

**ACCESS NOW, INC. V. SOUTHWEST
AIRLINES, CO.—USING THE “NEXUS”
APPROACH TO DETERMINE WHETHER A
WEBSITE SHOULD BE GOVERNED BY THE
AMERICANS WITH DISABILITIES ACT**

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INTRODUCTION

During the last fifteen years, the United States and the world as a whole have experienced dramatic advances in technology and exponential increases in Internet usage.¹ “There are now approximately one billion web pages on the Internet”² and over 203 million Internet users in the United States alone.³ These users access the Web, on average, more than once a day⁴ for a multitude of purposes, including shopping, transacting business, and accessing news and information.⁵ However, as the

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¹ *Reno v. ACLU*, 521 U.S. 844, 850 (1997) (“The Internet has experienced ‘extraordinary growth.’ The number of ‘host’ computers . . . increased from about 300 in 1981 to approximately 9,400,000 by . . . 1996. Roughly 60% of these hosts are located in the United States.”); *Access Now, Inc. v. Sw. Airlines, Co.*, 227 F. Supp. 2d 1312, 1314 (S.D. Fla. 2002), *appeal dismissed*, 385 F.3d 1324 (11th Cir. 2004). In one year alone, from 2002 to 2003, global wireless Internet usage increased by 145%, representing seventy-nine million users in 2003. *Converging Markets, Competing Technologies Mark Wireless Internet*, DCD BUS. REP., May 24, 2004.

² 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, 390 (2002) (citing Patrick Maroney, *The Wrong Tool for the Right Job*, 2 VAND. J. ENT. L. & PRAC. 191, 195 (2000)).

³ Nielsen//NetRatings, Net View Usage Metrics, http://www.nielsenratings.com/news.jsp?section=dat_to&country=us (last visited Nov. 5, 2005).

⁴ *Id.*

⁵ John Grady & Jane Boyd Ohlin, *The Application of Title III of the ADA to Sport Web Sites*, 14 J. LEGAL ASPECTS SPORT 145, 145 (2004); 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, 35 (2001). Internet shopping has become big business—total online spending in 2004 grew by 26% for the year to a record level of more than \$117 billion. *Online Holiday*

Internet has become increasingly sophisticated and relied upon, much of its content has become inaccessible to individuals with disabilities, particularly those with auditory, visual, or muscular impairments.⁶ This information accessibility problem has become known as the “digital divide,”⁷ and has generally been caused by the recent and rapid transition of the Internet from a text-based format to an increasingly multimedia-based format.⁸ This transition in format has led to increased inaccessibility because multimedia websites are generally incompatible with the assistive technologies employed by visually impaired Internet users.⁹ The most common incompatibility problem arises with text-to-speech software which cannot readily translate a pure graphical image into words;¹⁰ thus, while it is often said that a picture is worth a thousand words, it is not even worth *one* to the visually impaired Internet user. One study has estimated that,

Spending Surges Beyond Expectations, Driving E-Commerce to Record Annual Sales of \$117 Billion, PR NEWSWIRE U.S., Jan. 10, 2005.

⁶ See Richard E. Moberly, *The Americans with Disabilities Act in Cyberspace: Applying the “Nexus” Approach to Private Internet Websites*, 55 MERCER L. REV. 963, 963 (2004); Charles D. Mockbee IV, Comment, *Caught in the Web of the Internet: The Application of the Americans with Disabilities Act to Online Businesses*, 28 S. ILL. U. L.J. 553, 554 (2004) (citing 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, 35 (2001)).

⁷ See Moberly, *supra* note 6, at 963 (citing Andrew G. Celli, Jr. & Kenneth M. Dreifach, *Postcards from the Edge: Surveying the Digital Divide*, 20 CARDOZO ARTS & ENT. L.J. 53, 53–54 (2002)); Justin D. Petruzzelli, Note, *Adjust Your Font Size: Websites are Public Accommodations Under the Americans with Disabilities Act*, 53 RUTGERS L. REV. 1063, 1065 (2001).

⁸ Petruzzelli, *supra* note 7, at 1065 (citing *Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. 13 (2000) (statement of Dr. Steven Lucas, Vice President, Privaseek, Inc.)).

⁹ See Schloss, *supra* note 5, at 36. Some of the assistive technologies used by the visually impaired include voice-dictation software, which converts the user’s speech into written text; voice-navigation software, which allows users to open and close software applications upon verbal command; text-to-speech software, which converts on-screen text (including Internet text) into computer speech; magnification software, which increases the size of on-screen computer text; and braille-conversion software, which utilizes a keyboard-like piece of hardware to convert text into braille. *Id.* at 35.

¹⁰ See Petruzzelli, *supra* note 7, at 1065 (quoting *Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. 7 (2000) (statement of Gary Wunder, Programmer Analyst-Expert, ITS-Hosp Bus. Apps, Univ. of Mo.) (“Computer technology is not yet sufficiently advanced to recognize a picture and tell us that what [sic] appears on the screen.”)).

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as a result of the incompatibility problems of the “digital divide,” 98% of websites are, to some extent, inaccessible¹¹ to the approximately 1.5 million visually disabled individuals who regularly use the Internet.¹²

In order to gain greater access to the content of the Internet, visually disabled individuals have filed lawsuits pursuant to the Americans with Disabilities Act (“ADA”)¹³ to compel website providers to utilize formats that are more compatible with assistive technologies.¹⁴ The ADA was enacted in 1990 by the United States Congress for the purpose of providing “a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”¹⁵ The relevant subsection of the ADA in the majority of these cases is Title III, which states 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.”¹⁶ Thus, in order to succeed on a Title III claim, a plaintiff must establish that a website falls within the purview of the ADA by virtue of being a “place of public accommodation” or a “service” provided by a “place of public accommodation” as contemplated by the Act.¹⁷ The main point of contention is the scope of the term “place of public accommodation”—specifically, whether it is narrowly limited to physical locations that do business on an in-

¹¹ See Ranen, *supra* note 2, at 390 (citing Sally McGrane, *Is the Web Truly Accessible to the Disabled?*, Jan. 26, 2000, http://www.cnet.com/4520-6022_1-105103.html).

¹² *Access Now, Inc. v. Sw. Airlines, Co.*, 227 F. Supp. 2d 1312, 1314 (S.D. Fla. 2002), *appeal dismissed*, 385 F.3d 1324 (11th Cir. 2004).

¹³ 42 U.S.C. §§ 12101–12213 (2000).

¹⁴ See *Access Now, Inc. v. Claire’s Stores, Inc.*, No. 00-14017-CIV, 2002 WL 1162422, at *1 (S.D. Fla. May 7, 2002); *Access Now, Inc.*, 227 F. Supp. 2d at 1314–16; *Martin v. Metro. Atlanta Rapid Transit Auth.*, 225 F. Supp. 2d 1362, 1366 (N.D. Ga. 2002). In 1999, the National Federation for the Blind sued America Online, Inc. (“AOL”) for similar incompatibility issues; the National Federation later agreed to drop the suit on the condition that AOL modify its software to become compatible with the leading text-to-sound programs and braille-conversion devices. See Schloss, *supra* note 5, at 36 (citing Jonathan Bick, *Americans with Disabilities Act and the Internet*, 10 ALB. L.J. SCI. & TECH. 205, 217–19 (2000)); Patrick Maroney, *The Wrong Tool for the Right Job*, 2 VAND. J. ENT. L. & PRAC. 191, 194 (2000); Ritchenya A. Shepherd, *AOL Suit by the Blind Could Have Wide Impact*, RECORDER (S.F.), Nov. 16, 1999, at 3.

¹⁵ 42 U.S.C. § 12101(b)(1).

¹⁶ *Id.* § 12182(a).

¹⁷ See Mockbee, *supra* note 6, at 555.

person basis or whether it also includes various intangible entities, such as the Internet.¹⁸

Recently, in *Access Now, Inc. v. Southwest Airlines, Co.*,¹⁹ the District Court for the Southern District of Florida was asked to rule on this issue and declined to apply the ADA to a private commercial website operated by Southwest Airlines.²⁰ In dismissing the case, the court applied a narrow reading of the statute and held that “to fall within the scope of the ADA as presently drafted, a public accommodation must be a physical, concrete structure”²¹ which the consumer must enter to enjoy the goods and services provided therein.²² Therefore, because websites are not physical places, they are not covered by the ADA.²³ In addition, the court held that the plaintiffs failed to state a claim upon an alternative “nexus” theory in that they failed 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.”²⁴ The Eleventh Circuit Court of Appeals later affirmed the district court’s dismissal of the action.²⁵

¹⁸ Matthew A. Stowe, *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, 298 (2000).

¹⁹ 227 F. Supp. 2d 1312 (S.D. Fla. 2002), *appeal dismissed*, 385 F.3d 1324 (11th Cir. 2004).

²⁰ *Id.* at 1314.

²¹ *Id.* at 1318.

²² This “in-person” requirement of the definition of “public accommodation” is implied from the court’s rationale that “Title III of the ADA governs solely *access* to physical, concrete places of public accommodation.” *Id.* (emphasis added). The court rejected the holding in *Carparts Distribution Center, Inc. v. Automotive Wholesaler’s Ass’n of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994), that Title III of the ADA applies to discrimination in the access to employee medical benefit plans, even if the plans themselves are not purchased or sold on an in-person basis at a physical location.

²³ *Access Now, Inc.*, 227 F. Supp. 2d at 1319.

²⁴ *Id.* at 1321.

²⁵ *Access Now, Inc. v. Sw. Airlines, Co.*, 385 F.3d 1324, 1325 (11th Cir. 2004). In dismissing the action, the Eleventh Circuit did not reach the merits of the plaintiffs’ claim because, at the appellate level, the plaintiffs abandoned the claim that they made before the District Court—that southwest.com, *individually*, as a website, is a place of public accommodation and should be governed by the ADA. *Id.* at 1326–27. In its place, the plaintiffs raised a new argument on appeal pursuant to the “nexus” theory—that Southwest Airlines *as a whole* is a place of public accommodation because it operates a ‘travel service,’ and that it has violated Title III precisely because of the web site’s *connection* with Southwest’s ‘travel service.’” *Id.* at 1328 (emphasis in original). The Eleventh Circuit declined to entertain this new theory

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This Comment agrees with the district court's result that, based on the arguments presented at trial, Southwest Airlines' website, by itself, is not a public accommodation within the meaning of the ADA, but disagrees with the court's rigid "in-person" requirement for public accommodations and its narrow interpretation of the "nexus" theory. The court's interpretation of the ADA renders the law inapplicable to discrimination that does not prevent physical access to a concrete place of "public accommodation,"²⁶ and thus its reasoning is flawed in two respects. First, it does not comport with the plain meaning, stated purpose, and legislative history of the statute.²⁷ And second, it fails to account for a significant volume of prior case law involving the application of the ADA to intangible products and services offered by "public accommodations" that do not conduct their businesses on an in-person basis.²⁸ Part I of this Comment examines the methodology the district court employed in reaching its decision. Part II exposes the inherent flaws in the court's reasoning by analyzing the effects of the district court's failure to properly apply cardinal maxims of statutory interpretation and prior case law. It also discusses the "nexus" approach and examines why the plaintiffs lost their case, as well

and, accordingly, dismissed the case because the district court did not have the initial opportunity to perform the fact-intensive analysis required for a decision on the merits. *Id.* at 1331 (citing *Walker v. Jones*, 10 F.3d 1569, 1572 (11th Cir. 1994) (quoting *Depree v. Thomas*, 946 F.2d 784, 793 (11th Cir. 1991))).

²⁶ *Access Now, Inc.*, 227 F. Supp. 2d at 1321.

²⁷ See *supra* note 15 and accompanying text.

²⁸ See *Palozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 33 (2d Cir. 1999) (applying Title III to insurance underwriting based on the existence of a safe harbor provision); *Carparts Distribution Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 20 (1st Cir. 1994); *Winslow v. IDS Ins. Co.*, 29 F. Supp. 2d 557, 563 (D. Minn. 1998) (holding that the ADA is applicable to insurance policies and not limited to access to actual physical structures); *Chabner v. United of Omaha Life Ins. Co.*, 994 F. Supp. 1185, 1190 (N.D. Cal. 1998) (holding that Title III applies to insurance underwriting practices and not mere barriers to physical entry); *Connors v. Me. Med. Ctr.*, 42 F. Supp. 2d 34, 46 (D. Me. 1999) (applying the holding from *Doukas*); *Kotev v. First Colony Life Ins. Co.*, 927 F. Supp. 1316, 1322 (C.D. Cal. 1996) (holding that the ADA applies to the denial of a life insurance policy, and not mere denial of physical access to the place of accommodation where the policy is generated—the insurance office); *Doukas v. Metro. Life Ins. Co.*, 950 F. Supp. 422, 425–26 (D.N.H. 1996) (holding that Title III extends to the substance and contents of an insurance policy); *Baker v. Hartford Life Ins. Co.*, No. 94-C4416, 1995 WL 573430 (N.D. Ill. Sept. 28, 1995) (holding that the ADA does not require a plaintiff to be physically present at a place of public accommodation in order to be entitled to non-discriminatory treatment).

as hypothesizes about whether a proper application of the “nexus” theory would have changed the outcome. Finally, Part III raises concerns if a blanket application of the ADA were imposed on all websites, as advocated by some commentators.

I. THE DISTRICT COURT'S DECISION

A. *Statement of the Facts*

Access Now, Inc., a Florida non-profit “ADA advocacy organization,”²⁹ and Robert Gumson, a blind individual, filed suit in the United States District Court for the Southern District of Florida seeking injunctive and declaratory relief against Southwest Airlines, Co.³⁰ The plaintiffs asserted that the airline’s website, southwest.com, excluded them in violation of the ADA, as the goods and services offered online at its “virtual ticket counters” are inaccessible to blind persons.³¹ Southwest.com offers “sighted” consumers the means to purchase tickets, hotel stays, and car rentals, check airline fares and schedules, and stay up-to-date on sales and promotions.³² However, visually impaired individuals, who rely on screen reader technology, are unable to access these goods and services online because the website fails to provide “alternative text” which a screen reader program could use to communicate to its user what is graphically displayed on the website.³³ Although the plaintiffs did not argue that they are unable to access these goods and services via alternative means, such as by telephone, or physically visiting an airline ticket counter or travel agency,³⁴

²⁹ Access Now, Inc. is designated as a 501(c)(3) charitable organization by the IRS and is directed solely by non-paid volunteers; the goal of the organization is to create awareness about the need for ADA compliance and to initiate legal proceedings when necessary to achieve that goal. *See* ADA Access Now, <http://www.adaaccessnow.org/home.htm> (last visited Nov. 5, 2005).

³⁰ *Access Now, Inc.*, 227 F. Supp. 2d at 1314.

³¹ *Id.*

³² *Id.* at 1315. Nearly half of the airline’s passenger revenue is generated by online bookings via southwest.com. *Id.* Additionally, the airline boasts more than 3.5 million subscribers to its weekly “Click ‘N Save” e-mails. *Id.*

³³ *Id.* at 1316.

³⁴ *Id.* at 1316 n.3. Even if plaintiffs are able to access these goods and services by alternative means, this does not dispose of their suit, since Title III prohibits places of public accommodation from providing unequal or separate benefits to persons with disabilities unless such alternative means are absolutely necessary in order to make such benefits accessible. *See* 42 U.S.C. § 12182(b)(1) (2000).

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they submitted that visually impaired individuals are subject to price discrimination as they are unable to take advantage of web-only specials.³⁵ In response, Southwest Airlines moved to dismiss the complaint and its motion was granted.³⁶

B. The District Court's Opinion

In the absence of Eleventh Circuit precedent on the applicability of the ADA to websites, the district court viewed this case as one of first impression.³⁷ As such, the court identified two issues. First, whether Southwest's website constitutes "a place of public accommodation" within the meaning of the ADA—a question of statutory interpretation.³⁸ And second, in the alternative, whether the plaintiffs established a sufficient "nexus" between southwest.com and "a place of public accommodation."³⁹

In addressing the first issue, the district court concluded that the term "public accommodation" only includes "physical, concrete structures"⁴⁰ in which business is conducted on an in-person basis.⁴¹ In reaching this conclusion, the court first looked to the term in dispute and concluded that where a "plain and unambiguous meaning" is present, no further analysis is needed.⁴² In performing this step, the court noted that the ADA specifically identifies twelve categories of places of "public accommodation," all of which enumerate physical locations.⁴³ To

³⁵ Memorandum in Response to Motion to Dismiss Complaint with Prejudice at 7, *Access Now, Inc. v. Sw. Airlines, Co.*, 227 F. Supp. 2d 1312 (S.D. Fla. 2002) (No. 02-21734).

³⁶ *Access Now, Inc.*, 227 F. Supp. 2d at 1322.

³⁷ *Id.* at 1315.

³⁸ *Id.* at 1317.

³⁹ *Id.* at 1319.

⁴⁰ *Id.* at 1318 (citing *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279, 1283–84 (11th Cir. 2002)).

⁴¹ *See supra* note 22.

⁴² *Access Now, Inc.*, 227 F. Supp. 2d at 1317 (citing *Rendon*, 294 F.3d at 1283 n.6 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997))).

⁴³ *Id.* The twelve categories of "public accommodations," as enumerated by the ADA:

- (A) an inn, hotel, motel, or other place of lodging . . .;
- (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 . . . shopping center or other

supplement the text of the ADA, the court looked to the applicable federal regulations issued by the Attorney General which define a "place of public accommodation" as "a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the [twelve enumerated categories set forth in 42 U.S.C. § 12181(7)]."⁴⁴ The district court concluded that the word "facility"⁴⁵ in this definition, coupled with the Eleventh Circuit's previous interpretations of the ADA,⁴⁶ was dispositive of "Congress' clear intent that Title III of the ADA governs solely access to physical, concrete places of public accommodation."⁴⁷ Therefore, because Internet websites are neither among the enumerated categories of the ADA nor "physical, concrete structures," they are not covered by Title III.⁴⁸

Notwithstanding this analysis, the court then addressed the plaintiffs' creative argument that the website falls within the scope of Title III because it is a place of "exhibition, display and a sales establishment"—all specifically enumerated in the statute.⁴⁹ In rejecting this argument, the court turned to the

sales or rental establishment;

(F) a laundromat, dry cleaner, bank, . . . travel service, shoe repair service, . . . office of an accountant or lawyer, pharmacy, insurance office, . . . 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 post graduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, . . . or other social service center establishment; and

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

42 U.S.C. § 12181(7) (2000).

⁴⁴ *Access Now, Inc.*, 227 F. Supp. 2d at 1318 (quoting 28 C.F.R. § 36.104).

⁴⁵ The word "facility" in this definition is defined 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." 28 C.F.R. § 36.104 (2004).

⁴⁶ See *Rendon*, 294 F.3d at 1283; *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237, 1241 (11th Cir. 2000) (noting that "[b]ecause Congress has provided such a comprehensive definition of 'public accommodation' we think that the intent of Congress is clear enough").

⁴⁷ *Access Now, Inc.*, 227 F. Supp. 2d at 1318.

⁴⁸ *Id.*

⁴⁹ *Id.*; see also *supra* note 43 (discussing the enumerated categories of public

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interpretive maxim of *ejusdem generis*—“where general words follow a specific enumeration . . . the general words should be limited to . . . things similar to those specifically enumerated.”⁵⁰ Applying this maxim, the court noted that all of the specifically enumerated terms were physical, concrete structures; therefore, the general terms, “exhibition,” “display,” and “sales establishment” must be limited to physical, concrete structures as well.⁵¹

As an alternative means of applying the ADA to Southwest’s website, the court then considered, *sua sponte*, the second issue—whether the plaintiffs established a sufficient “nexus” between southwest.com and a physical, concrete place of public accommodation.⁵² Because the plaintiffs made no effort to establish such a “nexus” at the district court level and limited their arguments to evoking persuasive authority to expand the ADA’s application to websites as entities unto themselves,⁵³ the court found that the necessary “nexus” was lacking in order for the plaintiffs to state a claim.⁵⁴ Pursuant to their strategy, the plaintiffs cited the First Circuit’s decision in *Carparts Distribution Center, Inc. v. Automotive Wholesaler’s Ass’n of New England*⁵⁵ and the Seventh Circuit’s decision in *Doe v. Mutual of Omaha Insurance Co.*,⁵⁶ which point to the term “travel service” among the list of enumerated “public accommodations” as evidence that Congress intended this section of the ADA to be read broadly to include providers of services that “do not require a person to physically enter an actual physical structure.”⁵⁷ The

accommodations).

⁵⁰ *Access Now, Inc.*, 227 F. Supp. 2d at 1318 (quoting *Allen v. A.G. Thomas*, 161 F.3d 667, 671 (11th Cir. 1998) (quoting *United States v. Turkette*, 452 U.S. 576, 581–82 (1981))).

⁵¹ *Id.* at 1319.

⁵² *Id.*

⁵³ *Id.* On appeal, the plaintiffs did put forth arguments to establish a “nexus” between southwest.com and Southwest Airlines as a physical place of public accommodation; however, these arguments were rejected, as they were never developed at the district court level. *See Access Now, Inc. v. Sw. Airlines, Co.*, 385 F.3d 1324, 1325 (11th Cir. 2004).

⁵⁴ *Access Now, Inc.*, 227 F. Supp. 2d at 1321.

⁵⁵ 37 F.3d 12, 19 (1st Cir. 1994).

⁵⁶ *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999). *Doe* approvingly cites to *Carparts* for this proposition. *See id.* at 559; *see also infra* notes 112–13 and accompanying text.

⁵⁷ *Access Now, Inc.*, 227 F. Supp. 2d at 1319 n.8 (quoting *Carparts*, 37 F.3d at 19) (“By including ‘travel service’ among the list of services considered ‘public

plaintiffs then argued that the Eleventh Circuit's previous holding in *Rendon v. Valleycrest Productions*⁵⁸ was aligned with decisions of the First and Seventh Circuits, and therefore was binding authority on the issue of the applicability of the ADA to non-physical accommodations.⁵⁹

The district court dismissed the plaintiffs' arguments for two reasons. First, the court felt that the issue of statutory interpretation had already been resolved by the "plain meaning" approach; therefore, it was not necessary to refute the interpretations of the ADA contained in *Carparts* or *Doe*.⁶⁰ Instead, the court characterized those interpretations as dicta, as those cases did not specifically address the ADA's application to the Internet,⁶¹ and cursorily dismissed them by saying "the Eleventh Circuit has not read Title III of the ADA nearly as broadly as the First Circuit."⁶² Second, the court challenged the plaintiffs' assertion that *Rendon* adopted the interpretation contained in *Carparts* by stating that "*Rendon* not only did not approve of *Carparts*, it failed to even cite it."⁶³ The court then distinguished *Rendon*, which found for the plaintiffs based on the "nexus" approach, by declaring that the determinative factor in that case was that the plaintiffs had demonstrated that the challenged service limited their access to a physical place of public accommodation.⁶⁴ Here, the plaintiffs only contended that their access to "virtual ticket counters" was limited.⁶⁵ Therefore, because cyberspace is located in "no particular geographical

accommodations,' Congress clearly contemplated that 'service establishments' include providers of services which do not require a person to physically enter an actual physical structure.'")

⁵⁸ *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279 (11th Cir. 2002). In *Rendon*, plaintiffs with hearing and upper-body mobility impairments sued the producers of the television show, "Who Wants to Be a Millionaire," claiming that the use of the "fast finger" telephone selection process violated the ADA. *Id.* at 1280. The court held the "fast finger" process was a discriminatory screening mechanism that deprived the plaintiffs of the opportunity to compete for the privilege of being a contestant on the Millionaire program—a show that is filmed in a physical television studio. *Id.* at 1285.

⁵⁹ *Access Now, Inc.*, 227 F. Supp. 2d at 1320.

⁶⁰ *Id.* at 1319.

⁶¹ The issues in *Carparts* and *Doe* concerned the ADA's application to employee health benefit plans offered through the plaintiffs' employers. See *infra* notes 99–105, 112–13 and accompanying text.

⁶² *Access Now, Inc.*, 227 F. Supp. 2d at 1319.

⁶³ *Id.* at 1320.

⁶⁴ *Id.*; see also *supra* note 58.

⁶⁵ *Access Now, Inc.*, 227 F. Supp. 2d at 1321.

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location,” the plaintiffs failed to demonstrate that Southwest’s website impeded their access to any specific physical space, such as a “real” airline ticket counter or travel agency. Thus, they failed to establish the sufficient “nexus” required to invoke Title III of the ADA.⁶⁶

II. FLAWS IN THE COURT’S INTERPRETATION

A. *Cardinal Mistakes in Statutory Interpretation*

The district court improperly read an “in-person” requirement into the definition of “public accommodation” under the ADA.⁶⁷ This interpretation is flawed in several respects. First, in interpreting the term “public accommodation,” the court only analyzed § 12181(7) of the ADA and its parallel regulation in the Federal Register,⁶⁸ and it did so in isolation of any other provisions of Title III.⁶⁹ Nevertheless, even when viewed in isolation, the statutes do not explicitly impose, nor even hint at, an “in-person” requirement as conjured by the district court.⁷⁰ Such an isolated analysis is not only incomplete, but ignores the cardinal rule of statutory interpretation that “statutory language must be read in context.”⁷¹ The context here is provided by other provisions of Title III. One such provision, § 12182(b)(1)(a)(i), implicitly suggests that the district court’s interpretation is incorrect. That section reads, “[i]t shall be discriminatory to subject an individual . . . on the basis of a disability . . . to a denial of the opportunity . . . to participate in or benefit from the goods [or] services . . . of an entity.”⁷² Applying the court’s own “plain and unambiguous meaning” test to the phrase “of an

⁶⁶ *Id.* Even if the plaintiffs in *Access Now* were able to show that the website impeded their access to a particular Southwest aircraft, the district court would likely not have applied the ADA anyway because aircrafts are explicitly exempt from Title III. *Id.* at 1321 n.12 (citing 42 U.S.C. § 12181(10) (2000)).

⁶⁷ *See supra* note 22.

⁶⁸ 28 C.F.R. § 36.104 (2004).

⁶⁹ *Access Now, Inc.*, 227 F. Supp. 2d at 1317–18.

⁷⁰ 42 U.S.C. § 12181(7) (2000). A review of the statute reveals that it contains no explicit text that requires the entity to provide its goods and services on an “in-person” basis in order to be considered a “public accommodation” within the meaning of the Act.

⁷¹ *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 596 (2004) (quoting *Jones v. United States*, 527 U.S. 373, 389 (1999) (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961))).

⁷² 42 U.S.C. § 12182(b)(1)(a)(i) (emphasis added).

entity,” there is strong reason to infer that it would be discrimination under the ADA for an entity to deny to protected individuals any and all goods or services offered by the entity regardless of whether they are purchased or consumed “in-person” at the entity. Had the legislature intended to impose an “in-person” requirement, it would presumably have used the phrase “at an entity.”⁷³

The district court also ignored a second maxim of statutory interpretation—that courts should interpret statutes “so as to avoid rendering superfluous any parts thereof.”⁷⁴ The district court’s “in-person” requirement would violate this maxim by rendering meaningless many provisions of the ADA. First, only two of the five provisions that define prohibited discrimination under the Act explicitly refer to physical barriers.⁷⁵ Thus, the remaining three provisions, which extend the definition of discrimination beyond denial of physical access to a place of public accommodation, would be rendered meaningless.⁷⁶ For

⁷³ See Memorandum in Response to Motion to Dismiss Complaint with Prejudice, *supra* note 35, at 9 (positing alternate language Congress could have used had it intended to restrict the ADA’s application to only those services provided “at” a place of public accommodation); *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 33 (2d Cir. 1999).

The term ‘of’ generally does not mean ‘in,’ and there is no indication that Congress intended to employ the term in such an unorthodox manner Furthermore, many of the private entities that Title III defines as ‘public accommodations’—such as a ‘bakery, grocery store, clothing store, hardware store, [or] shopping center,’ as well as a ‘travel service, . . . gas station, office of an accountant or lawyer, [or] pharmacy,’ sell goods and services that are ordinarily used outside the premises.

Pallozzi, 198 F.3d at 33 (citations omitted) (alteration in original).

⁷⁴ *Chabner v. United of Omaha Life Ins. Co.*, 994 F. Supp. 1185, 1190 (N.D. Cal. 1998) (quoting *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991) (citing *United States v. Menasche*, 348 U.S. 528, 538–39 (1955))).

⁷⁵ 42 U.S.C. § 12182(b)(2)(A). Discrimination includes:

(iv) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities . . . where such removal is readily achievable; and

(v) where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable.

Id.

⁷⁶ See *Kotev v. First Colony Life Ins. Co.*, 927 F. Supp. 1316, 1322 (C.D. Cal. 1996). Title III of the ADA also contains these specific prohibitions:

(i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services,

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example, § 12182(b)(2)(A)(i) explicitly prohibits “the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability”⁷⁷ Thus, an entity that qualifies as a physical place of public accommodation could, theoretically, impose discriminatory eligibility criteria that do not relate to physical access, but such criteria would be prohibited by § 12182(b)(2)(A)(i) of the ADA.⁷⁸ For instance, the ADA would undeniably prohibit a health club, which is completely physically accessible, from refusing nonetheless to sell memberships to individuals in wheelchairs.⁷⁹

Second, these provisions are also necessary to effectuate the ADA’s protection of individuals who suffer from non-physical handicaps.⁸⁰

If Title III is violated only by discrimination that prevents physical access to a place of public accommodation, then many persons who do not suffer from a physical handicap but are explicitly protected by Title III could bring a Title III claim only if the public accommodation took affirmative steps to block such persons’ physical access.⁸¹

Such a result is not only absurd, but would also render superfluous the explicit protection that the ADA guarantees to persons who are disabled due to means other than a physical handicap.⁸² For example, the ADA would prohibit a restaurant that is physically accessible in every way from refusing to sell its

facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary . . . ;

(ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities . . . ; [and]

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services

42 U.S.C. § 12182(b)(2)(A).

⁷⁷ 42 U.S.C. § 12182(b)(2)(A)(i).

⁷⁸ Petruzzelli, *supra* note 7, at 1081.

⁷⁹ *Id.* (positing this hypothetical in order to show that the ADA should be applicable to more forms of discrimination involving a public accommodation than just physical access).

⁸⁰ The ADA defines a person with a disability as one who is physically or mentally impaired, has a record of such impairment, or is regarded as having such impairment. 42 U.S.C. § 12102(2).

⁸¹ *Kotev*, 927 F. Supp. at 1322.

⁸² 42 U.S.C. § 12102(2).

services to an individual who suffers from a mild mental impairment. Thus, the inclusion of provisions that protect individuals with non-physical handicaps demonstrates that physical access is not the only concern contemplated by Title III.

Finally, the district court's "in-person" requirement would render superfluous the ADA's "safe harbor" provision.⁸³ The "safe harbor" provision exempts health insurers and other similar organizations from the ADA's application to underwriting risks and risk classification that is based on sound actuarial principles.⁸⁴ The implication of this provision is that the ADA *does* regulate discrimination in underwriting that is not based on sound actuarial principles.⁸⁵ This is significant because the "safe harbor" provision does not involve physical access issues whatsoever.⁸⁶ Therefore, if Title III were meant only to prevent insurance companies, for example, from denying persons with disabilities physical access to their offices, as the district court's "in-person" requirement mandates, then there would have been no need for Congress to include the "safe harbor" provision in the Act.⁸⁷

The district court's analysis also fails to consider the ADA's purpose and to examine the legislative intent of the Act. The stated purpose of the ADA is "to invoke the sweep of Congressional authority . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities,"⁸⁸ and to "provide a clear and comprehensive national mandate for the elimination of discrimination against [such] individuals."⁸⁹ The purpose of Title III is "to bring individuals with disabilities into the economic and social mainstream of American life . . . in a

⁸³ See *id.* § 12201(c)(1).

⁸⁴ See *id.*; H.R. REP. NO. 101-485(II), at 137 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 420.

⁸⁵ See *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 33 (2d Cir. 1999); *Connors v. Me. Med. Ctr.*, 42 F. Supp. 2d 34, 46 (D. Me. 1999); *Winslow v. IDS Ins. Co.*, 29 F. Supp. 2d 557, 563 (D. Minn. 1998); *Chabner v. United of Omaha Life Ins. Co.*, 994 F. Supp. 1185, 1190-91 (N.D. Cal. 1998); *Doukas v. Metro. Life Ins. Co.*, 950 F. Supp. 422, 425-27 (D.N.H. 1996); *Kotev*, 927 F. Supp. at 1322-23. In addition, the ADA specifically states that the "safe harbor" provision "shall not be used as subterfuge to evade the purposes of [the Act]." 42 U.S.C. § 12201(c).

⁸⁶ See *Pallozzi*, 198 F.3d at 33; see also 42 U.S.C. § 12201(c).

⁸⁷ *Chabner*, 994 F. Supp. at 1190-91.

⁸⁸ 42 U.S.C. § 12101(b)(4).

⁸⁹ *Id.* § 12101(b)(1).

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clear, balanced, and reasonable manner.”⁹⁰ Congress’ intent in drafting Title III was to ensure that people with disabilities have equal access to the same range of goods and services that are offered by private institutions to those who do not have disabilities.⁹¹ “Neither Title III nor its implementing regulations make any mention of physical boundaries or physical entry,”⁹² and the legislative history of the Act discloses that the “lack of physical access to facilities” was only one of several “major areas of discrimination that needed to be addressed.”⁹³ Therefore, the court’s use of *ejusdem generis* and imposition of the self-created “in-person” requirement are inappropriate as they both frustrate Congress’ intent and are inconsistent with the stated purpose of the statute.⁹⁴

Finally, the court did not account for the historical context in which the ADA was enacted. Although the Internet existed in 1990, it was in its infancy and not as widely used as a means of transacting business and providing services as it is now.⁹⁵ Therefore, just because Congress may not have specifically envisioned the application of Title III to websites in 1990, such lack of foresight does not bar its application in the present. In drafting the twelve enumerated categories of public accommodations, Congress inserted the term “or other” followed by a general term at the end of each category.⁹⁶ This method of drafting suggests that Congress did not intend to make the list exhaustive, but rather envisioned a broader application of the

⁹⁰ *Carparts Distribution. Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994) (quoting H.R. REP. NO. 101-485(II), at 99 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 382).

⁹¹ *Id.*; *see* H.R. REP. NO. 101-485(I), at 58 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 296.

⁹² *Carparts*, 37 F.3d at 20.

⁹³ H.R. REP. NO. 101-485(II), at 35–36.

⁹⁴ The Eleventh Circuit, in adopting as precedent “old Fifth” Circuit case law, that which existed prior to the division of the Fifth Circuit into what is now the “new Fifth” and Eleventh Circuits, in *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981), also adopted the notion of interpreting a statute so as to not defeat its purpose. *See Miller v. Amusement Enters. Inc.*, 394 F.2d 342, 350 (5th Cir. 1968) (“Although we recognize that *ejusdem generis* is an old and accepted rule of statutory construction, we do not believe that it compels us . . . to interpret the statute in such a narrow fashion as to defeat . . . its obvious and dominating general purpose.”).

⁹⁵ Kara Grimes, Casenote, *Access Now, Inc. v. Sw. Airlines, Co.*, 227 F. Supp. 2d 1312 (S.D. Fla. 2002), 69 J. AIR L. & COM. 203, 206–07 (2004) (suggesting that court’s should not limit the scope of the ADA’s applicability merely because Congress did not foresee how the Internet would evolve).

⁹⁶ *Id.* at 207 (referring to 42 U.S.C. § 12181(7) (2000)).

statute to encompass entities related to those specifically enumerated.⁹⁷ Further, if a website is considered a service offered by an enumerated public accommodation, then it would certainly be subject to ADA application by virtue of 42 U.S.C. § 12182(b)(2)(A), which defines the types of discrimination covered by the Act.⁹⁸

B. Failure to Properly Apply Prior Case Law

The district court's rationale failed to adequately address or refute the reasoning contained in a significant volume of case law related to the ADA's application to entities that do not conduct business in-person. Such application was first considered in 1994, in the First Circuit's decision in *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England*.⁹⁹ The court considered the issue of whether a public accommodation is "limited to actual physical structures with definite physical boundaries which a person physically enters for the purpose of utilizing the facilities or obtaining services therein," or whether the term could be extended to include a health benefit plan that was offered offsite via an employer participant.¹⁰⁰ In rejecting a narrow interpretation, the court examined both the plain meaning and purpose of the statute, as well as Congress' intent in passing the ADA,¹⁰¹ and concluded:

⁹⁷ See *id.* (suggesting that the statutory language warrants broader applicability of the statute); Memorandum in Response to Motion to Dismiss Complaint with Prejudice, *supra* note 35, at 9 (citing Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 212 (1998)). In *Yeskey*, the court stated that "Congress did not 'envisio[n] that the ADA would be applied to state prisoners.'" *Yeskey*, 524 U.S. at 212 (quoting Brief for Petitioners at 13-14, Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206 (1998) (No. 97-634)).

⁹⁸ See *supra* note 75 and accompanying text.

⁹⁹ 37 F.3d 12, 18 (1st Cir. 1994). In *Carparts*, the plaintiff was the president and employee of Carparts, Inc., a corporation that participates in a health benefit plan offered by the defendant, Automotive Wholesalers Association of New England ("AWANE"). *Id.* at 14. The plaintiff was enrolled in the plan since 1977 and contracted HIV in 1986. *Id.* In 1990, AWANE informed the plaintiff that it was reducing benefits for "AIDS-related illnesses" to \$25,000, while otherwise maintaining lifetime benefits of \$1 million per plan member. *Id.* Plaintiff brought suit under Title III of the ADA claiming that the lifetime cap on benefits for individuals with AIDS constituted "illegal discrimination on the basis of a disability." *Id.*

¹⁰⁰ *Id.* at 18 (quoting *Carparts Distribution Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England*, 826 F. Supp. 583, 586 (D.N.H. 1993), *vacated*, 37 F.3d 12 (1st Cir. 1994)).

¹⁰¹ In determining the plain meaning of "public accommodation," the court noted that the enumerated categories of § 12181(7)(F) include "a 'travel service,' a 'shoe

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By 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 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 category of businesses from the reach of Title III and limit [its] application . . . to 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.¹⁰²

Furthermore, the court stated that, “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.”¹⁰³ Thus, the essence of the First Circuit’s holding is that the ADA applies to physical places of business regardless of whether or not they conduct their business in-person.¹⁰⁴ This holding has been followed by courts in various jurisdictions.¹⁰⁵

In 1999, in *Pallozzi v. Allstate Life Insurance Co.*,¹⁰⁶ the Second Circuit expanded the application of Title III to include insurance underwriting practices.¹⁰⁷ This expansion was also based on an examination of the plain meaning of the ADA, read

repair service,’ . . . and ‘other service establishment[s],’ . . . [t]he plain meaning of [which] do not require ‘public accommodations’ to have physical structures for persons to enter This, . . . considered together with agency regulations and public policy concerns, persuades us that the phrase is not limited to actual physical structures.” *Id.* at 19.

¹⁰² *Id.* at 19–20.

¹⁰³ *Id.* at 19.

¹⁰⁴ See Petruzzelli, *supra* note 7, at 1072.

¹⁰⁵ See *supra* note 28 (discussing authorities supporting *Carparts*).

¹⁰⁶ 198 F.3d 28 (2d Cir. 1999).

¹⁰⁷ *Id.* at 31. In *Pallozzi*, the defendant insurance company rejected a married couple’s request for a joint life insurance policy, and plaintiffs filed suit under Title III, claiming that the rejection was based on the fact that they both had mental disorders, and thus constituted prohibited discrimination. *Id.* at 30.

in context, and its legislative purpose.¹⁰⁸ The relevant context in *Pallozzi* was the presence of the “safe harbor” provision of the ADA that deals with underwriting and risk classification.¹⁰⁹ The Second Circuit reasoned that the presence of this provision implies that Title III *does* regulate insurance underwriting practices subject only to the limitations contained in the safe harbor provision.¹¹⁰ Therefore, because this provision lacks a physical access requirement, the Second Circuit declared that “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.”¹¹¹

Finally, and most on point to the discussion of the application of the ADA to the Internet, is the Seventh Circuit’s opinion in *Doe v. Mutual of Omaha Insurance Co.*¹¹² Although the facts of the case were similar to *Pallozzi*, Chief Judge Posner made the following statement concerning the “core meaning” of Title III:

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 public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do.¹¹³

Although dicta, this statement expands Title III, as applied in *Carparts*, from physical businesses whether or not they conduct their business on an in-person basis, to businesses that are simply “open to the public,” whether or not they have any physical offices.¹¹⁴

¹⁰⁸ *Id.* at 32–33. The United States District Court for the Northern District of California pronounced this expansion based on similar reasoning one year earlier, in 1998. *See Chabner v. United of Omaha Life Ins. Co.*, 994 F. Supp. 1185, 1187–91 (N.D. Cal. 1998) (holding that based on the plain meaning of the statute and on its legislative history, Title III protected a man suffering from muscular dystrophy from price discrimination by his insurance company).

¹⁰⁹ *See supra* notes 83–87 and accompanying text.

¹¹⁰ *Pallozzi*, 198 F.3d at 32–33.

¹¹¹ *Id.* at 33.

¹¹² 179 F.3d 557 (7th Cir. 1999).

¹¹³ *Id.* at 559 (emphasis added) (citation omitted).

¹¹⁴ It is questionable whether this distinction has any significance given that even the smallest web retailer would have to conduct his business from *some*

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The district court did not directly address or refute the reasoning in any of these cases when determining the scope of the term “public accommodation” and imposing its “in-person” requirement.¹¹⁵ Instead, the court characterized the language in *Carparts* and *Doe* as dicta,¹¹⁶ and deferred to *Rendon* as superseding authority for this proposition.¹¹⁷ However, *Rendon* is not a proper authority on this issue as the Eleventh Circuit never addressed the scope of the term “public accommodation,” nor alluded to an “in-person” requirement in that case because the defendants in *Rendon* conceded that they were a public accommodation.¹¹⁸ Therefore, it appears that the only basis for the district court’s interpretation is that it mistook the facts of *Rendon* as requirements.¹¹⁹

C. Misinterpretation of the “Nexus” Approach

The district court also erred when interpreting the “nexus” approach by requiring the plaintiff to demonstrate both a “nexus” between the website and a public accommodation, and that the website discriminates by *impeding access to a “specific, physical, concrete space.”*¹²⁰ While the first half of the court’s interpretation is correct, the second half is exceedingly narrow as “impeding physical access” is not a requirement of *Rendon*, but merely a recital of its specific facts.¹²¹ The Eleventh Circuit made this point clear when it stated, “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.”¹²² The correct interpretation of

physical space, as humans have not yet evolved to live in cyberspace alone.

¹¹⁵ See *supra* notes 60–62 and accompanying text.

¹¹⁶ See *supra* notes 60–62 and accompanying text.

¹¹⁷ See *supra* notes 63–64 and accompanying text.

¹¹⁸ *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279, 1283 (11th Cir. 2002).

¹¹⁹ The facts of *Rendon* were that the public accommodation in question, a television studio, happened to be one in which the privileges and advantages are enjoyed onsite. *Id.*

¹²⁰ *Access Now, Inc. v. Sw. Airlines, Co.*, 227 F. Supp. 2d 1312, 1321 (S.D. Fla. 2002) (emphasis added), *appeal dismissed*, 385 F.3d 1324 (11th Cir. 2004).

¹²¹ In *Rendon*, the “fast finger” telephone selection process happened to serve as a screening mechanism that prevented persons with disabilities from becoming contestants on the show and thus “accessing” the physical television studio. *Rendon*, 294 F.3d at 1282.

¹²² *Id.* (emphasis added).

the “nexus” approach is that once a plaintiff has established the necessary “nexus,” *all* of the protections of the ADA are triggered,¹²³ not just those pertaining to physical access.

The district court attempted to justify its interpretation by insinuating that the Eleventh Circuit was in accord with *Parker v. Metropolitan Life Insurance Co.*,¹²⁴ *Ford v. Schering-Plough Corp.*,¹²⁵ and *Weyer v. Twentieth Century Fox Film Corp.*,¹²⁶ and that those cases espoused such a requirement.¹²⁷ In actuality, the Eleventh Circuit only discussed those cases to refute the defendant’s arguments and to distinguish them on the basis of their facts from *Rendon*.¹²⁸ The cases are distinguishable in that the privilege sought by the plaintiffs in *Rendon* was offered directly by the defendant public accommodation, whereas in *Weyer*, *Ford*, and *Parker*, the challenged good was offered through the plaintiffs’ employers.¹²⁹ *This* was the grounds upon which those cases were decided—not upon a failure of the plaintiffs to prove that the defendants had impeded their physical access to a place of public accommodation.¹³⁰

¹²³ See 42 U.S.C. § 12182(b)(2)(A) (2000).

¹²⁴ 121 F.3d 1006, 1010–11 (6th Cir. 1997) (holding that while an insurance office is a public accommodation, plaintiff did not seek the services of a public accommodation when she accessed her employee benefits plan directly though her employer).

¹²⁵ 145 F.3d 601, 612–13 (3d Cir. 1998) (holding that no nexus exists between a plaintiff and an insurance company that administers her employee benefits plan when the plaintiff obtains her plan directly from her employer rather than through insurance company itself).

¹²⁶ 198 F.3d 1104, 1115 (9th Cir. 2000) (agreeing with the Third and Sixth Circuits and holding that an insurance company administering an employer-provided benefits plan is not a “place of public accommodation”).

¹²⁷ See *Access Now, Inc. v. Sw. Airlines, Co.*, 227 F. Supp. 2d 1312, 1320 n.10 (S.D. Fla. 2002) (stating that the Eleventh Circuit “recognized” those cases that did not apply *Carparts*), *appeal dismissed*, 385 F.3d 1324 (11th Cir. 2004).

¹²⁸ *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279, 1284 n.8 (11th Cir. 2002).

¹²⁹ *Id.*

¹³⁰ See *Ford*, 145 F.3d at 612–13 (“Since Ford received her disability benefits via her employment at Schering, she had no nexus to MetLife’s ‘insurance office’ and thus was not discriminated against in connection with a public accommodation.”); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010 (6th Cir. 1997) (“While we agree that an insurance office is a place of public accommodation . . . plaintiff did not seek the goods and services of an insurance office. Rather, Parker accessed a benefit plan provided by her private employer . . .”); *Weyer*, 198 F.3d at 1115 (“We agree with the Third and Sixth Circuits [*Ford* and *Parker*] and hold that an insurance company administering an employer-provided disability policy is not a ‘place of public accommodation’ under Title III.”). No “impeding physical access” requirement of the nexus approach appears in any of these cases.

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In addition to the lack of support for this interpretation in *Weyer*, *Ford*, and *Parker*, a careful reading of *Rendon* reveals that the Eleventh Circuit actually opposes such a requirement. Because *Rendon* involved an offsite screening procedure, the Eleventh Circuit was acutely conscious of Title III's applicability to both tangible and intangible barriers.¹³¹ Further, the court noted that intangible barriers can be created by an entity's refusal "to provide a reasonable auxiliary service that would permit the disabled to gain access to *or use* its goods and services."¹³² The phrase "or use" suggests that intangible barrier discrimination not only includes "impeding physical access," but also impeding the use of goods and services, as separate and distinct from the former.

Finally, the district court's interpretation of the "nexus" approach contravenes the basic maxim of statutory interpretation¹³³ in the same manner as its "in-person" requirement, as it renders the ADA inapplicable to many types of discrimination that are enumerated in the Act that do not explicitly relate to physical access.¹³⁴ Thus, the district court lacks both statutory authority and precedential support for its "in-person" requirement for "public accommodations" and its "impeding physical access" requirement for the "nexus" approach.

D. Would a Proper Application of the "Nexus" Approach Have Saved the Plaintiffs' Case?

Given the abundance of judicial error by the district court, it would be easy to conclude that this fully explains the plaintiffs' defeat. However, it is possible that they still could have won their suit had they made the right allegations at the right time and the court properly applied the "nexus" approach. At the district court level, the plaintiffs only argued that websites should be included within the meaning of "public accommodations" and did not pursue the "nexus" approach.¹³⁵ Therefore, they did not allege a connection between

¹³¹ See *Rendon*, 294 F.3d at 1283.

¹³² *Id.* at 1283 n.7 (citing 42 U.S.C. § 12182(b)(2)(A)(iii) (2000)) (emphasis added).

¹³³ See *supra* Part II.A.

¹³⁴ See *supra* note 75 and accompanying text.

¹³⁵ *Access Now, Inc. v. Sw. Airlines, Co.*, 385 F.3d 1324, 1325 (11th Cir. 2004).

southwest.com and a physical place of public accommodation.¹³⁶ The plaintiffs could have established this element by proving that the website was in fact a service provided by a “travel service” public accommodation (Southwest Airlines) that owns or leases real property.¹³⁷ On this basis, the plaintiffs could then have demonstrated that Southwest Airlines was discriminating within the meaning of the ADA by failing to make reasonable modifications to the website (e.g., making it compatible with screen reader technology) in order to provide such a service to persons with disabilities.¹³⁸ This application of the “nexus” approach is consistent with the ADA’s purpose of ensuring that people with disabilities have equal access to the same range of goods and services that are offered by private institutions and made available to those who do not have disabilities.¹³⁹ Had the plaintiffs pursued this strategy in the district court and upon appeal, it is likely that the Eleventh Circuit would have granted them relief based on their previous interpretation of the “nexus” approach.¹⁴⁰ However, because the plaintiffs did not make these arguments until the case progressed to the appellate level and abandoned the arguments they made at the district court level, we are left questioning the state of the law, as the Eleventh Circuit declined to rule on the merits of either theory.¹⁴¹

III. CONCERNS WITH BLANKET APPLICATION OF THE ADA TO ALL WEBSITES

Some commentators have embraced reasoning like the Seventh Circuit’s dicta¹⁴² and advocate that all websites constitute public accommodations because they are “open to the public,” and thus fall under the purview of the ADA.¹⁴³ Despite the attraction and moral laudability of such an interpretation, it

¹³⁶ *Access Now, Inc. v. Sw. Airlines, Co.*, 227 F. Supp. 2d 1312, 1321 (S.D. Fla. 2002), *appeal dismissed*, 385 F.3d 1324 (11th Cir. 2004).

¹³⁷ By proving that Southwest is a “travel service” that owns or leases real property, plaintiffs would have satisfied the district court’s requirements for “public accommodations.” *Id.* at 1318. Specifically, owning or leasing real property should satisfy the requirement of being a “physical, concrete structure.” *Id.*

¹³⁸ *See* 42 U.S.C. § 12182(b)(2)(A) (2000).

¹³⁹ *See supra* note 90 and accompanying text.

¹⁴⁰ *See supra* note 122 and accompanying text.

¹⁴¹ *Access Now, Inc.*, 385 F.3d at 1325.

¹⁴² *See supra* notes 113–14 and accompanying text.

¹⁴³ *See Schloss, supra* note 5, at 58; *Ranen supra* note 2, at 418.

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is not without its own problems. In February of 2000, when Congress held hearings on the subject, critics testified that millions of web pages would have to be taken down, some permanently, due to the cost of modifications.¹⁴⁴ However, such a result is unlikely as the ADA contains various internal limits to protect businesses subject to its regulation. For example, the ADA does not require businesses to make modifications that fundamentally alter the nature of the goods and services provided, or to take other steps to eliminate discrimination, if such steps would constitute an undue burden.¹⁴⁵ These internal limitations would likely protect small web retailers from being “crushed by the weight of burdensome ADA compliance,”¹⁴⁶ while ensuring that large commercial websites are accessible to individuals with disabilities.

The most serious problem with applying the ADA across the board to include all websites is that such an interpretation’s constitutionality is highly dubious. The ADA was enacted pursuant to Congress’s authority under the Commerce Clause of the United States Constitution.¹⁴⁷ Therefore, in order for a website to constitutionally be subject to the ADA, it must “substantially affect interstate commerce.”¹⁴⁸ In addition, as the district court correctly points out, the ADA also requires that “public accommodations” be physical structures (i.e., be entities that own or lease real property).¹⁴⁹ Many non-retail and non-commercial websites that are either personal in nature or merely provide information would arguably not satisfy these requirements. Therefore, it is likely that the ADA’s application to websites would be limited to commercial websites. If broader application is desired, the constitution requires a showing that the challenged website has a substantial effect on interstate commerce—a fact-intensive determination that would have to be made on a case-by-case basis.¹⁵⁰

¹⁴⁴ See Mockbee, *supra* note 6, at 571 (referencing this testimony by critics).

¹⁴⁵ See 42 U.S.C. § 12182(b)(2)(A)(ii)–(iii) (2000).

¹⁴⁶ See Mockbee, *supra* note 6, at 573.

¹⁴⁷ U.S. CONST. art. I, § 8, cl. 3.

¹⁴⁸ *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

¹⁴⁹ See *supra* notes 40–48 and accompanying text.

¹⁵⁰ See *Lopez*, 514 U.S. at 559.

CONCLUSION

As the Internet continues to grow, so will the “digital divide” so long as websites categorically do not have to comply with the ADA. The district court’s decision in *Access Now* is a step in the wrong direction based on the faulty imposition of an “in-person” requirement for public accommodations and an “impeding physical access” requirement for the “nexus” approach. These concocted requirements are without statutory authority or case precedent as they do not comport with the plain meaning of the ADA, read in context, its purpose, the intent of the legislature, or prior case law. Nevertheless, the district court’s “physical structure” interpretation of the term “public accommodation” is well supported and will likely prevent websites from qualifying for ADA application as entities unto themselves until either the Supreme Court or Congress resolves the issue. In the meantime, websites should be subject to the ADA so long as they are a service offered by a physical place of public accommodation and a “nexus” can be established between the two.