

Bringing the ADA Out of the Dark Ages: Social Media Websites Should Be Required to Meet the Accessibility Requirements of the Americans with Disabilities Act

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Introduction

THE INTERNET HAS TRANSFORMED from a place where people go to play online games into an essential part of day-to-day life. Today, the internet makes up the fabric of modern society; it has completely changed the way people view the world and interact with one another. Advancements in the internet's capabilities and uses have manifested in ways that are beyond the scope of factors that legislators took into consideration thirty-one years ago when the Americans with Disabilities Act ("ADA") was enacted.¹ Of the many fruits that the internet has provided to its users, social media websites are, arguably, some of the most widely used and socially valued features of cyberspace.² Social media platforms, for many, are so much more than a place to post animal photos for friends and the rest of the world to see. Social me-

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1. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (2009) (codified at 42 U.S.C. §§ 12101–12213).

2. See, e.g., J. Clement, *Most Popular Websites Worldwide as of June 2021, by Total Visits*, STATISTA (Aug. 3, 2021), <https://www.statista.com/statistics/1201880/most-visited-websites-worldwide/> [https://perma.cc/E8MB-7QVW] (YouTube is the second most visited website, Facebook is third, and Instagram is seventh).

dia, increasingly so since the dawn of the COVID-19 pandemic,³ is used as a medium for gathering as a community to share news, to communicate with one another, and to voice opinions. The COVID-19 virus, which emerged in December 2019, is a respiratory disease that can cause an individual to experience a variety of symptoms such as body aches, difficulty breathing, and nausea.⁴ As of the date this Comment was written, more people gather online than in person due to the virus.⁵

In this Comment, social media is defined as “computer-based technology that facilitates the sharing of ideas, thoughts, and information through the building of virtual networks and communities.”⁶ This includes platforms that allow blogging, business networking, writing reviews, and much more.⁷

Although social media was created to give the world an easy-to-access centralized place to gather, disabled individuals do not always have the privilege of easy access to these websites that able-bodied individuals take for granted.⁸ This Comment highlights the need for judicial and legislative action in protecting disabled individuals’ in-

3. See *Social Media Use During COVID-19 Worldwide - Statistics & Facts*, STATISTA (May 19, 2021), <https://www.statista.com/topics/7863/social-media-use-during-coronavirus-covid-19-worldwide/> [<https://perma.cc/6G4Z-Y5CV>].

4. *What is Coronavirus?*, JOHNS HOPKINS MED. (May 19, 2021), <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus> [<https://perma.cc/65D8-H8UT>].

5. See *Denver Orders Masks in More Settings, Cuts Gatherings from 10 to 5 People*, CITY & CNTY. OF DENVER (Oct. 16, 2020), https://www.denvergov.org/content/denvergov/en/environmental-health/news/newsroom_2020/covid19-update-Oct-19.html [<https://perma.cc/B84Y-7JSQ>] (responding to the three consecutive weeks of rising COVID-19 cases by limiting the number of people who can physically gather to from ten to five); *The State of Florida Issues COVID-19 Updates*, FLA. HEALTH (June 26, 2020, 6:34 PM), <http://www.floridahealth.gov/newsroom/2020/06/062620-1825-covid19.pr.html> [<https://perma.cc/6V28-82MQ>] (recommending social gatherings have no more than fifty people present); Philip Kiefer, *Will We Ever Trust Crowds Again?*, NAT’L GEOGRAPHIC (Sept. 29, 2020), <https://www.nationalgeographic.com/science/2020/09/coronavirus-will-we-ever-trust-crowds-again-cvd/#close> [<https://perma.cc/6TG6-55N2>] (“Even as some states begin to reopen, most Americans—regardless of political affiliation—say that they’re uncomfortable going into crowded situations, indoors and out . . .”).

6. Maya Dollarhide, *Social Media*, INVESTOPEDIA (Aug. 31, 2021), <https://www.investopedia.com/terms/s/social-media.asp> [<https://perma.cc/3SV6-HKSX>].

7. *Id.*

8. Blake E. Reid, *Internet Architecture and Disability*, 95 IND. L.J. 591, 593 (2020) (“[S]hortcomings in Internet accessibility threaten to deny millions of Americans access to the economic, educational, cultural, and democratic life of the twenty-first century.”); Bradley Allan Areheart & Michael Ashley Stein, *Integrating the Internet*, 83 GEO. WASH. L. REV. 449, 452 (2015).

ternet accessibility and, specifically, to social media websites as public forums.

One year before the first available public website, legislators enacted the ADA with no knowledge of the accessibility concerns the internet was to bring with it.⁹ The ADA's dated language has resulted in a federal circuit split as to whether non-physical places, such as social media websites, can be considered places of public accommodation and, thus, require ADA compliance.¹⁰ Due to the lack of uniformity in the ADA's application to non-physical places, disabled social media users are left with varying remedies, and, in some jurisdictions, with no remedy.

The inaccessibility issues vary from website to website, with some social media websites being more accessible than others. For example, TikTok recently announced that it will be offering users an option to automatically skip all videos that can trigger seizures.¹¹ Facebook and YouTube lie at the other end of the accessibility spectrum in this re-

9. Alyson Shontell, *FLASHBACK: This Is What the First-Ever Website Looked Like*, BUS. INSIDER (June 29, 2011, 1:57 PM), <https://www.businessinsider.com/flashback-this-is-what-the-first-website-ever-looked-like-2011-6> [<https://perma.cc/Z6CU-L3GR>].

10. *Compare* Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n, 37 F.3d 12, 19 (1st Cir. 1994) (finding "establishments of 'public accommodation'" are not limited to physical structures), *and* Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28, 32 (2d Cir. 1999) (stating Title III of the ADA "was meant to guarantee [the disabled] more than mere physical access"), *and* Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999) ("The core meaning of [section 302(a) of Title III], plainly enough, is that the owner or operator of a store, hotel, restaurant, dentist's office, travel agency, theater, Web site, or other facility (whether in physical space or in electronic space) that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do.") (citation omitted) *with* Ford v. Schering-Plough Corp., 145 F.3d 601, 614 (3d Cir. 1998) (stating the term "public accommodation" under Title III of the ADA does not "refer to non-physical access"), *and* Parker v. Metro Life Ins. Co., 121 F.3d 1006, 1010–11 (6th Cir. 1997) ("A [place of] public accommodation is a physical place . . ."), *and* Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1113 (9th Cir. 2000) ("The principle of *noscitur a sociis* requires that the term, 'place of public accommodation,' be interpreted within the context of the accompanying words, and this context suggests that some connection between the good or service complained of and an actual physical place is required."), *and* Gil v. Winn-Dixie Stores, Inc., 993 F.3d 1266, 1277 (11th Cir. 2021) ("[P]ublic accommodations are limited to actual, physical places [W]ebsites are not a place of public accommodation"). *Cf.* Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 952 (N.D. Cal. 2006) (following the 9th Circuit's interpretation that a public accommodation is a physical place, stating that "a plaintiff must allege that there is a 'nexus' between the challenged service [(i.e., a website)] and the [physical] place of public accommodation").

11. Catherine Shu, *New TikTok Feature Allows Users to Avoid Videos with Epileptic Seizure Triggers*, TECHCRUNCH (Nov. 24, 2020, 4:00 AM), <https://techcrunch.com/2020/11/24/new-tiktok-feature-allows-users-to-avoid-videos-with-epileptic-seizure-triggers/> [<https://perma.cc/GSM4-ATX6>].

gard. While both platforms do offer an option to turn video auto play off, neither of the platforms warn users of whether or not the video they choose to play will have images that trigger photosensitive epilepsy; instead, the platforms leave it up to the content creators to provide a warning.¹² However, self-regulation amongst content creators as to these warnings is dangerous because not all creators know about photosensitive epilepsy triggers.¹³ Unfortunately, malicious internet users have exploited a similar flaw that Twitter once had where GIFs (a picture file where the image moves) were auto played.¹⁴ For example, user John Rayne Rivello took advantage of this flaw and sent Kurt Eichenwald a strobe light GIF, resulting in Kurt having a seizure.¹⁵

Considering the varying accessibility issues among websites, various organizations, such as the World Wide Web Consortium (“W3C”) and the Federal Communications Commission, have developed suggested internet standards, providing owners a guide to voluntarily develop accessible websites.¹⁶ However, without the legally binding clarification that the ADA applies to websites, social media website owners have no legal duty to make their websites accessible. Consequently, website owners are free to continue developing features that

12. *Id.*; See Cameron Faulkner & Barbara Krasnoff, *How to Turn Off Autoplay Videos on Facebook, Twitter, Firefox, and More*, THE VERGE (Apr. 15, 2021, 5:40 PM), <https://www.theverge.com/21422932/autoplay-videos-how-to-facebook-twitter-reddit-chrome-safari-edge-firefox> [<https://perma.cc/TWC9-KWZG>]; see also *How to Use the Auto Play Button on YouTube: All You Need to Know*, INDIA TODAY (June 12, 2021, 7:06 PM), <https://www.indiatoday.in/information/story/how-to-use-the-auto-play-button-on-youtube-all-you-need-to-know-1814078-2021-06-12> [<https://perma.cc/6Y6H-429J>].

13. *Id.*

14. Shannon Vavra, *Seizure-Triggering Attack is Stark Example of How Social Media Can Be Weaponized*, CYBERSCOOP (Dec. 17, 2019), <https://www.cyberscoop.com/epilepsy-foundation-twitter-strobe-light-videos-gifs-cybercrime/> [<https://perma.cc/5DZZ-7SM9>]; see also Alex Perekalin, *The Aftermath of the Twitter Epilepsy Attack*, KASPERSKY (Jan. 6, 2020), <https://www.kaspersky.com/blog/twitter-epilepsy-attack-aftermath/31991/> [<https://perma.cc/5QXL-8FEG>] (“[M]ore than 30 accounts posted tweets with strobing images, tagging the Epilepsy Foundation and copying its hashtags.”).

15. Vavra, *supra* note 14.

16. *W3C Accessibility Standards Overview*, W3C WEB ACCESSIBILITY INITIATIVE (Apr. 30, 2021), <https://www.w3.org/WAI/standards-guidelines/#intro> [<https://perma.cc/8U6V-M3VX>]; *W3C Mission*, W3C, <https://www.w3.org/Consortium/mission> [<https://perma.cc/3GJY-RTRD>]. (“The W3C mission is to lead the World Wide Web to its full potential by developing protocols and guidelines that ensure the long-term growth of the Web.”); *Consumer Advisory Committee*, FED. COMM’N COMM’N (Feb. 5, 2021), <https://www.fcc.gov/consumer-advisory-committee> [<https://perma.cc/C7M2-68HM>] (“The purpose of the Committee is to make recommendations to the Commission regarding consumer issues within the jurisdiction of the Commission and to facilitate the participation of all consumers in proceedings before the Commission.”).

exclude or impede disabled users from the equal opportunity to access the website.¹⁷

Part I discusses the ADA's history, including the federal circuit courts of appeals' present interpretations of the ADA's applicability to websites. Further, Part I argues that the First, Second, and Seventh Circuits' interpretation of the ADA—determining that the ADA does apply to non-physical places independent of a nexus to a physical place—should be the controlling interpretation as applied to social media websites. Part II discusses possible solutions as to how Congress, the Supreme Court, and regulatory agencies can resolve the issue of social media inaccessibility for disabled individuals and give them a legal remedy for inaccessible social media websites.

I. The ADA Should Be Interpreted to Apply to Social Media Websites

The circuit split regarding whether websites are considered places of public accommodation, requiring ADA compliance, is broken up into three interpretations: (1) websites are only considered places of public accommodation if it is associated with a brick-and-mortar location; (2) websites can never be considered places of public accommodation; and (3) websites, whether or not they have a brick-and-mortar location, are places of public accommodation.¹⁸ Limiting

17. Letter from Stephen E. Boyd, Assistant Att'y Gen., U.S. Dep't of Justice, to Ted Budd, Congressman, U.S. House of Reps. (Sep. 25, 2018) (stating that there are no specific regulations or other rules that require websites to be ADA compliant). See *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations*, 75 Fed. Reg. 142, 43460 (withdrawn July 26, 2010) (to be codified at 28 C.F.R. pts. 34, 35).

18. *Compare* *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n*, 37 F.3d 12, 19 (1st Cir. 1994) (finding "establishments of 'public accommodation'" are not limited to physical structures), and *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 32 (2d Cir. 1999) (stating Title III of the ADA "was meant to guarantee [the disabled] more than mere physical access"), and *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999) ("The core meaning of [section 302(a) of Title III], plainly enough, is that the owner or operator of a store, hotel, restaurant, dentist's office, travel agency, theater, Web site, or other facility (whether in physical space or in electronic space) that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do.") (citation omitted) with *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 614 (3d Cir. 1998) (stating the term "public accommodation" under Title III of the ADA does not "refer to non-physical access"), and *Parker v. Metro Life Ins. Co.*, 121 F.3d 1006, 1010–11 (6th Cir. 1997) ("A [place of] public accommodation is a physical place . . ."), and *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1113 (9th Cir. 2000) ("The principle of *noscitur a sociis* requires that the term, 'place of public accommodation,' be interpreted within the context of the accompanying words, and this context suggests that some connection between the good or service complained of and an

the ADA's scope to only physical places, or only websites that are associated with physical places, is contrary to Congress's intent to afford disabled individuals the ability to take advantage of the same opportunities that able-bodied individuals do.¹⁹ This section argues that the ADA applies to social media websites based on Congress's intent in enacting the ADA and the fact that these platforms meet all of the requirements to be considered places of public accommodation.

A. History of the ADA

In 1990, the ADA was enacted with the intent to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”²⁰ The statute allowed those with disabilities to enjoy the same opportunities as others in the areas of public accommodations, employment, recreation, and education.²¹ Specifically, with regard to public accommodations, the ADA prohibits owners, lessees, or operators of a place of public accommodation to discriminate against individuals based on their disability “in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodation” of the entity.²² Congress has clearly stated that the ADA affords “a broad scope of protection” in protecting disabled individuals from barriers that prevent them from “participat[ing] in or benefit[ing] from the goods, services, facilities,

actual physical place is required.”), and *Gil v. Winn-Dixie Stores, Inc.*, 993 F.3d 1266, 1277 (11th Cir. 2021) (“[P]ublic accommodations are limited to actual, physical places [W]ebsites are not a place of public accommodation”). Cf. *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 952 (N.D. Cal. 2006) (following the 9th Circuit interpretation that a public accommodation is a physical place and stating that “a plaintiff must allege that there is a ‘nexus’ between the challenged service [(i.e., a website)] and the [physical] place of public accommodation”).

19. See 42 U.S.C. §§ 12101(a)(3), (b)(1).

20. 42 U.S.C. §§ 12101(a)(3), (b)(1). See Nathaniel Vargas Gallegos & Jesse Sealey, *The Coming Ubiquity of ADA Compliance to the Internet and Its Extension to Online Education*, 20 J. TECH. L. & POLICY 1, 4 (2015); Courtney L. Burks, *Improving Access to Commercial Websites Under the Americans with Disabilities Act and the Twenty-First Century Communications and Video Accessibility Act*, 99 IOWA L. REV. 363, 370 (2013); *Introduction to the ADA*, INFO. & TECH. ASSISTANCE ON THE AM. WITH DISABILITIES ACT, https://www.ada.gov/ada_intro.htm [<https://perma.cc/TW22-TWYL>].

21. 42 U.S.C. § 12101(a)(3) (1990); *Introduction to the ADA*, *supra* note 20.

22. 42 U.S.C. § 12182(a); 28 C.F.R. §§ 36.102(a)(1)–(3) (2020). See *Ford*, 145 F.3d at 612; *Weyer*, 198 F.3d at 1113; *Pallozzi*, 198 F.3d at 31; *Rendon*, 294 F.3d at 1282; *Vargas & Sealey*, *supra* note 20, at 4; Sean Pope, *America Off-Line: A look at the Applicability of the Americans with Disabilities Act on Streaming Digital Media and the Internet*, 34 LOY. L.A. ENT. L. REV. 193, 195–96 (2014).

privileges, advantages, or accommodations of an entity.”²³ For the purposes of the ADA, a public accommodation is a “privately operated entit[y]” whose operations affect commerce.²⁴ Commerce is defined broadly in the ADA as “travel, trade, traffic, commerce, transportation, or communication” between points in the same state but through another state or foreign country; between points in a foreign country and a state; or among points in more than one state.²⁵ Public accommodations examples include, but are not limited to, retail stores, places of entertainment, schools, and places of public gathering.²⁶

A public accommodation complies with the ADA if it is “designed, constructed, and altered” to meet the ADA’s standards.²⁷ Public accommodations are not ADA-complaint if the entity fails to either take steps to modify or “make reasonable modifications” to its “policies, practices, or procedures,” and those modifications are necessary for disabled individuals to enjoy the fruits of the commercial entity.²⁸ An exception to the public accommodation rule is when making the modification, or the steps to make the modification, would “fundamentally alter the nature of [the] goods, services, facilities, privileges, advantages, or accommodations” or whether the steps would be an “undue burden” on the entity.²⁹

B. How the Courts Interpret the ADA’s Applicability to Non-Physical Locations

Federal circuit courts have opined on the ADA’s applicability to non-physical locations since the statute’s inception.³⁰ There is a split amongst the circuits as to whether a location satisfies the requirements to be considered a “public accommodation” and, therefore, must comply with ADA standards.³¹

23. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553; 42 U.S.C. §§ 12182(b)(1)(A)(i)–(ii) (2020).

24. 42 U.S.C. § 12181(7).

25. 42 U.S.C. § 12181(1).

26. *Id.* §§ (7)(C)–(E), (J).

27. 28 C.F.R. § 36.101(a).

28. 42 U.S.C. §§ 12182(b)(2)(A)(ii)–(iii).

29. *Id.*

30. *Carparts Distribut. Ctr., Inc. v. Auto. Wholesaler’s Ass’n*, 37 F.3d 12 (1st Cir. 1994).

31. *Compare id.*, and *Palozzi v. Allstate Life Ins. Co.*, 192 F.3d 28, 32 (2d Cir. 1999) (holding places of public accommodation do not have to be physical structures), and *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999) (holding places of public accommodation can be physical or non-physical), with *Ford v. Schering-Plough Corp.*, 145

The First, Second, and Seventh Circuits have found that the ADA may apply to a website, regardless of whether the website is connected to a physical place.³² As explained in *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Association of New England, Inc.*, these circuits believe that a public accommodation under Title III is “not so limited” to physical structures.³³ In *Carparts*, decided by the First Circuit, the court looked at the ADA’s non-exhaustive list of what is considered a public accommodation to infer that non-physical locations are included in “service establishments.”³⁴ Although the court conceded that a reader of Title III may get the impression that the statute primarily applies to places requiring physical access, the bare and “ambiguous” language makes no mention for physical boundaries or physical entry requirements to be considered a public accommodation.³⁵ Taking into account Congress’s intent, the plain meaning of the statutory language, corresponding regulations, and public policy, the First Circuit held that Title III applies to both physical and electronic places on the basis that:

[to]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 indiscriminately to other members of the general public.³⁶

On the other hand, the Third and Ninth Circuits follow the physical nexus test, which considers a non-physical place, like a website, to be a place of public accommodation only if it has a “nexus” to a physi-

F.3d 601, 614 (3rd Cir. 1998) (holding places of public accommodation must be a physical brick-and-mortar place), and *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010–11 (6th Cir. 1997) (holding places of public accommodation are physical places), and *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1113 (9th Cir. 2000) (holding that there must be “some connection between the good or service complained of and an actual physical place” for an intangible item to be considered a public accommodation).

32. See J. Gregory Grisham, *Website Inaccessibility: The New Wave of ADA Title III Litigation*, 20 FEDERALIST SOC’Y REV. 66, 68–69 (2019).

33. *Carparts*, 37 F.3d at 19.

34. *Id.* (stating that Congress, in including “travel service” as a public accommodation, “clearly contemplated that ‘service establishments’ include providers of services which do not require a person to physically enter a physical structure” since many travel services, and other service establishments, conduct their business solely via phone or mail); 42 U.S.C. § 12181(7) (listing “place of public exhibition or entertainment,” “place of public gathering,” and “place of recreation”).

35. *Carparts*, 37 F.3d at 19.

36. *Id.* at 20.

cal brick-and-mortar location.³⁷ The Ninth Circuit recently applied this test in *Robles v. Domino's Pizza*, where Mr. Robles, a blind man, was unable to order a pizza from Domino's because his screen reader software was incompatible with the Dominos' website and phone app.³⁸ To determine whether the ADA applied to these platforms, the *Robles* court examined the Department of Justice's ("DOJ") regulations pertaining to Title III, which state that a public accommodation is required to "furnish appropriate auxiliary aids and services where necessary to ensure *effective communication* with individuals with disabilities."³⁹ The court explained that "[t]he statute applies to the services of a place of public accommodation, not services *in* a place of public accommodation. To limit the ADA to discrimination in the provision of services occurring on the premises of a public accommodation would contradict the plain language of the statute."⁴⁰ Further, the court determined that while the ADA only applies to "actual, physical places where goods or services are open to the public, and places where the public gets those goods or services," there had to be "some connection between the good or service complained of and an actual physical place."⁴¹

Lastly, the Sixth and Eleventh Circuits define a place of public accommodation as a physical, brick-and-mortar place.⁴² The most recent case on this issue, *Gil v. Winn-Dixie Stores, Inc.*, involved Mr. Gil, a blind man, who was attempting to order prescription refills online through the Winn-Dixie Stores' website.⁴³ Unfortunately for Mr. Gil, his screen reader software was incompatible with Winn-Dixie's website code, rendering the website inaccessible to him.⁴⁴ After hearing arguments from both sides, the Eleventh Circuit ultimately held that websites were not places of public accommodation.⁴⁵ The court reasoned that the ADA's statutory language was "unambiguous and clear" that

37. *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612–13 (3d Cir. 1998); *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 905–06 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 122 (2019).

38. *Robles*, 913 F.3d at 902, 906.

39. *Id.* at 904 (citing 28 C.F.R. § 36.303(c)(1) (2020)).

40. *Robles*, 913 F.3d at 905 (quoting *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 953 (N.D. Cal. 2006)) (emphasis in original).

41. *Robles*, 913 F.3d at 905 (quoting *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000)).

42. *See Gil v. Winn-Dixie Stores, Inc.*, 993 F.3d 1266, 1277 (11th Cir. 2021); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1011–12, 1014 (6th Cir. 1997).

43. *Gil*, 993 F.3d at 1270–71.

44. *See id.*

45. *Id.* at 1276–77.

websites are not public accommodations because intangible places or spaces were not listed as examples in the statute.⁴⁶

To recap, the circuits view intangible places as it relates to a place of public accommodation in three different ways. Some circuits hold that intangible places can be a place of public accommodation.⁴⁷ Others hold that intangible places can qualify so long as there is a physical place that the intangible place is connected to,⁴⁸ or they hold that an intangible place can never be a place of public accommodation.⁴⁹

C. The Public Accommodation Test Applicability to Social Media Websites

As a result of the COVID-19 pandemic society has transitioned to accessing foods and services through the internet, rather than through physical places.⁵⁰ One of Congress's goals in enacting the ADA was to make clear that members of the disabled community have a *right* to "fully participate in *all* aspects of society."⁵¹ In recognizing this right, Congress's intent was to enact a "broad scope of protection" that would allow disabled people to have the same or similar opportunity to benefit from the goods and services of public accommodations and commercial facilities as those who are able-bodied.⁵² In interpreting the ADA broadly, as instructed by the plain language of the ADA Amendments Act, social media websites qualify as places of public accommodation and should be required to comply with the ADA's guidelines.⁵³ Thus, the line of precedent that aligns most with Con-

46. *Id.*

47. *Carparts Distrib. Ctr. v. Auto. Wholesaler's Ass'n*, 37 F.3d 12, 19 (1st Cir. 1994); *Palozzi v. Allstate Life Ins.*, 198 F.3d 28, 32–33 (2d Cir. 1999); *Doe v. Mutual of Omaha Ins.*, 179 F.3d 557, 559 (7th Cir. 1999).

48. *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612–13 (3d Cir. 1998); *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 905–06 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 122 (2019).

49. *Gil*, 993 F.3d at 1277; *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1011–12, 1014 (6th Cir. 1997).

50. *See COVID-19 Has Changed Online Shopping Forever, Survey Shows*, UNITED NATIONS CONF. ON TRADE & DEV. (Oct. 8, 2020), <https://unctad.org/news/covid-19-has-changed-online-shopping-forever-survey-shows> [<https://perma.cc/XLN3-LV4R>]; Matthew Keegan, *Why Coronavirus May Make the World More Accessible*, BBC (May 13, 2020), <https://www.bbc.com/future/article/20200513-why-the-coronavirus-can-make-the-world-more-accessible> [<https://perma.cc/6ZGE-JXVP>].

51. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3553 (emphasis added).

52. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3554; 28 C.F.R. §§ 36.101(a)–(b) (2016).

53. ADA Amendments Act of 2008 § 2.

gress's legislative intent is that of the First, Second, and Seventh Circuits, which do not require a website to have a nexus to a physical place for it to qualify as a place of public accommodation.⁵⁴

To be considered a place of public accommodation, there must be (1) a private entity (2) that operates a facility (3) whose operations affect commerce and (4) falls into one of the enumerated categories set forth in the corresponding regulations.⁵⁵ As will be discussed below, social media websites meet all four elements of this test and, therefore, courts should include these websites in the ADA's protection.

First, social media websites are owned and operated by private entities.⁵⁶ A private entity is any person or entity besides a public entity, which is any person or entity affiliated with state or local government.⁵⁷ Therefore, since private companies own and operate social media websites, the first element is satisfied.

Second, social media websites are facilities. A facility is "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."⁵⁸ It is noteworthy that Congress's definition specifies that a facility can be "real or personal property," which, by its plain meaning, means that a facility does not need to be a building or located on land to satisfy this element, since personal property can be intangible.⁵⁹ Although many of the examples in the definition of what is considered a facility are physical places, by broadly interpreting the statute, as Congress instructed, a social media website could fit in several of these categories such as

54. *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England*, 37 F.3d 12, 19 (1st Cir. 1994); *Pallozzi v. Allstate Life Ins.*, 198 F.3d 28, 32–33 (2d Cir. 1999); *Doe v. Mutual of Omaha Ins.*, 179 F.3d 557, 558–59 (7th Cir. 1999).

55. 28 C.F.R. § 36.104 (2021).

56. See *Facebook, Inc. Restated Certificate of Incorporation*, SEC (July 29, 2004), <https://www.sec.gov/Archives/edgar/data/1326801/000119312512175673/d287954dex33.htm> [<https://perma.cc/5FJ6-QUXY>]; *Twitter, Inc. Amended and Restated Certificate of Incorporation*, SEC (Apr. 19, 2007), <https://www.sec.gov/Archives/edgar/data/1418091/000119312513406804/d564001dex32.htm> [<https://perma.cc/3KFJ-BAX2>]; *Sixteenth Amended and Restated Certificate of Incorporation of Pinterest, Inc.*, SEC (Dec. 22, 2017), <https://www.sec.gov/Archives/edgar/data/1506293/000119312519092894/d674330dex31.htm> [<https://perma.cc/ET3F-UENF>].

57. 28 C.F.R. § 36.104 (2016).

58. 28 C.F.R. § 36.104 (2020).

59. *Id.*; *Property*, BLACK'S LAW DICTIONARY (11th ed. 2019) (personal property is "[a]ny movable or intangible thing that is subject to ownership and not classified as real property").

“site,” “personal property,” and “structure.”⁶⁰ Although intangible, a social media website, just like any other website, is considered personal property.⁶¹ Thus, a social media website could be considered a facility.

Third, social media websites’ operations affect commerce.⁶² Title III of the ADA defines commerce broadly as travel, trade, traffic, commerce, transportation, or *communication* that is either “(a) among the several states, (b) between any foreign country or any territory or possession and any State; or (c) between points in the same State but through another state or foreign country.”⁶³ A communication is “[t]he interchange of messages or ideas by speech, writing, gestures, or conduct.”⁶⁴ A communication is “among the several states” if the message or idea moves from one state to another.⁶⁵ The DOJ instructs that the phrase “operations that affect commerce” has an “extremely broad application.”⁶⁶ Social media websites’ electronic medium gives users the ability to post a *communication*, a photo for example, in Florida and have other users in Florida, Indiana, India, or any other part

60. 28 C.F.R. § 36.104 (2020). *See id.*; *Site*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“A place or location. . . .”); *Structure*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/structure> [<https://perma.cc/EA6H-TZGU>] (One of several definitions states, “something arranged in a definite pattern of organization,” with an example being, “a rigid totalitarian structure”). *See also* Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New England, 37 F.3d 12, 20 (1st Cir. 1994) (“To . . . limit the application of Title III to physical structures . . . would severely frustrate Congress’s intent that individuals with disabilities fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public.”).

61. 28 C.F.R. § 36.104 (2020). *See Property*, *supra* note 59.

62. *See* Rob Price, *Facebook Is Adding Shops to Let Businesses Sell Products Through the Social Network*, BUS. INSIDER (May 19, 2020, 10:12 AM), <https://www.businessinsider.com/facebook-launches-shops-ecommerce-feature-businesses-2020-5> [<https://perma.cc/9NVV-2QLW>]; Daniel Keyes, *Facebook Is Expanding Access to Social Commerce Features*, BUS. INSIDER (Aug. 27, 2020, 7:41 AM), <https://www.businessinsider.com/facebook-dives-into-social-commerce-with-new-features-2020-8> [<https://perma.cc/SUN7-854K>]; Hannah Murphy, *TikTok Takes on Facebook with US Ecommerce Push*, FIN. TIMES (Feb. 7, 2021), <https://www.ft.com/content/629c1c17-3daa-46af-8177-1814baaa2bed> [<https://perma.cc/JBF6-3DFS>]. *See also Affecting Commerce*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“[T]ouching or concerning business, industry, or trade. . . .”).

63. 42 U.S.C. § 12181 (emphasis added).

64. *Communication*, BLACK’S LAW DICTIONARY (11th ed. 2019)

65. *See* Clement v. Satterfield, 927 F. Supp. 2d 297, 312 (W.D. Va. 2013) (“Courts have consistently interpreted Title III’s definition of commerce as applying the full scope of government’s power under the Commerce Clause of the United States Constitution.”). *See also* Heart of Atlanta Motel v. United States, 379 U.S. 241, 255 (1964); U.S. CONST. art. I, § 8, cl. 3.

66. Guidance on ADA Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 28 C.F.R. App. C to pt. 36, App. C 1991

of the world instantaneously communicate and interact with the user who posted the photo. Social media platforms allow much more than intrastate, interstate, and international photo sharing—users can share posts, share videos, or even use the platform as a messaging service to message anyone in the world without worrying about being subject to international messaging fees that phone companies impose.⁶⁷ Thus, social media websites' operations affect commerce though communication by hosting a place for users to interact, connect, and communicate with one another in the same state, different states, or even different countries.⁶⁸

In addition to its operations affecting commerce through communication, some social media websites' operations affect traditional commerce since users can purchase and sell items through the websites.⁶⁹ Established social media companies have implemented new features to their platforms to stay relevant, and long-standing platforms have mutated into more than just a place to post status updates and communicate with one another.⁷⁰ For example, Facebook and Instagram have unveiled and implemented a feature called "Shops," which allows users on each platform to browse, sell, and purchase items.⁷¹ Thus, some social media websites satisfy the public accommodation test's third element by affecting commerce through offering an e-commerce platform because the social media companies allow users to engage in intrastate, interstate, and international commerce.⁷²

Lastly, social media websites fall into two of the enumerated categories that are defined as public accommodations: a place of public

67. *Leading Countries Based on Facebook Audience Size as of October 2020*, STATISTA (July 2021), <https://www.statista.com/statistics/268136/top-15-countries-based-on-number-of-facebook-users/> [<https://perma.cc/SP8G-95NT>]; Katie Sehl, *Facebook Messenger: The Complete Guide for Businesses*, HOOTSUITE (June 25, 2021), <https://blog.hootsuite.com/facebook-messenger/> [<https://perma.cc/DTG3-V5QX>].

68. *Leading Countries Based on Facebook Audience Size as of October 2020*, *supra* note 67.

69. *Commerce*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The exchange of goods and services, esp. on a large scale involving transportation between cities, states, and countries.").

70. Price, *supra* note 62.

71. See Keyes, *supra* note 62.

72. See Hannah Murphy, *supra* note 62 (TikTok announced "an aggressive expansion into e-commerce" that will feature livestreamed shopping, similar to television shopping channels); Price, *supra* note 62; *But see* Jason Del Ray, *Twitter's 'Buy' Button Is Officially Dead*, VOX (Jan. 18, 2017, 1:02 PM), <https://www.vox.com/2017/1/18/14311230/twitter-buy-button-dead-killed-shuts-down> [<https://perma.cc/EZ3C-Q89Y>].

gathering and a place of entertainment.⁷³ The ADA includes “a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment” as public accommodations, as well as “an auditorium, convention center, lecture hall, or other place of public gathering.”⁷⁴ An entity does not have to be similar to the listed examples of what a public accommodation is, but it merely has to fall within the overall category of each enumerated example to qualify.⁷⁵ Social media websites create a place where the public can virtually gather to share ideas, to communicate with one another, and to entertain one another. Although the other examples of a “place of public gathering” and “place of exhibition or entertainment” are physical places, a broad interpretation of the language does not require a brick-and-mortar, physically accessed place.⁷⁶ A broad interpretation, as instructed by Congress, would encompass any private entity if the entity’s operations affect commerce and are either a place of entertainment or a place of public gathering.⁷⁷ Therefore, a social media website, as a place of public gathering and place of exhibition or entertainment, satisfies the public accommodation test’s fourth and final element.

Since social media websites are owned by private companies, are facilities that affect commerce, and fall into two of the enumerated categories that are defined as places of public accommodation, all four elements have been met, which means social media websites should be required to comply with the ADA.

II. Potential Legislative and Judicial Solutions

In 2010, in an effort to address the ADA’s unresolved ambiguity as to whether it applies to websites, the DOJ considered amending the

73. 42 U.S.C. §§ 12181(7)(C)–(D) (“a motion picture house, theater, concert hall, stadium, or other place of exhibition” or “an auditorium, convention center, lecture hall, or other place of public gathering”).

74. *Id.*

75. H. REP. NO. 101–485, pt. 3, at 54 (1990) (“A person alleging discrimination does not have to prove that the entity being charged with discrimination is similar to the examples listed in the definition. Rather, the person must show that the entity falls within the overall category.”).

76. 42 U.S.C. §§ 12181(7)(A)–(L) (2020); 28 C.F.R. § 36.101(b) (2020).

77. 42 U.S.C. §§ 12181(6)–(7) (2020); 28 C.F.R. § 36.101(b) (the purpose of the ADA Amendments Act is to reinstate a “broad scope of protection under the ADA”); H. REP. NO. 101–485, pt. 3, at 54 (1990) (“A person alleging discrimination does not have to prove that the entity being charged with discrimination is similar to the examples listed in the definition. Rather, the person must show that the entity falls within the overall category.”).

ADA regulations “in order to establish requirements for making the goods, services, facilities, privileges, accommodations, or advantages offered by public accommodations via the Internet, specifically at sites on the World Wide Web, (Web) accessible to individuals with disabilities.”⁷⁸ However, in 2017, the DOJ withdrew its notice to amend the ADA in this way.⁷⁹ The DOJ justified the retraction by stating it “is evaluating whether promulgating regulations about the accessibility of Web information and services is necessary and appropriate.”⁸⁰ The most recent statement from the DOJ addressing the issue of website accessibility for public accommodations was made in a 2018 letter stating, “[t]he Department first articulated its interpretation that the ADA applies to public accommodations’ websites over 20 years ago. This interpretation is consistent with the ADA’s [T]itle III requirement that the goods, services, privileges, or activities provided by places of public accommodation be equally accessible to people with disabilities.”⁸¹

Although social media websites’ existing features have become more accessible, unfortunately, the disabled community is often an afterthought when it comes to platforms maintaining accessible existing features and creating new ones. For example, Facebook Messenger had a bug that made its voice over function, which reads what a disabled user has typed in their message, essentially unusable.⁸² The issue took about two weeks to repair.⁸³ Twitter has also had its fair share of accessibility issues; Twitter developed a feature that allowed users to create “voice tweets” as an alternative to text tweets with no closed captioning option for the deaf and hard-of-hearing to interact with these tweets.⁸⁴ Additionally, voice tweets flash the posting user’s profile picture rapidly, which could result in seizures among photo-

78. Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 142, 43460 (withdrawn July 26, 2010) (to be codified at 28 C.F.R. pts. 34, 35).

79. Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions, 82 Fed. Reg. 246, 60932 (2017) (to be codified at 28 C.F.R. pts. 35, 36).

80. *Id.*

81. See Letter from Stephen E. Boyd to Ted Budd, *supra* note 17.

82. April Glaser, *When Things Go Wrong for Blind Users on Facebook, They Go Really Wrong*, SLATE (Nov. 20, 2019, 2:46 PM), <https://slate.com/technology/2019/11/facebook-blind-users-no-accessibility.html> [<https://perma.cc/8SMR-G5ZT>] (the voiceover would be interrupted by new notifications which would force the voiceover to restart).

83. *Id.*

84. Sara Katz, *Twitter Just Rolled Out a Feature That’s Inaccessible to Disabled Users*, SLATE (June 19, 2020, 11:05 AM), <https://slate.com/technology/2020/06/twitter-voice-tweets-accessibility.html> [<https://perma.cc/9C3K-VB6C>].

sensitive epileptic users.⁸⁵ The accessibility issue is not isolated to Facebook and Twitter; it is a widespread issue that has pervaded social media websites throughout all years of social media's existence.⁸⁶

Since there is uncertainty as to whether the ADA applies to websites, social media companies are currently under no obligation to make their platforms features accessible to those with disabilities.⁸⁷ The lack of explicit applicability has left social media companies to unilaterally determine what is accessible enough. Each platform creates different standards and each leaves hundreds of thousands of people without the same or similar access to the platforms as able-bodied users. Congress should either amend the ADA or promulgate regulations explicitly stating that the ADA applies to websites to promulgate the ADA's intent and to promote disabled social media users' interests.

Private organizations, like the Web Accessibility Initiative, have developed their own standards to combat the lack of uniformity in accessibility among websites.⁸⁸ The Web Accessibility Initiative's goal is to provide "a single shared standard for web content accessibility that meets the needs of individuals, organizations, and governments internationally."⁸⁹ For example, the Web Content Accessibility Guidelines 2.1 ("WCAG") provides three different sets of guidelines, each with varying levels of accessibility, to increase web content accessibility.⁹⁰ These levels, in order from the least accessible to the most accessible, are A, AA, and AAA.⁹¹

85. *Id.*

86. See Tess Arthur, *Designing for Everyone: A Reflection on the Usability and Accessibility of Instagram*, MEDIUM (Apr. 3, 2018), <https://medium.com/@obtessed/designing-for-every-one-a-reflection-on-the-usability-and-accessibility-of-instagram-48ae82ee9c58#:~:text=how%20Instagram%20does%20present%20accessibility,visually%20and%20hearing%20impaired%20users.&text=IN%20addition%20to%20adding%20this,hearing%20impaired%20and%20blind%20users> [https://perma.cc/89B6-3NTH] (discussing Instagram's lack of ability for users to add closed captioning and audio descriptions to videos); Debra Ruh, *Accessibility in Social Media*, LEVEL ACCESS (2012), <https://www.levelaccess.com/accessible-social-media/> [https://perma.cc/GC8X-3SKX] (describing common accessibility issues among Twitter, Facebook, LinkedIn, and YouTube).

87. See Letter from Stephen E. Boyd to Ted Budd, *supra* note 17.

88. *W3C Accessibility Standards Overview*, *supra* note 16.

89. *Id.*

90. *Id.* ("Web 'content' generally refers to the information in a web page or web application, including: natural information such as text, images, and sounds[;] code or markup that defines structure, presentation, etc.").

91. *Id.*

To meet the minimum level of accessibility, Level A, there are thirty criteria that the website must meet.⁹² Included among these criteria are requirements to provide captions for all prerecorded audio content in synchronized media (such as in videos), offer keyboard shortcuts to navigate the website, and ensure nothing “flashes more than three times in any one second period.”⁹³

To meet the second highest level, Level AA, the website must meet all thirty Level A criteria plus an additional twenty more.⁹⁴ Level AA requires more minutiae adjustments to the website. For example, there is a specific ratio of color contrast for text and images and, additionally, text must be able to be resized up to two hundred percent.⁹⁵

To meet the maximum level of accessibility, Level AAA, the website must meet the requirements of Levels A and AA plus twenty-eight more requirements, totaling seventy-eight rules.⁹⁶ The additional rules are the most technical and require the most preparation in an attempt for maximum accessibility levels.⁹⁷ For example, sign language interpretations must be provided for all prerecorded audio content in synchronized media.⁹⁸

Since 1998, websites created or used by U.S. federal agencies have been required to make their websites accessible to people with disabilities.⁹⁹ More recently, in 2017, the Architectural and Transportation Barriers Compliance Board enacted a rule that requires the same federal websites to meet the criteria for Level AA accessibility of the WCAG standards, the mid-level standard.¹⁰⁰ If Level AA requirements satisfies the federal government’s standard for its website accessibility, then this or a similar standard should be the universal public accommodation website standard. The goal of the ADA is to facilitate opportunities for members of the disabled community to exercise their right

92. *How to Meet WCAG (Quick Reference)*, WEB ACCESSIBILITY INITIATIVE (Oct. 4, 2019), https://www.w3.org/WAI/WCAG21/quickref/?currentsidebar=%23col_customize&levels=AA%2Caaa&techniques=advisory%2Cfailures [https://perma.cc/CEC9-WT76].

93. *Id.*

94. *Id.*

95. *Id.*; *WCAG Levels: What’s the Difference?*, MY ACCESSIBLE WEBSITE, <https://myaccessible.website/blog/wcaglevels/wcag-levels-a-aa-aaa-difference> [https://perma.cc/QNX9-GCA6].

96. *How to Meet WCAG (Quick Reference)*, *supra* note 92.

97. *See id.*

98. *Id.* (Rule 1.2.6 Sign Language (Prerecorded)).

99. 29 U.S.C. § 794d (a)(1).

100. Architectural and Transp. Barriers Compliance Bd., 36 C.F.R. §§ 1193–94 (2017).

to “fully participate in all aspects of society.”¹⁰¹ To achieve said goal, the Legislative Branch of the federal government should do one of two things, both of which require WCAG compliance similar to that required of federal website: (1) Congress should amend the ADA to explicitly state that a website can be considered a public accommodation; or (2) the DOJ should amend its existing regulations pertaining to the ADA to explicitly provide that a website can be a place of public accommodation.

Until the Legislative Branch enacts statutes or regulations that explicitly state that websites can be considered a place of public accommodation, jurisdictions will continue to inconsistently apply the ADA to websites unless the Supreme Court of the United States accepts a case that presents this issue. The opportunity was presented to the Court in 2019 when Domino’s, in the Ninth Circuit Court of Appeals case *Robles v. Domino’s Pizza*, petitioned for certiorari; however, the Court, without comment, declined the invitation to resolve this issue.¹⁰²

Conclusion

Today, thirty-one years after the enactment of the ADA, society’s dependency on the internet for all aspects of life has made internet accessibility more important than ever. Since 2008, the percentage of people in the United States who currently use social media has gone up from ten percent to eighty-two percent of the population.¹⁰³ With social media becoming a staple of modern society, the need for ADA compliance grows with each new feature that social media platforms introduce. Without explicit and concrete statutory language, regulatory language, or Supreme Court precedent that states a website can be considered a public accommodation, social media companies, depending on their jurisdiction, are free to develop new features that preclude functionality for members of the disabled community. Although social media companies are increasingly becoming more sensitive to the issue of accessibility, disabled users are left without a legal remedy against platforms whose features are not as mindful of every-

101. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(2), 122 Stat. 3553, 3553; 42 U.S.C. § 12101(2)(a)(2) (2020).

102. *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898, 905–06 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 122 (2019).

103. *Percentage of U.S. Population Who Currently Use Any Social Media From 2008 to 2021*, STATISTA (Apr. 14, 2021), <https://www.statista.com/statistics/273476/percentage-of-us-population-with-a-social-network-profile/> [https://perma.cc/D6AM-Z6YF].

thing they could do to make the feature more accessible. To truly give disabled individuals their best chance to “fully participate in *all* aspects of society,” courts should interpret the ADA to include websites, or the Legislative Branch should enact legislation that explicitly includes social media websites.¹⁰⁴ Social media websites should not only be for the select few—they should be accessible to all.

104. American Disability Act Amendments Act of 2008, Pub. L. 110-325, § 2, 122 Stat. 3553, 3553 (2008) (codified as amended at 42 U.S.C. ch. 126 § 12101 et seq.) (emphasis added).

