGA Tour, Inc.*, 532 U.S. at 676.
[206] *See Weyer,* 198 F.3d at 114; *Ford*, 145 F.3d at 612-613; *Stoutenborough*, 59 F.3d at 583; .
[207] *PGA Tour, Inc.,* 532 U.S. at 677: Pennsylvania Dept. of Corrections v. Yeskey, 524 U.S. 206, 209-10 (1998) (holding the plain language of Title II of the ADA covers state prisons and programs for offenders,

Title II of the ADA prohibits disability discrimination by public entities, but did not expressly list state prisons or programs for prisoners such as boot camps for first time offenders.[208] Yet the Court found the state prisons and programs were covered by Title II of the ADA consistent with legislative intent that was plainly stated in Title II.[209]

Applying the analysis of cases that construe other Titles of the ADA to interpret the scope of Title III may have limitations, however. Unlike Title III, Title II of the ADA is not restricted to "public accommodations" and does not define "public accommodations."[210] For this reason courts may construe Title III in light of other federal civil rights laws that also limit coverage to public accommodations.[211] For example, in the analysis of whether participants in a sport are protected by Title III, *PGA Tour, Inc*. discussed cases involving allegations of race discrimination in public accommodations under Title II of the Civil Rights Act of 1964 (Title II of the CRA).[212] Courts have broadly construed the public accommodation provisions of Title II of the CRA to cover participants as well as spectators.[213] *PGA Tour, Inc*. found the cases interpreting Title II of the CRA persuasive on the issue of whether Title III included participants as well as spectators within its protections, while noting differences in the definitions under Title III

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so an inmate denied admission to a boot camp based on his history of hypertension was entitled to bring a disability discrimination claim).

[208] P*ennsylvania Dept. of Corrections*, 524 U.S. at 209-10*; see also* 42 U.S.C. § 12131 (2003).

[209] P*ennsylvania Dept. of Corrections*, 524 U.S. at 209-10.

[210] *Id*.; see *PGA Tour, Inc*., 532 U.S. at 681.

[211] *See PGA Tour, Inc*., 532 U.S. at 681.

[212] *Id.;* Civil Rights Act of 1964, 78 Stat. 243, 42 U.S.C. §2000a (2003) [hereinafter Title II of the CRA]. Title II of the CRA prohibits "public accommodations" from discriminating on the basis of race, color, religion, or national origin. *See* 42 U.S.C. §2000a (2003)

[213] *PGA Tour, Inc.,* 532 U.S. at 681*;* Daniel v. Paul, 395 U.S. 298, 306 (1969); Wesley v. Savannah, 294 F. Supp. 698 (S.D. Ga. 1969) (holding a private association was prohibited from limiting entry in a golf tournament on a municipal course to its own members but permitted all (and only) white golfers who paid the fees to compete); Evans v. Laurel Links, Inc., 261 F. Supp. 474, 477 (E.D. Va. 1966) (holding commercial golf establishment must permit black golfers to play on its course);

of the ADA and Title II of the CRA.[214] Specifically, the Court in *PGA Tour, Inc*. noted that, unlike Title III of the ADA, Title II of the CRA includes "place of exhibition or entertainment" in its definition of "public accommodation," but does not specifically list "golf course" as an example.[215] Given the broad Congressional intent found in Title III of the ADA as explained in *PGA Tour, Inc*., Title III's failure to expressly list commercial websites for customers as examples of public accommodations may not be fatal to a Title III claim involving a commercial website. At a minimum, the scope of Title III as it relates to websites should be construed in light of recent U.S. Supreme Court cases, as opposed to the narrow construction of Circuit Court cases discussed earlier in this paper.

2. *Rendon*, Communication Barriers, and the Nexus Theory

Assuming the correct construction of "place of public accommodation" is limited to *physical* facilities, it is still possible to argue Title III encompasses the use of the mail, telephone systems and websites to do business with the public.[216] Assume a business has a "brick and mortar" facility that is a "place of public accommodation," and it operates a website where it also offers goods and services to the public. Under existing case law in

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[214] *PGA Tour, Inc.,* 532 U.S. at 681.

[215] *Id.,* at 681; 42 U.S.C. §2000a(b) (2003).

[216] Robertson, *supra* note 9, at 211-12 (concluding websites created by businesses with a physical presence may be required to make their sites accessible to the disabled due to the nexus between the website and the physical place of public accommodation). *See also* McNeil v. Time Ins. Co., 205 F3d 179, 188 (5th Cir. 2000); Doe v. Nat'l Bd. of Med. Examiners, 199 F.3d at 157 (3rd Cir. 1999); Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006 , 1013 (6th Cir. 1997). Robertson made this argument in an article that was published before the Eleventh Circuit issued its decision in *Rendon*. Robertson, *supra* note 9., at 211-12. *See also* Rendon v. Valleycrest Productions, Ltd. 294 F.3d 1274, at 1283-84. However, the *Rendon* court squarely addressed a situation involving an off-site communication barrier to a brick and mortar facility:

> [T]he plain. . . statutory language . . . reveals that the definition of discrimination provided in Title III includes covers both tangible barriers and intangible barriers, such as eligibility requirements and screening rules or discriminatory policies and procedures that restrict a disabled person's ability to enjoy the defendant entity's goods, services and privileges.

several circuits, the business may be required to comply with Title III under the theory that there is a "nexus" between the goods or services offered on the website and the physical facility.[217] The Eleventh Circuit's recent decision in *Rendon* illustrates the application of the nexus theory in the context of an automated telephone answering system that operates as a communications barrier between disabled individuals and the physical place of public accommodation.[218] As discussed earlier in this paper, *Rendon* held the automated phone answering system operated to exclude individuals with hearing and mobility impairments from becoming contestants on the game show, which is held in a physical place, a TV studio.[219] In a similar situation involving a website, where a nexus exists between the website and a place of public accommodation and the website operates as a barrier to the place of public accommodation, Title III may apply and the public accommodation may have an obligation to make its communications system, including a website, accessible to people with disabilities.[220]

Id. at 283. .

[217] *See Rendon*, 294 F.3d at 1284. *Rendon* distinguished previous Title III cases, including the insurance cases discussed earlier in this paper at note 31, from the circumstances in *Rendon*, stating:

> These cases are . . . inapposite . . . they do not stand for the broad proposition that a place of public accommodation may exclude persons with disabilities from services or privileges performed within the premises of the public accommodation so long as the discrimination itself occurs off site or over the telephone. At most, they can be read to require a nexus between the challenged service and the premises of the public accommodation. That nexus is surely present here. Plaintiffs seek access to privileges provided in Defendants' theater. None of the insurance cases countenance, for example, refusal to let individuals in wheelchairs buy insurance policies so long as the company does so by declining to make telephone appointments with disabled customers.

Id.

[218] *Id.* at 1280-81; *see also* NCD Position Paper*, supra* note 4, at 17-19 (stating that the central point in the Eleventh Circuit's decision in *Rendon* is that "nexus" is the test for application of Title III to off-site, nonphysical actions and procedures).

[219] *Rendon*, 294 F.3d at 1282-83.

[220] *See* Robertson, *supra* note 9, at 211-12; *see also* NCD Position Paper, *supra* note 4, at 18. The extent of a business's obligations under Title III with respect to making a website accessible for people with disabilities is not clear. *See* references to commentators who have addressed this issue *supra* note 9.

At first blush, the nexus theory seems to create a very large opening for plaintiffs to challenge inaccessible websites as communication barriers to brick and mortar businesses. Today, any business that is open to the public, affects commerce, and is listed in the statutory definition of "place of public accommodation" is also likely to have a website for its customers.[221]

But must the customer using a commercial website also seek to physically enter the place of public accommodation by virtue of the public accommodation's website in order to be covered by Title III? Prior to *PGA Tour, Inc.* and *Rendon*, several commentators argued that Title III only covered *physical* access to place of public accommodation.[222] The facts in *PGA Tour, Inc*., involved golf competitions that were held in physical places, and it provides no insight on this question.[223] The Eleventh Circuit's recent decision in *Rendon,* which expressly limited its holding to a situation where plaintiffs sought to enter a tangible facility to compete on a game show*,* also provided no insight on this question.[224]

In sum, at a minimum, the nexus theory supports Title III coverage of websites provided by businesses that facilitate access by customers to the brick and mortar facilities of those businesses. For this reason, this paper concludes that at least some

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[221] *See* Internet Software Consortium, http://www.isc.org/ds/WWW-200207/dist-bynum.html*, supra* note *7.*
[222] *See Bick, supra* note 166, at 215; Maroney, *supra* note 152, at 202-03. *See also PGA Tour, Inc*. 532 U.S. at 661*; Rendon*, 294 F.3d at 1282. *See also* NCD Position Paper, *supra* note 4, at 21 (arguing that Title III prohibits discrimination by places "of" public accommodation and that its application is not limited to discrimination "in" places of public accommodation). The NCD Position Paper further argues that the District Court in *Southwest Airlines* made a serious error when it ruled: "Title III of the ADA sets forth the following general rules against discrimination *in* places of public accommodation". *Id.* (emphasis added).
[223] *See PGA Tour, Inc*., 532 U.S. at 680.
[224] *See Rendon*, 294 F.3d at 1282.

commercial websites are within the scope of Title III. The recent court cases, however, do not preclude a broader interpretation of Title III to cover commercial websites for customers that are unconnected to brick and mortar places of business.

3. Accessibility and Websites Outside the Context of Title III

Outside the context of Title III, courts and administrative agencies have addressed the applicability of federal discrimination statutes to virtual spaces. Some of these decisions support construction of Title III to cover customer websites.

One case involved web accessibility issues related to a website for customers that is factually similar to the *Southwest Airlines* case, although it involved public transportation provided by a public as opposed to a private entity. In *Vincent Martin v. Metro Atlanta Rapid Transit Authority* (MARTA), the district court for the Northern District of Georgia held disabled users of a municipal mass transit system were entitled to a preliminary injunction against MARTA for its failure to make its website accessible to the visually disabled under Title II of the ADA.[225] In *Vincent Martin*, the plaintiffs' claimed MARTA violated Section II of the ADA by providing schedule and route information to the public via a website that was not equally accessible to people with visual disabilities.[226] Although MARTA also provided information about particular routes and schedules by telephone to the visually disabled, *Vincent Martin* held the telephone service was not equivalent to the service MARTA provided to the general

[225] Vincent Martin v. Metro Atlanta Rapid Transit Authority (MARTA), 225 F. Supp. 2d 1362, 1383 (N.D. Ga. 2002).

public, and that MARTA could do a lot more to make its website accessible to people with visual disabilities.[227] *Vincent Martin* held MARTA must format its website to be accessible for persons who are blind but who are capable of using text reader computer software.[228] Despite the very similar factual situation between the customer websites of MARTA and Southwest Airlines, the district court in *Southwest Airlines* rejected the plaintiffs' argument that the court should consider *Vincent Martin* as authority to hold that Title III requires accessible customer websites.[229] *Southwest Airlines* held that because the claims against MARTA were against a public entity, *Vincent Martin* is inapplicable.[230]

Another recent case also involves the definition of public accommodation under Title III. In *Noah v. AOL Time Warner, Inc*., a federal district court for the Eastern District of Virginia dismissed claims of religious harassment by a participant in an online chat room hosted by America Online, Inc. (AOL), an Internet Service Provider (ISP).[231] In *Noah*, Plaintiff, a Muslim, claimed AOL was liable for the online harassment under Title II of the Civil Rights Act of 1964 (CRA of 1964).[232] The federal district court

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[226] *Vincent Martin*, 225 F. Supp. 2d at 1377.
[227] *Id*.
[228] *Id*. (holding failure to do so would violate Title II of the ADA, which includes a mandate to make "adequate communications capacity available, through accessible formats and technology.") (citing 49 C.F.R. § 37.167(f)).
[229] *Vincent Martin*, 225 F. Supp.2d at 1377.
[230] *Southwest Airlines*, 277 F. Supp. 2d at 1319.
[231] Noah v. AOL Time Warner, Inc., 261 F. Supp. 2d 532 (E.D.Va. 2003). *See also* Clegg v. Cult Awareness Network, 18 F.3d 752, 756 (9th Cir. 1994) (holding Title II only covers "places, lodgings, facilities and establishments open to the public, and applies to organizations only when . . . membership in the organization is . . . necessary . . . to use the facility").
[232] *Noah*, 261 F. Supp. 2d at 534. S*ee also* The Civil Rights Act of 1964, 42 U.S.C. §2000a(a) (2003) [hereinafter Title II of the CRA]. Title II of the CRA prohibits race, color, religion or national origin discrimination in goods or services provided by any place of public accommodation. *Id.* Title II also includes an exhaustive list of facilities that are covered as places of public accommodation. 42 U.S.C. § 2000a(b) (2003).

dismissed the plaintiff's Title II claims on two separate grounds.[233] First, *Noah* held AOL, as an ISP, has statutory immunity against Title II claims under the Communications Decency Act of 1996 (CDA).[234] Under the CDA, ISP's have statutory immunity for state and federal claims that relate to the ISP's role as a "publisher" of statements made by third parties on interactive computer services supplied by the ISP.[235] Second, in the alternative, *Noah* dismissed the plaintiff's Title II claims on the basis that a chat room is not a "place of public accommodation" under Title II of the CRA.[236] In reaching this second holding, *Noah* examined cases under Title II of the CRA and under Title III of the ADA that have considered whether a "place of public accommodation" must be a physical place.[237] In this context, *Noah* discussed the district court's decision in *Southwest Airlines.*[238] *Noah* recognized that the Circuit Courts are split on this issue under Title III of the ADA, but held that under Title II of the CRA, "place[s] of public accommodation" are limited to physical places and do not include online chat rooms.[239]

Noah, unlike *Vincent Martin*, is not factually similar to the *Southwest Airlines* case for several reasons. First, Noah does not involve claims of inaccessible website content and website design, but rather involves claims of online discrimination and harassment by users of a website. Second, *Noah* involves claims against an ISP, where

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[233] *Noah*, 261 F. Supp. 2d at 537.
[234] *Id*. at 537-39 (construing the Communications Decency Act of 1996, 47 U.S.C. §230 (2003)).
[235] *Id*.
[236] *Id*. at 544 (construing 42 U.S.C. § 2000a(b) (2003)).
[237] *Id.* at 541-44.
[238] *Id.* at 544 (citing *Southwest Airlines*, 227 F. Supp. 2d at 1316). *Noah* also discussed Torres v. AT&T Broadband, LLC, 158 F. Supp. 2d 1035, 1037-38 (N.D. Cal. 2001). *Noah*, 261 F. Supp. 2d at 544. The district court in *Torres* considered a claim that a digital cable system was in violation of the ADA because its on-screen channel guide was not accessible to the visually disabled. *Torres*, 158 F. Supp. 2d 1035, 1037-38. *Torres* found the digital cable system was not a "place of public accommodation" under Title III of the

statutory immunity has expressly been granted to ISPs in light of their role as a system provider for communications between other parties. In contrast, *Vincent Martin* applied Title II to web access issues arising from the design of customer websites that are nearly identical to those raised in *Southwest Airlines*, and the reasoning of the court in *Vincent Martin* supports the construction of Title III, like Title II, to encompass customer websites.

Administrative agency guidance under Title I of the ADA also supports a construction of Title III to include commercial websites. The Equal Employment Opportunity Commission (EEOC) administers claims of employment discrimination including disability discrimination under Title I of the ADA.[240] The EEOC is cognizant of pending litigation against *Southwest Airlines* related to the accessibility of its website.[241] In response to an anonymous question from an employer with a website used to post job openings and accept job applications, the EEOC issued a policy letter in which it stated that an employer may have to provide an accessible website for users who are visually impaired if the user requests an accommodation.[242] In its policy letter, the EEOC

ADA because viewing the cable system's images does not require the plaintiff to gain access to any actual physical public place. *Id*.

[239] *Noah*, 261 F. Supp. 2d at 541, 543.

[240] 42 U.S.C. §§ 12111, 12117 (2003).

[241] *EEOC Policy Letters Employer's Responsibility to Provide Accessible Web Site Still Undefined*, 25-8 DISABILITY COMPLIANCE BULLETIN (May 1, 2003) (referencing and discussing *Letter to Anonymous*, 25 NDLR 257 (EEOC 2003) and *Southwest Airlines*, 227 F. Supp. 2d at 1316).

[242] *Id.* The context for the EEOC's guidance was an inquirer's question as to whether employers violate Title I of the ADA if their websites that list job vacancies and receive job applications do not provide larger type for users who are visually impaired. *Id.* The EEOC advised the employer that if a job seeker requested an accommodation for a vision impairment related to a website, the employer should first determine if the job seeker is a qualified individual with a disability; if so, the employer should then explore whether it would be reasonable to provide equipment to enlarge the font on its website. *Id*. The EEOC also advises that the employer may consider alternative accommodations such as providing a hard copy of the material on the website or providing a reader of the material. *Id.*

referenced the *Southwest Airlines* case, indicating that the issue of whether an employer must provide an accessible website is still evolving.[243]

C. *An International Perspective on Accessible Website Design*

Accessible website design is being advanced on an international basis. The United Nations General Assembly adopted the Standard Rules on the Equalization of Opportunities of Persons with Disabilities (Standard Rules) in 1993:[244]

> Rule 5 of the Standard Rules addresses accessibility in terms of the physical environment and with reference to information and communications services. Among other points, Rule 5 recommends that: 'states … develop strategies to make information services and documentation accessible for different groups of persons with disabilities.'[245]

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[243] *Id*.

[244] Deanie French and Leo Valdes, *Electronic Accessibility: United States and International Perspectives*, 10:1 EDUC. TECH. REV. (2002) (on file with author; page numbers are not available for this document); *The Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, U.N. GAOR, 48th Sess. Annex, U.N. Doc. A/48/96 (1993), *available at* http://www.un.org/esa/socdev/enable/dissre00.htm [hereinafter UN Standard Rules]; Report of the United Nations Consultative Group Meeting on International Norms and Standards Relating to Disability *available at* http://www.independentliving.org/docs4/disberk0.html (Dec. 12, 1998).

[245] French and Valdes, *supra* note 244. *See also* Rule 5, Accessibility, UN Standard Rules, *supra* note 247 *available at* http://www.un.org/esa/socdev/enable/dissre04.htm (last visited Oct. 1, 2003).

The Standard Rules are not legally binding, but rather encourage governments to take action to promote equal opportunities for people with disabilities, including accessibility of information and communications services.[246]

Several countries have issued policy statements that encourage accessible website design by government and/or commercial websites. For example, Australia, Canada and Portugal have issued such policy statements; however, they primarily address accessibility of government websites.[247]

Unlike most other countries that have only issued policy statements, the U. S. has legislation that requires federal government websites and other electronic and information technology to be accessible for people with disabilities.[248] Under Section 508 of the Rehabilitation Act of 1973 (Section 508), all U.S. federal agencies must comply with the accessibility standards set by the Architectural and Transportation Barriers Compliance Board (U.S. Access Board).[249] Section 508 applies to all electronic and information technology that is developed, procured, maintained, or used by the federal government

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[246] French and Valdes, *supra* note 244.
[247] *Id*.; *see also* World Wide Web Consortium, *Policies Relating to Web Accessibility*, *available at* http://www.w3.org/WAI/Policy/ (summarizing the policies and laws in different countries related to web accessibility) (last visited Oct. 1, 2003).
[248] Rehabilitation Act of 1973 § 508, *amended by* the Workforce Investment Act of 1998, 29 U.S.C. §794(d) (2003) [hereinafter Section 508]; French and Valdes, *supra* note 244; *see also* Bick, *supra* note 166, at 222. French and Valdes report that federal websites in Canada are probably the most accessible websites among developed nations having complied with the Treasury Board Secretariat's Common Look and Feel Guidelines. French and Valdes, *supra* note 244. This Canadian legislation is similar to Section 508 in the United States and was adopted with a compliance date of December 31, 2002. Treasury Board of Canada Secretariat, *Common Look and Feel for the Internet*, http://www.cio-dpi.gc.ca/clf-upe/index_e.asp (last visited Oct. 1, 2003).
[249] Section 508, 29 U.S.C. §794(d) (2003); Architectural And Transportation Barriers Compliance Board, *Electronic and Information Technology Accessibility Standards* (Dec. 21, 2000), 36 C.F.R. Part 1194 p. 498 *et seq*. (2003), preamble and text of final rule, *available at* http://www.access-

and requires that such electronic and information technology be accessible to people with disabilities.[250] The U.S. approach that requires the U.S. Access Board to set standards for accessibility of electronic and information technology used by the federal government contrasts with the approach of other countries that have deferred to the leadership of the World Wide Web Consortium (WC3) and the accessibility standards found in its Web Accessibility Initiative.[251] The U.S. Access Board issued a final administrative rule on electronic and information technology and accessibility standards (final rule), which became was effective in June 2001.[252] The final rule covers web-based Intranet and Internet information and applications.[253] Although the final rule does not adopt the Web Content Accessibility Guidelines that have been recommended by the W3C, the rule does

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board.gov/sec508/508standards.htm. *See also* Latresa McLawhorn, *Leveling the Accessibility Playing Field: Section 508 of the Rehabilitation Act*, 3 N.C. J.L. & TECH. 63, 63-64 (2001).

[250] McLawhorn, *supra* note 249, at 67-68. Under Section 508, federal agencies are required to purchase the most accessible electronic and information technology available and to make federal websites accessible unless it would be an undue burden on the agency. *Id.* at 64. Section 508 does not apply to the private sector except to the extent of doing business with the federal government, or to recipients of federal funds. *Id*. However, organizations and state agencies that receive federal funds under the Assistive Technology Act of 1998 are required to comply with Section 508. *Id*.; *see also* Assistive Technology Act of 1988, 29 U.S.C. §3001 (2003).

[251] French and Valdes, *supra* note 244. It is interesting to compare the U.S. approach under Section 508 with Canada's Common Look and Feel Initiative and Canada's implementing draft regulations; the latter expressly adopts the World Wide Web Consortium's Web Content Accessibility Guidelines 1.0. *See infra* note 255. The World Wide Web Consortium [hereinafter W3C] is an international forum with nearly 400 member organizations that develop technologies for the Web. William E. Kennard & Elizabeth Evans Lyle, *With Freedom Comes Responsibility: Ensuring That the Next Generation of Technologies Is Accessible, Usable and Affordable*, 10 COMMLAW CONSPECTUS 5, 14 (2001). The W3C has undertaken a Web Accessibility Initiative (WAI). *Id.*; s*ee also* W3C, *Web Content Accessibility Guidelines 1.0* (May 1999), , http://www.w3.org/TR/WCAG10/ [hereinafter WCAG 1.0]. W3C published the WCAG 1.0 as a Recommendation in May 1999. *Id*.

> The Working Draft version for 2.0 builds on WCAG 1.0. It has the same aim: to explain how to make Web content accessible to people with disabilities and to define target levels of accessibility. Incorporating feedback on WCAG 1.0, this Working Draft of version 2.0 focuses on checkpoints. It attempts to apply checkpoints to a wider range of technologies and to use wording that may be understood by a more varied audience.

Id.

[252] *See* Architectural and Transportation Barriers Compliance Board, Electronic and Information Technology Access Standards, *supra* note 249. *See also* 36 C.F.R. §1194.22 (2003) (providing technical standards for web-based intranet and internet information and applications), *available at* http://www.access-board.gov/sec508/508standards.htm. *See also* Taylor, *supra* note 46, at 39 (observing

reference them.[254] Other developing countries, including Canada and the European Union, use the W3C's Web Accessibility Initiative (and its Web Content Accessibility Guidelines) as the source of reference material regarding new technologies and developments for accessible web design.[255]

As described above, countries with policies or laws that mandate or encourage accessible websites and these policies or laws generally focus on government operated websites, as opposed to websites provided by businesses for their customers. Australia is a notable exception because it requires private websites that offer services to the public to be accessible. In *Maguire v. Sydney Organizing Committee For the Olympic Games*

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that although the final rule does not refer to the WCAG 1.0 except in notes, it is very similar to the recommendations for accessibility found in WCAG 1.0).

[253] Taylor, *supra* note 46, at 39.

[254] *See* Architectural and Transportation Barriers Compliance Board, *supra* note 249, preamble including a section by section Analysis, 36 C.F.R. Part 1194 p. 498 *et seq*. (2003) (responding to comments received related to 36 C.F.R. §1194.22 that the U.S. Access Board interprets these standards for web-based information and applications consistently with certain Priority one checkpoints of the W3C Web Content Accessibility Guidelines); *see also* Taylor, *supra* note 46, at 39.

[255] French and Valdes, *supra* note 244. *See Canada's Common Look and Feel Standards and Guidelines for Intranets, Extranets and Other Electronic Documents* – DRAFT, http://www.cio-dpi.gc.ca/clf-upe/intranet/intranet03_e.asp (last visited Oct. 1, 2003)(requiring compliance with WCAG 1.0 including compliance with the Priority 1 and 2 Checkpoints). *See infra* note 281 for a discussion of the Priority Checkpoints included in the WCAG 1.0. The European Union (EU) is in the process of standardizing web accessibility using the Web Accessibility Initiative (WAI). French and Valdes, *supra* note 244. The EU has adopted a European Action Plan with a special section titled "e-accessibility: Participation for all in the knowledge-based economy." *Id.*; *see also* Information Society, EUROPA, *Web Content Accessibility Guidelines for EU Public Sites, available at* http://europa.eu.int/information_society/topics/citizens/accessibility/web/wai_2002/index_en.htm (last visited Oct. 1, 2003). 2002 is the target deadline for all EU countries to make their federal websites accessible following the WAI Content Accessibility Guidelines. *Id.*; *see also* Information Society, EUROPA, *eEurope 2002: Accessibility of Public Web Sites and Their Content*, COM (2001) 529 final, *available at* http://europa.eu.int/information_society/topics/citizens/accessibility/web/wai_2002/cec_com_web_wai_2001/index_en.htm. The EU is also taking steps to extend web accessibility to the private sector. Information Society, EUROPA, *Council Resolution on "e-Accessibility" – improving the access of people with disabilities to the Knowledge Based Society*, 2470th Council Meeting on Employment, Social Policy, Health and Consumer Affairs, 26-29 (Dec. 2002), *available at* http://europa.eu.int/information_society/topics/citizens/accessibility/eaccess2002/council_res_eaccess2002index_en.htm; Ministerial Symposium Towards an Inclusive Information Society in Europe: Ministerial Declaration on eInclusion (Final Version) (Nov. 4, 2003), *available at* http://www.eu2003.gr/en/articles/2003/4/11/2502/.

(SOCOG), the Australian Human Rights and Equal Opportunity Commission found the SOCOG discriminated against a blind user of its website when it failed to make the site accessible to him in accordance with the W3C's Web Content Accessibility Guidelines.[256] Maguire, the plaintiff in the case, who is blind, complained that the SOCOG discriminated against him on the basis of his disability because the SOCOG's websites for the Sydney 2000 Olympic Games were not accessible in compliance with the W3C's Web Content Accessibility Guidelines.[257] As defenses, the SOCOG asserted that it had made the website accessible with respect to two of Maguire's complaints in the interim between the time that the complaint was filed and the date of the hearing, and that it would be an unjustifiable hardship for it to make the site accessible as to Maguire's third complaint.[258] In contrast to the U.S. cases involving claims of disability discrimination related to inaccessible websites provided by businesses for their customers, *Maguire*'s case was not dismissed without a hearing.[259] The Australian Human Rights & Equal Opportunity Commission (Australian HREOC) fully analyzed Maguire's claims of disability discrimination under Australia's disability discrimination statutes that closely resemble Title III of the ADA.[260] Like Title III of the ADA,

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[256] Maguire v. Sydney Organising Committee for the Olympic Games (SOCOG), Australian Human Rights and Equal Opportunity Commission, No. H 99/115, William Carter QC, Sydney, 8, 24 Aug. 2000, *available at* http://www.hreoc.gov.au/disability_rights/decisions/comdec/2000/DD000120.htm.

[257] *Id*. Maguire's complaint asked the Australian Human Rights and Equal Opportunity Commission to make the following orders or declarations: 1) That SOCOG include ALT text on all images and image map links on the website; 2) That SOCOG ensure access from the Schedule page to the Index of Sports; and 3) That SOCOG ensure access to the Results Tables on the website during the Olympic Games. *Id.* "The use of ALT text on images and image map links is a matter comprehended by the W3C Guidelines." *Id*. Essentially, the use of ALT text requires a website to provide text in lieu of images on a website such that a screen reader or other assistive technology used by a person with a visual impairment can access the content of the web page. *See* references and discussion at *supra* note 252; *see also* WCAG 1.0, *supra* note 251.

[258] *Maguire*, *available at* http://www.hreoc.gov.au/disability_rights/decisions/comdec/2000/DD000120.htm, *supra* note 256.

[259] *Id.; see also Southwest Airlines,* 227 F. Supp. 2d at 1312.

[260] Section 24 of the Australian Disability Discrimination Act of 1992 (herein after DDA) provides:

Australia's disability discrimination statute prohibits disability discrimination by facilities that provide services, including entertainment and recreation services, and makes no reference to the Internet or websites.[261] Yet the Australian HREOC found the DDA applicable to the SOCOG's websites and held the sites had discriminated against Maguire:

> [C]omplainant was clearly the recipient of less favorable treatment by the respondent in that he was unable to access the services offered by the respondent by means of its web site or at best he was offered imperfect or limited access only because of the manner in which the services were made available and this less favorable treatment was because of his disability.[262]

The Australian HREOC also rejected the SOCOG's unjustifiable hardship defense, in part based on expert testimony including the testimony of an expert who chaired the Authorizing Tool Guidelines Group of the W3C.[263] The Australian HREOC

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(1) It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's disability … (a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person; or (b) in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or (c) in the manner in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person.

(2) This section does not render it unlawful to discriminate against a person on the ground of the person's disability if the provision of the goods or services, or making facilities available, would impose unjustifiable hardship o the person who provides the goods or services or makes the facilities available.

Maguire, *available at* http://www.hreoc.gov.au/disability_rights/decisions/comdec/2000/DD000120.htm, *supra* note 256. Section 4 of the DDA defines "services" to include "services relating to entertainment, recreation, or refreshment." *Id.*

[261] *Id.*

[262] *Id.*

[263] *Id.*

concluded that provision of an accessible website for the complainant and other vision impaired persons would constitute a very considerable benefit to them, enabling access to precisely the same body of information available to sighted persons about an event that would engage the whole nation.[264] It also concluded that the detriment to the SOCOG would be modest because it would take only four weeks for the SOCOG to make the site accessible in compliance with the first priority level of the Web Content Accessibility Guidelines.[265] The Australian HREOC ordered the HREOC SOCOG to do all that is necessary to render its website accessible to complainant Maguire by a specified date, with the option for ability of Maguire to reopen the case and claim damages if the site was not made accessible.[266] In fact the site was not made accessible within the required timeframe and damages were awarded.[267]

A lawsuit under the Disability Discrimination Act in the United Kingdom (UK) has recently been brought against companies in the UK that alleges failure to make their websites accessible to people with visual disabilities.[268] The announcement of the suit follows an earlier announcement this year by the Disability Rights Commission in the UK that it was investigating 1,000 websites related to accessibility.[269]

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[264] *Id.*
[265] *Id.*
[266] *Id.*
[267] *Internet still covered under Australian Discrimination Law*, 2002 Media Releases, Australian HREOC, *available at* http://www.hreoc.gov.au/media_releases/2002/72_02.html (last revised Oct. 23, 2002) (noting that two years ago a $20000 damages award was made against SOCOG because their site was not accessible during the Olympic Games) (on file with author).
[268] Jonathan Webdale, *RNIB Brings UK's First Action Over Site Accessibility*, New Media Age, July 03, 2003, *available at* http://www.newmediazero.com (on file with author).
[269] *Id.*

In sum, although Australia is clearly the international leader having mandated accessible customer websites under its disability discrimination law, an international move toward accessibility is also evident. Developed nations, other than the U.S., appear to be following the W3C's Web Content Accessibility Guidelines, and in some cases, have found disability discrimination where websites are not in conformance with the guidelines.

D. *The Technical Feasibility of Making Websites Accessible*

Today, there is little dispute that information technology exists to make websites accessible for people with disabilities -- in other words, it is technically feasible to design for commercial websites to be designed to be accessible to people with disabilities.[270] Reported court Court decisions support this conclusion. For example, in the U.S., *Vincent Martin* required Atlanta's public transportation system to make its website accessible under Title II of the ADA, specifically commenting on the ability of the public transportation system to do so.[271] And in the international context, Australia held the website for the Olympic Games in Sydney was required to make its website accessible for people with disabilities, specifically discussing the technical feasibility of making the website accessible.[272] These courts would not likely have required the website operators to make their websites accessible if the technology did not exist to support

[270] *See* NCD Position Paper, *supra* note 4, at 26-28 (concluding that the requirements to make private commercial websites accessible to people with disabilities are unobtrusive, inexpensive and easily accomplished).
[271] *Vincent Martin*, 225 F. Supp. 2d at 1377 (holding MARTA "can do a better job of making information available in accessible formats to the visually impaired").

accessibility.[273] In fact, both courts expressly recognized the ability of the website operators to make their websites much more accessible to people with visual disabilities.[274]

Given the technical feasibility of making websites accessible for people with disabilities, one might ask why many websites are not currently accessible, including commercial websites for customers.[275] Some courts have declined to construe Title III to require commercial websites to be accessible, relying on the fact that website technology to make websites accessible is rapidly evolving and concluding that there are no well-defined standards to make commercial websites accessible for the disabled.[276] While it is true that technology supporting accessible websites continues to evolve, it is not true that there are no well-defined standards to support making commercial websites accessible for the disabled.[277]

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[272] *Maguire*, *available at* http://www.hreoc.gov.au/disability_rights/decisions/comdec/2000/DD000120.htm (holding SOCOG must make its website accessible in light of the W3C's Web Content Accessibility Guidelines, which provide technical guidance to make websites accessible for the disabled).

[273] Feasibility, including technical feasibility, is inherent in the non-discrimination obligations under the Title III obligation for public accommodations to make reasonable modifications that are readily achievable, meaning that they are easily accomplishable and able to be carried out without much difficulty or expense. Schloss, *supra* note 9, at 55. Feasibility is also inherent in the analysis required to determine whether making a facility accessible would be an undue burden, and therefore not required. Ranen, *supra* note 160, at 414.

[274] *Vincent Martin*, 225 F. Supp. 2d at 1377; *Maguire*, *available at* http://www.hreoc.gov.au/disability_rights/decisions/comdec/2000/DD000120.htm.

[275] It is reported that that there are now approximately one billion web pages on the Internet, however ninety-eight percent of these websites are to some extent inaccessible to the visually disabled. Ranen, *supra* note 160, at 390. The vast majority of websites are inaccessible to the visually disabled because the two main technologies used by the visually disabled to access web content (screen readers that convert text to voice and refreshable Braille displays that convert scanned documents into Braille) rely on textual data from websites, and web designers have largely ignored the needs of the visually disabled to have access to text content. *Id*.

[276] *See, e.g., Southwest Airlines*, 227 F. Supp. 2d at 1321 n.13.

[277] Providing text equivalents of non-text content on web pages benefits many disabled web users including those who are blind and people with reading difficulties that often accompany cognitive disabilities, learning disabilities, and deafness. WCAG 1.0, *supra* note 255, at 5. Providing text displayed visually benefits users who are deaf as well as the majority of Web users. *Id*.

There are two major sources of technical standards for designing websites that are accessible: accessibility standards developed by the private sector (the W3C's Web Content Accessibility Guidelines),[278] and the federal regulations requiring U.S. government websites to be accessible for the disabled (Section 508 Guidelines).[279] Either of these sources of technical guidelines for accessible websites may be used as a benchmark for accessibility under Title III.[280] The W3C's Web Content Accessibility Guidelines 1.0 is characterized as a "stable" document that includes "specifications," and is a source of well-defined standards that courts could use to measure accessibility of commercial websites.[281] One important advantage of the W3C's Web Content Accessibility Guidelines (over website accessibility standards like the Section 508 Guidelines established by statute or administrative regulation) is that they were developed with the involvement of the international business community and are available for international application, consistent with the international dimensions of the Internet and the Web.[282]

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[278] *See* discussion of WCAG 1.0, *supra* note 251-255 and accompanying text.

[279] *See* Section 508, 29 U.S.C. §794(d) (2003); 36 C.F.R. Part 1194 p. 498 *et seq*. (2003). The term "Section 508 Guidelines" is used in this paper to refer to the standards adopted by the U.S. Access Board to implement Section 508. *See* 36 C.F.R. Part 1194 p. 498 *et seq*.; *see also supra* notes 248-254 and accompanying text.

[280] *See* NCD Position Paper, *supra* note 4, at 28 (discussing the availability and use of the excellent and proven models for making the content of websites accessible including the Section 508 Guidelines and the W3C's Web Content Accessibility Guidelines).

[281] The WCAG 1.0 is a stable document that may be used as reference material or cited as a normative reference; it is referred to as a "specification" which has been endorsed as a W3C Recommendation. WCAG 1.0, *supra* note 251, at 3. WCAG includes checkpoints that are assigned priority levels. *Id*. at 7-8. Priority 1 checkpoints consist of requirements that a web content developer *must* satisfy for groups of users to access to information within the document. *Id.* Priority 2 checkpoints consist of requirements that a web content developer *should* satisfy or access to information on the site will be difficult by some groups of users. *Id.* Priority 3 checkpoints consist of requirements that a web content developer *may* address to improve accessibility by groups of users. *Id.*

The U.S. government's mandate to make all federal websites accessible to the disabled is supported by specific standards developed by an administrative agency under Section 508.[283] Thus, for websites located within the U.S., the Section 508 Guidelines are a second source of standards that courts could apply under Title III as a benchmark to determine if a website is accessible.[284] Unlike the W3C's Web Content Accessibility Guidelines, the 508 Guidelines will require legislative action to keep them current with developing technology.[285] As such, the 508 Guidelines are likely to lag behind web technology and technology used by the disabled to access the web.[286] On the other hand, the Section 508 Guidelines have the advantage of reflecting the involvement of Congress and administrative agencies (unlike the W3C guidelines), and courts may therefore be more likely to recognized the 508 Guidelines as standards for accessibility in the U.S.[287]

In sum, it is feasible for businesses to make their websites accessible for people with disabilities using the W3C's Web Content Accessibility Guidelines or the Section 508 Guidelines. Making websites accessible for the disabled makes the websites

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[282] See *supra* note 251 and accompanying text for a discussion of WCAG 1.0.
[283] *See* Section 508*,* 29 U.S.C. §794(d) (2003); 36 C.F.R. §§ 1194 *et seq*. (2003). *See also supra* notes 252-254 and accompanying text. *See also* the official website for Section 508, *available at* http://www.access-board.gov/sec508/508standards.htm.
[284] *See* Section 508*,* 29 U.S.C. §794(d) (2003); 36 C.F.R. § 1194 *et seq.* (2003). The Section 508 standards "will create a perception that a standard good enough for the government should also apply to the private sector." Ranen, s*upra* note 163, at 402. The standards that govern implementation of Section 508 are quite rigorous; however the federal government's experience has demonstrated that the cost of creating accessibility by bringing sites within the strict federal standards is likely to be very low. Robertson, *supra* note 9, at 215, 224.
[285] Section 508*,* 29 U.S.C. §794(d) (2003); 36 C.F.R. § 1194 (2003).
[286] Section 508*,* 29 U.S.C. §794(d) (2003).
[287] *See id*. In the U.S., the W3C's web content accessibility guidelines (e.g., WCAG 1.0) are currently being followed by private industry only on a voluntary basis, limiting the availability of W3C-compliant commercial websites for disabled customers. Robertson, *supra* note 9, at 202-03. The business sector has been surprisingly slow to make websites accessible to those with disabilities despite the market opportunities that would result from voluntary compliance with the WCAG guidelines. *Id*.

accessible to people in a variety of groups in addition to those with vision and other disabilities.[288]

VI. CONCLUSION

Should the courts find Title III covers commercial websites that offer their goods and services to the public? The right answer is "yes." As discussed in this paper, statutory construction, recent developments in the courts, the international perspective, and technical feasibility all support the conclusion that websites for customers are, and should be, required to comply with the ADA's rules for places of public accommodation. All customers of publicly available commercial websites, including those with disabilities, are entitled to access to the information on the sites including customers with disabilities. The goal of full and equal access by persons with disabilities to web commerce facilities is too important to be excluded from the scope of Title III. Judicial support for this view of the scope of Title III is particularly strong under the nexus theory for websites offered to customers as a means of communicating with otherwise brick and mortar businesses. However, recent Supreme Court cases construing Title III and other federal civil rights laws that concern public accommodations support a broader construction of Title III that is not limited to a nexus with a physical facility.

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[288] According to the W3C's Web Content Accessibility Guidelines:

> These guidelines explain how to make Web content accessible to people with disabilities. . . . The primary goal of these guidelines is to promote accessibility. However, following them will also make Web content more available to all users, whatever user agent they are using (e.g., desktop browser, voice browser, mobile phone, automobile-based personal computer, etc.) or constraints they may be operating under (e.g., noisy surroundings, under- or over-illuminated rooms, in a hands-free environment, etc.). Following these guidelines will also help people find information on the Web more quickly. These guidelines do not discourage content developers from using images, video, etc., but rather explain how to make multimedia content more accessible to a wide audience.

The conclusion reached in this paper that commercial websites are covered by Title III addresses only the coverage of Title III. It does not define the non-discrimination obligations by businesses to design commercial websites in an accessible way, or preclude alternative ways of providing equivalent access. Concluding that commercial websites open to the public are governed by Title III simply means that customers who are disabled have the rights under the ADA that Title III provides. The critical conclusion that this paper supports is that e-businesses that serve the public are covered by the ADA and their customers are entitled to make Title III claims. Once these claims are properly recognized as within the scope of Title III, accessibility for the disabled in virtual marketplaces is sure to be furthered as the courts and administrative agencies apply Title III to work out the details. Along with the cost of removing barriers, e-businesses will gain access to the expanding market of disabled customers who will increasingly be able to shop on the Internet. This is consistent with Title III's mandate to remove barriers that preclude people with disabilities from fully and equally participating in all aspects of society.

WCAG 1.0, *supra* note 251 at 1-2 (emphasis omitted).