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Can Online-Only Businesses Constitute Places of Public Accommodation Under Title III of the ADA?

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I. INTRODUCTION

As the United States of America has evolved throughout the years, the various civil rights and liberties that the government guarantees to Americans have simultaneously evolved through powerful social movements.[1] The Disability Rights Movement, commencing in the 1960s, was one such powerful social movement that protected and enriched the lives of individuals with disabilities through the passage of the Americans with Disabilities Act (ADA) in 1990.[2] The ADA offers many protections to individuals with disabilities; Title III of the ADA provides one such protection, which prohibits disability discrimination in all *places of public accommodation*.[3] Currently, however, there is a Federal Circuit Court split debating whether websites for online-only businesses can constitute places of public accommodation, thus having the potential to face liability under Title III of the ADA due to the operation of inaccessible websites.[4] To continue this powerful civil rights evolution in America, this article suggests that online-only businesses with websites lacking a nexus to a physical location should constitute places of public accommodation and therefore face liability under Title III of the ADA.

The latter half of the twentieth century focused on various social and political rights movements that aimed to eliminate discrimination by

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[1] *Socio-Political Movements of the Mid-20th Century*, INTEREXCHANGE (Sept. 28, 2015) [hereinafter *Movements*], https://www.interexchange.org/articles/career-training-usa/2015/09/28/socio-political-movements-mid-20th-century/; *see also Social Movements of the 20th Century*, GA. HIST. SOC'Y, https://georgiahistory.com/education-outreach/online-exhibits/online-exhibits/three-centuries-of-georgia-history/twentieth-century/social-movements/.

[2] *See generally* Abigail Abrams, *30 Years After a Landmark Disability Law, the Fight for Access and Equality Continues*, TIME (July 23, 2020, 9:03 AM), https://time.com/5870468/americans-with-disabilities-act-coronavirus/.

[3] *See* Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (1990). Title III of the ADA outlines and defines various categories of what precisely constitutes places of public accommodation to provide equal access and prevent the discrimination of individuals based on their disability. *See* 42 U.S.C. § 12181.

[4] *See infra* Part IV (highlighting the notable Federal Circuit split in which the First, Fourth, and Seventh Circuits have held that websites can constitute places of public accommodation under Title III of the ADA, while the Third, Sixth, and Ninth have held that websites cannot constitute places of public accommodation absent some sort of physical location attached to that online business).

providing equality and justice to all individuals in this country regardless of their race, gender, socio-economic status, sexual preference, and disability.[5] Advocates in the Civil Rights Movement, Mexican-American Civil Rights Movement, Gay Liberation Movement, Women's Suffrage Movement, Anti-War Movement, and Disability Rights Movement made significant strides in their respective social environments.[6] Central to this article is the significant Disability Rights Movement, which aimed to provide equal opportunity and equal access to people with disabilities, while rallying against negative stereotypes and advocating for institutional change.[7]

In *Martinez v. Cot'n Wash, Inc.*, the California Court of Appeal for the Second District applied a strict method of textual interpretation to decide that, absent any nexus to a physical location or storefront, a website by itself cannot constitute a place of public accommodation under Title III of the ADA.[8] Part II provides an overview of the Americans with Disabilities Act, focusing on a modern conflict emerging from the prominent rise in Title III claims under the ADA.[9] Part III discusses the congressional intent behind the ADA.[10] Part IV provides a historical background of the federal circuit split on determining places of public accommodation, particularly focusing on Ninth Circuit precedent.[11] Part VI analyzes the majority opinion in *Martinez*, set forth by Presiding Justice Frances Rothschild's strict method of textual interpretation for Title III of the ADA.[12] Part VII explains the significance of the *Martinez* decision and the disproportionate impact that this federal circuit split has on the lives of individuals with disabilities.[13] Finally, Part VIII is a brief conclusion of this case note, reiterating the harmful reality of the *Martinez* decision and analogous Ninth Circuit precedent.[14]

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[5] *See generally* Movements, *supra* note 1.
[6] *Id.*
[7] *A Brief History of the Disability Rights Movement,* Anti-Defamation League (Mar. 5, 2017), https://www.adl.org/education/resources/backgrounders/disability-rights-movement.
[8] Martinez v. Cot'n Wash, Inc., 297 Cal. Rptr. 3d 712, 732 (Ct. App. 2022), *review denied*, 2022 Cal. LEXIS 6744 (2022).
[9] *See infra* Part II.
[10] *See infra* Part III.
[11] *See infra* Part IV.
[12] *See infra* Part VI.
[13] *See infra* Part VII.
[14] *See infra* Part VIII.

II. OVERVIEW OF THE AMERICANS WITH DISABILITIES ACT

The Disability Rights Movement was a prominent fight for social equality, opportunity, and advocacy long before the passage of the ADA in 1990.[15] Throughout the 1960s and 1970s, steadfast and ardent activists of the Disability Rights Movement successfully lobbied Congress to pass the first-ever law that would protect the civil rights of people with disabilities in America: the Rehabilitation Act of 1973.[16] The Rehabilitation Act of 1973 prohibited discrimination on the basis of mental or physical disability by providing equal access and opportunity to individuals with disabilities who sought federal government employment or other federally funded programs.[17] The Rehabilitation Act of 1973 focused on breaking down various societal barriers faced by individuals with disabilities by banning discrimination on the basis of disability in all institutions, such as employment, education, and access to society, receiving federal funds.[18] As historic as the Rehabilitation Act was in recognizing individuals with disabilities as a minority class worthy of protection for the first time in American history, the Act was limited in both scope and practice.[19] The Rehabilitation Act was particularly limited in how it defined disability and how it determined which aspects of society could be subject to disability discrimination.[20] Therefore, the Rehabilitation Act was a successful first step that laid the framework for enacting future legislation, further protecting the lives of those with disabilities in America.[21]

In 1990, almost seventeen years after the Rehabilitation Act of 1973, Congress enacted the Americans with Disabilities Act ("ADA"), the first piece of legislation in American history to explicitly eliminate and prevent discrimination against individuals with disabilities in a wider category of social activities including but not limited to education, employment, healthcare, and commerce.[22] Soon after its enactment, in

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[15] Abrams, *supra* note 2.
[16] *See supra* note 7.
[17] *Id.*
[18] Arlene Mayerson, *The History of the Americans with Disabilities Act*, DISABILITY RTS. EDUC. & DEF. FUND (1992), https://dredf.org/about-us/publications/the-history-of-the-ada.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*

2008, the Americans with Disabilities Act Amendment Act ("ADA–AA") was passed to enhance and expand the definition of disability to "make it easier for people with disabilities to obtain protection under the ADA."[23] In 2008, the Americans with Disabilities Act Amendment Act ("ADA–AA") was passed to enhance and expand the definition of disability to "make it easier for people with disabilities to obtain protection under the ADA."[24] The ADA has blatantly mandated that businesses all across the country evaluate and assess whether they are truly providing sufficient and acceptable access to people with disabilities.[25] Additionally, the ADA was drafted with the basic presumption that American individuals with disabilities have a strong desire to work, are capable of working, and should not be excluded or segregated from social activities due to their disability alone.[26] The ADA is currently divided into five different sections, or "Titles."[27] Title I covers equal employment opportunities and employer requirements, Title II covers state and federal government services such as public education or transportation, Title III guarantees equal access to goods and services for businesses, places of public accommodation, and privately owned transportation systems, Title IV covers telecommunication services, and Title V covers general miscellaneous claims.[28]

This article will primarily focus on Title III of the ADA, which prohibits discrimination for all individuals with disabilities in *places of public accommodation*.[29] Accordingly, all places deemed public accommodations must comply with the ADA standards of accessibility to avoid discrimination lawsuits.[30] However, as this article will discuss, there has been great debate over what constitutes a place of public

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[23] 28 C.F.R. § 36.101 (2016) (explaining the purpose and broad coverage of the ADA).
[24] 28 C.F.R. § 36.101 (2016) (explaining the purpose and broad coverage of the ADA).
[25] Mayerson, *supra* note 18.
[26] *Id.*
[27] ADA, *supra* note 3.
[28] *Id.*
[29] Americans with Disabilities Act, 42 U.S.C. § 12181.
[30] *Id.* The purpose and goal of Title III of the ADA is to "implement subtitle A of title III of the Americans with Disabilities Act of 1990, as amended by the ADA Amendments Act of 2008, which prohibits discrimination on the basis of disability by covered public accommodations and requires places of public accommodation and commercial facilities to be designed, constructed, and altered in compliance with the accessibility standards established by this part." 28 CFR § 36.101.

accommodation.[31] Title III of the ADA defines 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 following 12 categories: (1) lodging facility; (2) restaurant or bar; (3) theater, concert hall, or stadium; (4) auditorium, convention center, or similar lecture hall (5) bakery, grocery store, or any shopping center; (6) laundromat, travel service, bank, hospital, or other service establishment; (7) terminal or depot for public transportation; (8) museum, library or place of public collections; (9) park, zoo, or amusement park; (10) nursery, school, or other place of education; (11) day care, homeless shelter, adoption agency, or similar service center; and (12) gymnasium, bowling alley, golf course, or place of similar recreation.[32] Given this categorical definition, websites do not constitute places of public accommodation upon a strict interpretation of the text.[33] However, with the 21st century rise of technology and e-commerce, this strict interpretation presents a significant problem for individuals with disabilities who are unable to engage in online commerce due to inaccessible websites.[34] Given the prominent rise of e-commerce in this country and the arguably ambiguous language of Title III, it appears necessary for Congress to once again expand and amend the ADA to include websites as places of public accommodation.[35]

Long before the ADA, California passed the Unruh Civil Rights Act ("UCRA") in 1959.[36] The UCRA aimed to eliminate business

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[31] *See infra* Part IV (highlighting the Federal Circuit Split in determining whether websites can be considered places of public accommodation and face liability under Title III of the ADA).

[32] 28 C.F.R. § 36.104 (defining a place of public accommodation under Title III of the ADA and providing the clear list of the places of public accommodation that fall under this definition).

[33] *Id.* When using a strict method of textual interpretation to analyze this categorical definition, Title III of the ADA seemingly only considers physical locations, such as a park or school, to be places of public accommodation. Non-physical locations, such as websites, are not explicitly listed as possible places that could constitute places of public accommodation.

[34] *Id.*

[35] *Id.*

[36] Cal. Civ. Code § 51 (Deering, 2016). The text is as follows: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, *disability*, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal

discrimination by ensuring equality for all individuals in California in the realm of commerce and employment.[37] Unlike the ADA, which focuses on providing accessibility and equality for those with disabilities, the UCRA has a much wider scope which focuses on providing accessibility and equality for all people regardless of race, gender, disability, political affiliation, sexuality, etc.[38] Both pieces of legislation—the ADA and UCRA—provide essential rights for individuals with disabilities.[39] Furthermore, individuals with disabilities in California often file claims under both pieces of legislation because the ADA is limited to legal remedies while the UCRA provides monetary remedies for injured plaintiffs.[40] As this article will explain, through *Martinez v. Cot'n Wash, Inc.*, if a plaintiff is unable to show such intentional, willful, and affirmative disability discrimination, they must prove an ADA violation to be successful under the Unruh Act in California.[41] To bring a successful claim under the California Unruh Act, plaintiffs alleging discrimination specifically due to their disability can recover under two different theories: "(1) a violation of the ADA; or (2) denial of access to a business establishment based on intentional discrimination."[42] Due to the dominant rise in e-commerce in today's society, especially during the COVID-19 pandemic when many businesses moved to online platforms, claims of this sort have emerged quite frequently, specifically in California.[43]

As the e-commerce industry becomes more common and technologically advanced on a daily basis, the number of Title III claims under the ADA has created tremendous conflict for businesses and

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accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever" (emphasis added). *Id.*

[37] *Id.*

[38] Sandeep Ravindran, *California's Unruh Act and What It Means for Businesses?*, CODEMANTRA (Nov. 2, 2022), https://codemantra.com/californias-unruh-act-and-what-it-means-for-businesses-in-california/.

[39] *Id.*

[40] *Id.*

[41] Jeffrey B. Margulies & Eva Yang, *CA Court Shuts Down Website Accessibility Claims for Online-Only Businesses*, NORTON ROSE FULBRIGHT (August 2022), https://www.nortonrosefulbright.com/en/knowledge/publications/08b28fd0/ca-court-shuts-down-website-accessibility-claims-for-online-only-businesses.

[42] Martinez v. Cot'n Wash, Inc., 297 Cal. Rptr. 3d 712, 717 (Ct. App. 2022) (citation omitted).

[43] Kristina M. Launey & Minh N. Vu, *Federal Website Accessibility Lawsuits Increased in 2021 Despite Mid-Year Pandemic Lull*, SEYFARTH SHAW LLP (March 21, 2022), https://www.adatitleiii.com/2022/03/federal-website-accessibility-lawsuits-increased-in-2021-despite-mid-year-pandemic-lull/.

disabled individuals across the United States.[44] In California, there has been a significant increase in Title III lawsuits that specifically allege inaccessible website domain violations, thereby not including violations for inaccessible mobile applications or any other Title III violation.[45] Seyfarth Shaw, a prominent law firm involved in ADA claims, has tracked this rise in federal lawsuits under Title III of the ADA since 2013.[46] Back in 2013, Seyfarth Shaw reported 2,722 federal filings under Title III of the ADA across the United States.[47] As of 2021, there were 11,452 federal filings of this same sort.[48] Seyfarth also tracked these Title III lawsuits on a state by state level, finding that more plaintiffs filed Title III lawsuits in California than in all the other forty-nine states combined.[49] This dramatic increase in Title III federal lawsuits, in addition to the staggering amount of lawsuits present in California in particular, presents a major concern that this thunderous e-commerce industry will soon be forced to face.[50]

III. CONGRESSIONAL INTENT BEHIND THE ADA

What did Congress *actually* intend when it brainstormed, drafted, and signed the Americans with Disabilities Act into law? As mentioned previously, the ADA was designed to prevent disability discrimination and provide equal access to places of public accommodation to individuals with disabilities.[51] In 1990, the drafters of the ADA undoubtedly could not

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[44] *Id.*

[45] *Id.* In 2018 in California, there were only 10 lawsuits specifically alleging inaccessible website violations in federal court; in 2021 in California, there were 359 lawsuits specifically alleging inaccessible website violations brought. *Id.* These lawsuits do not account for demand letters sent to firms and any sort of violation of inaccessible mobile applications. *Id.* Nevertheless, this is still a dramatic increase in the amount of Title III lawsuits in California. *Id.*

[46] Minh Vu, Kristina Launey & Susan Ryan, *ADA Title III Federal Lawsuit Filings Hit an All Time High*, SEYFARTH SHAW LLP (February 17, 2022), https://www.adatitleiii.com/2022/02/ada-title-iii-federal-lawsuit-filings-hit-an-all-time-high/.

[47] *Id.*

[48] *Id.* Thus, there was a staggering 320% increase in Title III lawsuits under the ADA from 2013 (2,722 filings) to 2021 (11,452 filings). *Id.*

[49] *Id.* Seyfarth Shaw's report specifically highlighted California, Florida, and New York, since these three states received the most Title III filings. *Id.* In 2021, Seyfarth reported that New York had 2,774 lawsuits; Florida had 1,054 lawsuits; and California had 5,930. *Id.*

[50] *See id.*

[51] *See supra* Part II.

have hypothesized the manner in which the internet would evolve over the years to become so prominent in the national commerce market.[52] Therefore, it is necessary to recognize that the ADA was created during a time when the need to guarantee visually impaired or blind individuals access to the internet was not necessary given the internet's obscurity.[53] Today, however, the internet has been manufactured into every single aspect of our lives, assisting in everyday tasks such as grocery shopping or more complex tasks such as working a full-time job.[54] In order for the ADA to be active and effective in this modern society, legislative [or judicial] change is necessary to maintain Congress's initial mandate to prohibit disability discrimination when the ADA was first created in 1990.[55]

Put simply, Congress enacted the ADA to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[56] The 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."[57] Congress recognized that people with physical and mental disabilities were particularly isolated and segregated individuals who faced discrimination in many aspects of society.[58] Further, the Congressional intent behind the ADA was to provide people with disabilities the same equal access to a plethora of goods and services offered by private establishments that people without disabilities are already provided regularly.[59] Thus, the primary objective of Title III has consistently been "to bring individuals with disabilities into the economic and social mainstream of American life . . . in a clear, balanced, and reasonable manner."[60] Therefore, it is imperative that to respect the Congressional intent behind the ADA, Title III must be amended to keep pace with the modern, technological society of the twenty-first century.[61]

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[52] *See* Martinez v. Cot'n Wash, Inc., 297 Cal. Rptr. 3d 712, 732 (Ct. App. 2022), review denied (Nov. 9, 2022) (explaining that since 1990, "websites have become central to American life").
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] 42 U.S.C. § 12101(b)(1).
[57] 42 U.S.C. § 12101(b)(4).
[58] 42 U.S.C. § 12101(a)(1)–(2).
[59] S. REP. NO. 101-116, at 58 (1989).
[60] H.R. REP. NO. 101-485, pt. 2, at 99 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 382.
[61] *Id.*

IV. BACKGROUND

A. *Federal Circuit Split*

As this article has prefaced, there is a federal circuit court split on whether online-only businesses, absent a nexus to the goods and services of a physical location of that business, can constitute a "place of public accommodation" under Title III of the ADA.[62] Two prominent and opposing views have emerged from this federal circuit split to solve future disputes of this sort.[63] These two differing perspectives have developed a nuanced federal circuit split that highlights the ambiguous statutory language of what exactly constitutes a "place of public accommodation" under Title III of the ADA.[64] The first view, held by the First, Fourth, and Seventh Circuits, holds that any website can be considered a place of public accommodation under Title III ADA and thus face liability if that website is inaccessible to an individual with disabilities.[65] The second view, held by the Third, Sixth, and Ninth Circuits, maintains that websites are *not* places of public accommodation unless the "denial [of equal access to that website] has prevented or impeded a disabled plaintiff from equal

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[62] *See* Margulies & Yang, *supra* note 41.
[63] Martinez v. Cot'n Wash, Inc., 297 Cal. Rptr. 3d 712, 731 (Ct. App. 2022), review denied (Nov. 9, 2022).
[64] *Id.*
[65] *Id*. The First Circuit precedent is rooted in the *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England* decision. 37 F.3d 12, 19 (1st Cir. 1994). In *Carparts*, the First Circuit held that limiting the scope of Title III "places of public accommodation" only to include physical locations "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 . . ." that individuals without disabilities ordinarily enjoy. *Id.* at 20. Fourth Circuit precedent is rooted in the *Mejico v. Alba Web Designs, LLC* decision. 515 F. Supp. 3d 424, 434 (W.D. Va. 2021). In *Mejico*, the Fourth Circuit held that defendant violated Title III of the ADA when a permanently blind plaintiff could not access the defendant's website, thus concluding that a place of public accommodation is not limited to physical establishments and can include commercial websites offering goods and services to customers. *Id.* at 434. Finally, Seventh Circuit precedent is rooted in the *Doe v. Mutual of Omaha Insurance Co.* decision. 179 F.3d 557, 558 (7th Cir. 1999). In *Doe*, the Seventh Circuit held that a place of public accommodation should not be limited to physical locations since the precise site of the sale is actually irrelevant in determining whether a business properly provides equal access to goods and services to the public. *Id.* at 559.

access to, or enjoyment of, the goods and services offered at the defendant's physical facilities."[66] The remaining circuit courts have either remained silent on the matter or have decided cases inconsistently, thus furthering the confusion and indecisiveness surrounding this precarious federal circuit split.[67]

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[66] *Martinez*, 297 Cal. Rptr. 3d at 722 (alteration in original). The Third Circuit precedent is rooted in the *Ford v. Schering-Plough Corp.* decision. 145 F.3d 601, 614 (3d Cir. 1998). In *Ford*, the Third Circuit found that places of public accommodation do not refer to non-physical areas of access because the plain meaning of the statutory language creates no ambiguity. *Id.* at 613–14. Sixth Circuit precedent is rooted in the *Parker v. Metropolitan Life Insurance Co.* decision. 121 F.3d 1006, 1010 (6th Cir. 1997). In *Parker*, the Sixth Circuit recognized that insurance offices were places of public accommodation, but since plaintiff was asking for access to a specific benefit plan from her employer, who was not a place of public accommodation, the Court declared that plaintiff was only entitled to access the goods or services offered from an actual place of public accommodation. *Id.* at 1010. The Sixth Circuit strictly and narrowly defined "place" and "facility" to conclude that places of public accommodation must be physical locations. *Id.* at 1011. Finally, Ninth Circuit precedent that refuses to allow websites to constitute places of public accommodation will be subsequently highlighted in this article. *Robles v. Domino's Pizza, L.L.C.*, 913 F.3d 898, 902 (9th Cir. 2019).

[67] The Second and Eleventh Circuits have provided inconsistent decisions on whether websites can constitute places of public accommodation under Title III of the ADA. *See* Nat'l Fed'n of the Blind v. Scribd Inc., 97 F. Supp. 3d 565, 567 (D. Vt. 2015); Winegard v. Newsday LLC, 556 F. Supp. 3d 173, 174 (E.D.N.Y. 2021); Gil v. Winn-Dixie Stores, Inc., 993 F.3d 1266, 1270 (11th Cir. 2021), *opinion vacated on reh'g*, 21 F.4th 775 (11th Cir. 2021). One district court in the Second Circuit found that websites can be considered places of public accommodation under Title III of the ADA. *Nat'l Fed'n of the Blind*, 97 F. Supp. 3d at 567. In *Nat'l Fed'n of the Blind*, the court found that because the specific text of Title III was ambiguous and that the particular site of a service was irrelevant, a digital library website failing to offer accessible reading services violated the ADA when a blind person was unable to access the goods and services of this library. *Id.* at 569–70. On the other hand, a different district court within the Second Circuit held that Title III of the ADA excludes websites of businesses that lack "public-facing, physical retail operations." *Winegard*, 556 F. Supp. 3d at 174. In *Winegard*, where a deaf plaintiff sued a newspaper company since its company website failed to provide closed captioning for videos, this district court declared that the statutory language only refers to physical places and not stand-alone websites. *Id.* at 180. The Eleventh Circuit has furthered the uncertainty and inconsistency surrounding Title III of the ADA's application to websites as places of public accommodation. *Gil*, 993 F.3d at 1270. Just recently in *Gil*, the Eleventh Circuit vacated its own opinion that declared that websites were not places of public accommodation. *Id.* This Court remanded the case to the district court, declaring the case moot since the previous district court injunction had expired by the time of this appeal. *Id.*

The first view, held by the First, Fourth, and Seventh Circuits, is predicated upon the idea that it is "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."[68] These circuit courts have recognized that websites should fall under the sixth category of "other service establishment" for constituting a place of public accommodation, specifically the "Travel Service" grouping.[69] Specifically, the First Circuit in *Carparts* held that a place of "public accommodation" under Title III of the ADA was not limited to a physical, actual structure or location.[70] Further, the First Circuit reasoned that by including "travel service" and "other service establishment" as possible places of public accommodation, those types of entities do not necessarily require a person to physically enter an actual, physical structure to enjoy the goods and services so a website should be viewed analogously.[71] These circuit courts collectively acknowledge and use Title III's ambiguity regarding what constitutes a "place of public accommodation" to argue that inaccessible websites *should* face liability under Title III of the ADA.[72]

The Third, Sixth, and Ninth Circuits, providing the opposing view, together recognize what has materialized as the "nexus standard," where actionable Title III claims can be brought against businesses with inaccessible websites so long as they have a physical premise, facility, or storefront associated with the website.[73] In response to the First, Second, and Seventh Circuits' reliance on the "other service establishment" and "travel service" categorical placement for websites under the ADA, the Third, Sixth, and Ninth Circuits have consistently held that service establishments and travel services must be read and interpreted in the context of the entire statute (*noscitur a sociis*)—since taking these phrases out of the context creates ambiguous terms that should not be considered in this definition.[74] In other words, if a plaintiff fails to show that the inaccessibility of a business's website impeded their ability to access to

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[68] *Martinez*, 297 Cal. Rptr. 3d at 721–22 (quoting *Carparts Distribution Center v. Automotive Wholesaler's Assn*., 37 F.3d 12, 19–20 (1st Cir. 1994)).
[69] *Martinez*, 279 Cal Rptr. 3d at 721.
[70] *Carparts*, 37 F.3d at 19.
[71] *Id.*
[72] *See generally*, *supra* note 58.
[73] *Martinez*, 297 Cal. Rptr. 3d at 722.
[74] *Id.*

the goods and services at a physical premises, then the plaintiff will not succeed on their ADA cause of action.[75]

B. *Ninth Circuit Precedent*

In *Robles v. Domino's Pizza, LLC*, the Ninth Circuit adopted the latter view that requires a company to have a physical location or storefront in order to consider a website a place of public accommodation under Title III of the ADA and thereby subject it to liability.[76] In *Robles*, Guillermo Robles, a blind individual who accesses the internet with screen-reading software that dictates and vocalizes visual information on websites, sued Domino's Pizza, alleging they had failed to "design, construct, maintain, and operate its [website and app] to be fully accessible to and independently usable by Mr. Robles and other blind or visually-impaired people."[77] Mr. Robles tried to order a pizza from Domino's online platform, but was unsuccessful because the website was incompatible with his reading software that could interpret for him.[78] Therefore, Robles sued in California alleging that the Domino's website and mobile application both violated the UCRA and the ADA—seeking monetary damages through UCRA and injunctive relief through the ADA—in hopes of making this website, and all others, fully accessible to blind or visually impaired individuals.[79] The District Court in this case held that Domino's was not liable under Title III of the ADA.[80]

The Ninth Circuit Court of Appeals reversed, holding that because Domino's had an "actual, physical place where goods or services were open to the public," the associated Domino's website and mobile application were considered places of public accommodation because the website was a direct nexus to this physical location.[81] Here, there was an obvious nexus established from the inaccessible Domino's mobile application and website with Robles' access to the goods and services of this particular place of public accommodation.[82] More specifically, the fact that Robles could not adequately utilize Domino's website and mobile application to locate the nearest restaurant, order a pizza, and then schedule at-home pizza delivery hindered his ability to access to access

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[75] *Id.*
[76] *Robles v. Domino's Pizza, L.L.C.*, 913 F.3d 898, 902 (9th Cir. 2019).
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*; *see also* 42 U.S.C. § 12182(b)(2)(A)(iii).
[81] *See Robles*, 913 F.3d 898 at 905 (quoting Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1113–14 (9th Cir. 2000)).
[82] *Id.*

this place of public accommodation.[83] Here, the Ninth Circuit held that the Domino's website faced liability under Title III of the ADA because a place of public accommodation engages in unlawful discrimination when it fails 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 the auxiliary aids and services."[84] In other words, since Domino's website had a clear nexus to a physical place of public accommodation, it violated the ADA by failing to provide auxiliary services and aids for individuals like Mr. Robles.[85] The Ninth Circuit held that the ADA undoubtedly mandates that all places of public accommodation must provide auxiliary aids and services to individuals who are blind to ensure and grant access to visual materials on websites or databases.[86] This court emphasized that the ADA "applies to the services *of* a place of public accommodation, not services *in* a place of public accommodation."[87] However, the Ninth Circuit refused to decide whether Domino's actually maintained a website and mobile application that complied with the ADA.[88] Instead, the Ninth Circuit remanded to the district court to proceed with discovery to decide if, in fact, Robles was provided "full and equal enjoyment" of Domino's website that the ADA demands.[89]

Upon remand two years later in 2021, the District Court for the Central District of California held that the Domino's Pizza website was not fully accessible through undisputed evidence, but that the mobile application was not proven to be inaccessible because insufficient evidence was provided to support a conclusion otherwise.[90] With regard to the ADA claim of Domino's Pizza website, the expert witnesses brought by both Robles and by Domino's Pizza concluded that the website was not fully accessible since it used "outdated" software.[91] Therefore, since the evidence proved that the website was not fully accessible to a blind individual like Robles, the court granted Robles' motion for summary

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[83] *Id.*
[84] *Id.* at 904–05.
[85] *Id.* at 905.
[86] *Id.*
[87] *Id.*
[88] *Id.* at 911.
[89] *Id.*
[90] Robles v. Domino's Pizza L.L.C., No. 16-6599 JGB (Ex), 2021 WL 2945562, at *1, *8–9 (C.D. Cal. June 23, 2021).
[91] *Id.* at 8.

judgment with regard to Domino's website accessibility.[92] With regard to the ADA claim of Domino's app, since it was not clearly proven that Domino's goods and services were *actually* inaccessible to a blind individual like Robles, the district court denied Robles' motion for summary judgment with regard to Domino's app accessibility.[93] As for the UCRA claims against Domino's Pizza, since the website's inaccessibility violated the ADA, the website also automatically violated the UCRA.[94] Since the Domino's app did not violate the ADA, nor could it be shown that Domino's Pizza intentionally discriminated against Robles in maintaining its own app, the court found that Domino's did not violate UCRA with regard to the Domino's app claim.[95] Therefore, reiterating the *Robles* judgment that websites can be considered places of public accommodation if that website facilitates access to the goods and services of physical places of public accommodation,[96] the District Court ordered that Domino's Pizza bring its website in compliance with the proper accessibility guidelines and standards since it was proven to be inaccessible.[97]

Following this decision in *Robles*, the Ninth Circuit joined the Third and Sixth Circuits to assert that websites cannot be considered places of public accommodation absent a nexus to a physical location.[98] Additionally, this Ninth Circuit decision implied that exclusively online businesses failed to pass this test since they did not have physical locations associated with their businesses.[99] Although the outcome of this decision was successful in part for Robles—as this decision compelled Domino's to update its previously inaccessible website—future plaintiffs who bring discrimination lawsuits against exclusively online businesses would not succeed throughout the Ninth Circuit.[100] Other Ninth Circuit decisions regarding this same matter further highlighted this unfavorable reality.[101]

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[92] *Id.* at 9.
[93] *Id.*
[94] *Id.* at 10.
[95] *Id.*
[96] *Robles v. Domino's Pizza, L.L.C.*, 913 F.3d 898, 902 (9th Cir. 2019).
[97] *Id.*; *see generally* Shawn Henry, *W3C Accessibility Standards Overview*, W3C, https://www.w3.org/WAI/standards-guidelines/ (June 29, 2022) (sharing the goal of creating a single standard set of guidelines used to make web content more accessible for those with disabilities through four goals of accessibility: perceivability, operability, understandability, and robustness).
[98] *Id.*
[99] *Id.* at 905.
[100] *Id.*
[101] *See* Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1115 (9th Cir. 2000) (interpreting the term "place of public accommodation" to mean an actual, physical space, thus enhancing the Third and Sixth Circuit Court

Through the lens of the *Martinez* case, this article highlighted how a subsequent California Court of Appeal decision followed the Ninth Circuit's precedent to put an end to online-only business website liability under Title III of the ADA.[102]

V. FACTS OF THE CASE

Abelardo Martinez, an individual with a visual disability, brought a single cause of action against Cot'n Wash, Inc. (CW) for violating the California Unruh Civil Rights Act when he was unable to fully access and enjoy the goods and services of CW's retail website.[103] CW is a company that exclusively sells all of its products and services on its website for retail purposes—therefore, it does not sell any products or services at its physical location.[104] Martinez, alleging that CW's website was inaccessible to him, is "permanently blind and uses screen readers in order to access the internet and read website content."[105] Besides screen-readers, many have wanted more features on websites to make them more accessible to those with disabilities, including such features as: invisible alternative text to graphics, enhanced keyboard functioning to replace mouse functioning, and navigation tools such as image maps and website headings to make the site more accessible.[106] The importance of incorporating these accessibility features in online platforms is crucial because without them, "a website will be inaccessible to a blind or visually-impaired person using a screen reader."[107]

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precedent holding that an insurance company with an employer-provided disability policy alone does not constitute a place of public accommodation under the ADA even though an insurance company does); *see also* Earll v. eBay, Inc., 599 Fed. Appx. 695, 696 (9th Cir. 2015) (emphasizing the *Weyer* decision to further maintain the viewpoint that because eBay's services on its website were not connected to any physical location or storefront, eBay was not subject to Title III of the ADA since it was not deemed a proper place of public accommodation).

[102] *See infra* Part IV.

[103] Martinez v. Cot'n Wash, Inc., 297 Cal. Rptr. 3d 712, 715 (Ct. App. 2022).

[104] *Id.* at 716.

[105] *Id.*

[106] *Id.*

[107] *Id.*

Martinez alleged that CW intentionally discriminated against him by maintaining a retail website that was not compatible with the necessary screen reading software that Martinez needed to operate the website.[108] As previously mentioned, the two ways to prove a UCRA violation are by proving an ADA violation or by proving intentional discrimination that impedes an individual's full enjoyment and access to the business.[109] The trial court held that CW did not violate the UCRA because Martinez did not adequately allege that CW's website violated Title III of the ADA.[110] Pursuant to the complaint, the trial court determined that CW's website was not a place of public accommodation and that CW's conduct did not evince the requisite discriminatory intent.[111] Alejandro Martinez brought this appeal in the California Court of Appeals (Second District, First Division) as successor in interest since his brother, Abelardo Martinez, died during the lifetime of this appeal.[112] Thus, Martinez brought this appeal to reverse the trial court decision holding that CW's website did not violate the UCRA.[113] As mentioned above, the UCRA ensures that all individuals in California, regardless of their personal characteristics—including one's disability—are afforded the right to full enjoyment of business accommodations, facilities, services, etc.[114]

This court concluded that Martinez did not allege sufficient facts to prove that CW intentionally discriminated against him by maintaining an inaccessible website and refused to recognize the CW website as a place of public accommodation under Title III of the ADA, thus invalidating any ADA violation claim or UCRA violation claim.[115] The *Martinez* court further concluded that until Congress amends the ADA, "retail websites without any connection to a physical space" cannot be interpreted to be places of public accommodation in accordance with Title III of the ADA.[116]

VI. ANALYSIS OF OPINION

A. *Background*

In the *Martinez* decision, Presiding Justice Frances Rothschild concluded that CW's website, which was operated by an online-only

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[108] *Id.* at 715.
[109] *Id.* at 717.
[110] *Id.* at 715.
[111] *Id.*
[112] *Id.* at 715–16. To clarify, the name "Martinez" will serve in this article to mean both Abelardo and Alejandro Martinez. *Id. See also* 12 C.F.R. § 1024.31 (2017) (defining successor in interest to be "a person to whom an ownership

business, could not be considered a place of public accommodation.[117] Therefore, CW did not violate Title III of the ADA.[118] Absent an ADA violation, California courts have held that the plaintiff must alternatively show a defendant's intentional discrimination to violate the UCRA.[119] Justice Rothschild held that Martinez did not sufficiently allege facts to establish intentional discrimination under the Unruh Act, noting that just because CW *knew* of the discriminatory effect of its website, this disparate impact alone does not constitute discriminatory intent.[120]

The *Martinez* court reasoned that to prove a successful Title III violation of the ADA, "a plaintiff must show: (1) a covered disability; (2) that 'the defendant is a private entity that owns, leases, or operates a place of public accommodation; and (3) the plaintiff was denied *public accommodations* by the defendant because of [the] disability.'"[121] As previously discussed, whether a website can be considered a place of public accommodation has led to a federal circuit split debating whether websites could be categorized in any of the twelve statutory categories.[122] Through a three-part analysis evaluating relevant California precedent, statutory language interpretation, and legislative history, the *Martinez* court held that because CW's website does not fall into any of these twelve enumerated categories in the ADA constituting an actual place of public accommodation, it cannot face liability under Title III of the ADA.[123]

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interest in a property securing a mortgage loan subject to this subpart is transferred from a borrower").

[113] *Id.* at 715.

[114] *See* Cal. Civ. Code § 51 (Deering, 2016); *see also supra* text accompanying note 36.

[115] *Martinez*, 297 Cal. Rptr. 3d at 715.

[116] *Id.*

[117] *Id.* at 732.

[118] *Id.*

[119] *Id.* at 717.

[120] *Id.* at 718–20.

[121] *Id.* at 720 (quoting Molski v. M.J. Cable, Inc., 481 F.3d 724, 730 (9th Cir. 2007)).

[122] *Id.* at 720–22.

[123] *Id.* at 720–32.

B. *Relevant California Precedent*

The *Martinez* court, in deciding to adopt the nexus analytical framework set forth by the Third, Sixth, and Ninth Circuit Courts, relied heavily on two California courts of appeal decisions that have previously applied the nexus framework to decide whether a website constitutes a place of public accommodation under Title III of the ADA.[124] As the *Martinez* court recognized, the lack of clear and formative jurisprudence on this matter creates a significant challenge that burdens future courts to navigate this murky federal circuit split.[125]

In *Thurston v. Midvale Corp.*, where plaintiff "sued a restaurant for disability discrimination . . . for maintaining a website that was incompatible with her screen reading software," the court applied a nexus-based approach to find that the restaurant violated the ADA since its website was directly associated with a physical location.[126] Additionally, the *Thurston* court held that this decision was consistent with "Congress's mandate that the ADA keep pace with changing technology to effectuate the intent of the statute."[127] Analogously, in *SDCCU*, where a similarly disabled plaintiff sued a bank that maintained an inaccessible website, the court applied the nexus standard to hold that the plaintiff alleged sufficient ADA violation facts against the bank since the goods and services offered on the website were directly associated with a physical location.[128] The courts in *Thurston* and *SDCCU* never actually reached the legal issue of whether a stand-alone website could be categorized as a place of public accommodation under Title III of the ADA violation because these two cases found clear and sufficient violations of inaccessible websites that were directly associated with physical locations that automatically constituted places of public accommodation.[129] While *Martinez* highlights this nexus-based approach, this opinion failed to acknowledge and expand upon Congress's mandate and intention to keep pace with changing technology throughout this modern era.[130] It would seemingly hold that if the ADA was to keep such pace, then stand-alone websites for online only

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[124] *Id.* at 722–23; *see* Thurston v. Midvale Corp., 252 Cal. Rptr. 3d 292, 302 (Ct. App. 2019); *see also* Martinez v. San Diego Cnty. Credit Union, 264 Cal. Rptr. 3d 600, 603 (Ct. App. 2020) [hereinafter SDCCU].
[125] Martinez v. Cot'n Wash, Inc., 297 Cal. Rptr. 3d 712, 722 (Ct. App. 2022).
[126] *Id.* at 723.
[127] *Id.* (quoting *Thurston*, 252 Cal. Rptr. 3d at 301).
[128] *Id.*
[129] *Id.*
[130] *Id.* at 723, 729.

businesses, given this prominent technological rise of e-commerce, *should* constitute places of public accommodation under the ADA.[131]

Presiding Justice Rothschild cited two other cases that addressed whether a digital cable service constituted a place of public accommodation under Title III of the ADA.[132] Presiding Justice Rothschild introduced *Belton* and *Torres* to provide additional examples of places throughout society that could not be reasonably classified as a place of public exhibition or entertainment within the meaning of Title III of the ADA.[133] As Rothschild explained, *Belton* relied on *Torres* to hold that "a digital cable service was not a place of public accommodation."[134] However, Rothschild kept the door open for future Title III causes of action by noting that just because a digital cable service could not be considered a place of public accommodation, it does not automatically mean that any digital place—such as a retail website—also fails to constitute a place of public accommodation.[135]

C. *Statutory Language Interpretation*

While some courts believe statutory interpretation is necessary to solve issues of ambiguous language, other courts are hesitant to interpret statutes so broadly because it runs the risk of frustrating the main purpose and intent of the legislation itself.[136] The *Martinez* court takes the latter

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[131] *Id.*

[132] *Id.* at 723–24; *see* Torres v. AT&T Broadband, LLC, 158 F. Supp. 2d 1035, 1037–38 (2001) (where visually impaired plaintiffs sued under the ADA since their digital cable providers failed to make the channel listing programs fully accessible to them, this Court held that the defendant's digital cable system did not constitute a facility nor a place of public accommodation "because in no way does viewing the system's images require the plaintiff to gain access to any actual physical public place."); *see also* Belton v. Comcast Cable Holdings, LLC, 60 Cal. Rptr. 3d 631, 642–43 (Ct. App. 2007) (where blind individuals seeking to listen to FM or music services were required to purchase a basic cable tier which included programming that they could not view due to its inaccessibility, this Court held that cable services were not places of public accommodation so plaintiffs had no viable ADA claim).

[133] *See* Martinez v. Cot'n Wash, Inc., 297 Cal. Rptr. 3d 712, 723 (Ct. App. 2022).

[134] *Id.*

[135] *Id.* at 723–24.

[136] *See supra* Part IV (discussing this dynamic Federal Circuit split where the First, Fourth, and Seventh Circuits interpreted this ambiguous language broadly

viewpoint by respecting the plain language of the ADA in an attempt to comply with the legislative intent of Congress when it initially drafted the ADA.[137] The plaintiff in *Martinez* argued that the plain meaning of the statute is sufficiently broad to be expanded to include retail websites since "a physical place is not a necessary component of the ADA's definition of a place of public accommodation."[138] The Court disagreed, holding that just because the ADA does not explicitly include a physical place requirement, the plain meaning of the word "place," given the many dictionary definitions maintaining that a place involves a physical location, is easily understood to have intentionally excluded business establishments that lack a physical presence despite not being explicitly stated in the ADA.[139] Additionally, Rothschild incorporated a Supreme Court case that reversed a New Jersey Supreme Court decision that declared the Boy Scouts organization to be a place of public accommodation without defining what a "place" was in that case.[140] In *Boy Scouts of America v. Dale*, the Supreme Court held that the word "place" connotes a physical place when it decided that the Boy Scouts organization was not a place of public accommodation.[141] Although Rothschild agreed that the term "place of public accommodation" was indeed ambiguous, Rothschild concluded that this term clearly connoted a physical place once historical circumstances, dictionary definitions, and legislative history were incorporated into the analysis.[142]

Additionally, *Martinez* argued that a retail website should constitute a "facility" within the meaning of Title III of the ADA since this term was also ambiguous and explicitly present in the statutory language of the ADA.[143] However, once this court reviewed the statute's legislative history and enactment purposes, Presiding Justice Rothschild once again held that a mere website could not constitute a "facility" under the ADA because it failed to fall into one of the explicit and enumerated categories that were used to define the word "facility" in the statutory language.[144]

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while the Third, Sixth, and Ninth Circuits strictly interpreted this same language).

[137] *Martinez*, 297 Cal. Rptr. 3d at 724.

[138] *Id.*

[139] *Id.* at 725.

[140] *Id.* (referencing Boy Scouts of America v. Dale, 530 U.S. 640, 657 (2000)).

[141] Boy Scouts of America v. Dale, 530 U.S. 640, 657 (2000).

[142] *Id.* at 656–57; *see also Martinez*, 297 Cal. Rptr. 3d at 725.

[143] *Martinez*, 297 Cal. Rptr. 3d at 725–26.

[144] *See* 28 C.F.R. § 36.104 (Title III of the ADA defines "facility" to be "all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or

The plaintiff in this case reminded the court that the purpose of the ADA, since its inception, was to afford individuals with disabilities all the rights and privileges that people without disabilities experienced in the socio-economic realm of society.[145] However, this opinion concluded that retail websites are "their own animal, a creature unlike brick and mortar establishments" by reiterating the idea that differentiating purely digital transactions and transactions with physical components is not an absurd or illogical pathway forward.[146] This decision intentionally goes against this critical purpose of the ADA because it limits and impedes the access and enjoyment of modern day economic channels of communication to individuals with disabilities.[147]

D. *Inaction from Congress and Legislative History*

The *Martinez* court explained that, although the ADA was enacted in 1990, during a time when commercial businesses did not have the online presence that online commercial businesses have today, Congress's intentional decision to use the phrase "place" was implicitly a clear exclusion of any business that lacks a physical place.[148] Further, since e-commerce was not as common during 1990's as it is today, the architects of this statute failed to categorize websites as places of public accommodation.[149] With the understanding that the intentions of Congress can and should change as society progresses with time, it should be highlighted that Congress has previously been asked to amend the ADA.[150] In 2008, Congress amended the ADA to clarify the definition of "disability" since there was judicial confusion for interpreting this phrase and its relation to the various ADA protections.[151] Therefore, given the obvious judicial confusion of places of public accommodation evidenced from this major federal circuit split, Congress's inaction on the matter is inexcusable.[152]

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personal property, including the site where the building, property, structure, or equipment is located."); *Martinez*, 297 Cal. Rptr. 3d at 726.

[145] *Martinez*, 297 Cal. Rptr. 3d at 727–28.

[146] *Id.* at 727.

[147] *Id.*

[148] *Id.* at 725.

[149] *Id.*

[150] *Id.* at 729.

[151] *Id.*

[152] *Id.*

Although Congress has not acted to amend and modify the definition of what constitutes a place of public accommodation, in 2022 the Department of Justice (DOJ) recognized how ambiguous and confusing the term is when it concluded that websites *should* be considered places of public accommodation.[153] However, because the DOJ has failed to exercise its rulemaking power and issue any regulations on whether websites for online only businesses constitute places of public accommodation under Title III of the ADA, Justice Rothschild concluded that the joint failure from the DOJ and Congress to provide such clarification "is not a reason for [a California Court of Appeal] to step in and provide that clarification."[154]

In *Martinez*, the opinion affirmed the view that the judicial system needs to stay out of the legislative process of democracy, so that legislatures write the law and judges interpret the law as written.[155] The presiding Justice Rothschild agreed that the word "facility" *should* incorporate websites as places of public accommodation, but maintained that until Congress asks to amend the language of this particular statute, the court would only interpret the law from the current language of the statute.[156] Thus, the court concluded that CW's website could not be considered a place of public accommodation because "the language of the [ADA], when considered in the context . . . of formal guidance, [did] not permit [the court] to adopt an interpretation of the [ADA] that is not dictated by its language."[157]

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[153] *Guidance on Web Accessibility and the ADA*, U.S. DEP'T OF JUST. (Mar. 18, 2022), https://beta.ada.gov/resources/web-guidance/. Although the DOJ has provided its stance on whether websites should be considered places of public accommodation, every effort put forth by the DOJ since the ADA's passage in 1990 has been abandoned. *Title III of the Americans with Disabilities Act and Website Compliance*, AM. BAR. ASS'N (Feb. 22, 2022), https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2022/february-2022/title-iii-americans-disabilities-act-website-compliance. The American Bar Association (ABA) provides a detailed account of the DOJ's efforts by explaining that the DOJ first offered its viewpoint in a 2003 Voluntary Action Plan, followed by a 2010 Advance Notice of Proposed Rulemaking proposal, 2014 settlements, the 2017 rule applying to federal websites, and a 2018 letter from Assistant Attorney General Stephen E. Boyd regarding flexibility in website accessibility compliance. *Id.* As the ABA explains, these efforts may influence how courts decide future cases, but until Congress creates a new law or amends the old law, they carry little weight. *Id.*

[154] *Martinez*, 297 Cal. Rptr. 3d at 730.

[155] *Id.* at 731.

[156] *Id.*

[157] *Id.*

VII. SIGNIFICANCE AND IMPACT

According to the Center for Disease Control and Prevention, there are sixty-one million adults living with a disability in the United States—this is approximately 26% of all adults living in the United States.[158] More specifically, there are approximately twelve million adults, aged forty or older, who have vision disabilities.[159] Of that group, over one million adults were legally blind in America as of 2015.[160] By 2050, scientists associated with the National Institutes of Health (NIH) have expected that the number of people in the United States with visual impairment and blindness disabilities will double.[161] These significant statistics highlight a concerning problem for our technologically advanced, modern society: the growing number of individuals with vision impairment disabilities in America alongside a rise of e-commerce primarily on online websites.[162] With e-commerce becoming more popular and normalized each day, individuals with disabilities should not be hindered from accessing and enjoying the benefits of e-commerce websites like other Americans without disabilities.[163]

This is a devastating reality for businesses in California, which have been forced to become online-only businesses due to the rise of

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[158] Carole Martinez, *Disability Statistics in the US: Looking Beyond Figures for an Accessible and Inclusive Society*, INCLUSIVE CITY MAKER (Apr. 8, 2022), https://www.inclusivecitymaker.com/disability-statistics-in-the-us/ (citing *Disability Impacts All of Us*, CTR. FOR DISEASE CONTROL AND PREVENTION (May 15, 2023), https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html.).

[159] *Id.*

[160] *Id.*

[161] Rohit Varma et al., *Visual Impairment and Blindness in Adults in the United States: Demographic and Geographic Variations from 2015 to 2050*, 134 JAMA OPHTHALMOLOGY 802, 807–09 (2016). This study was conducted by eight doctors from various departments of ophthalmology across the country. *Id.* JAMA Ophthalmology is a peer-reviewed medical journal published by the American Medical Association. *Id.* This study was funded by the National Eye Institute which is part of NIH. *Id.* The study found that in 2015, 3.22 million people fell in the specific visual impairment category of disability, while 1.02 million people were diagnosed with being legally blind. *Id.* By 2050, these scientists approximate that 6.95 million people with have a specific visual impairment while 2.01 million people will be legally blind. *Id.*

[162] *Id.*

[163] *Id.*

COVID-19 in 2020.[164] It is equally, if not more, devastating for individuals with disabilities in California who are unable to engage in and enjoy e-commerce on inaccessible websites.[165] If individuals with disabilities cannot navigate the websites to shop, those businesses risk losing sales and profits unless they abide by the appropriate website accessibility standards.[166] In this era of modern technology and the rise of e-commerce, the *Martinez* and *Robles* decisions together create an obvious problem for shoppers engaging with small businesses and online-only businesses.[167] If individuals with disabilities continue to be denied access to online-only business websites for e-commerce, this could lead to a plethora of ADA and UCRA lawsuits aiming to prevent this palpable disability discrimination.[168] Since the pandemic in 2020, online shopping has become common in today's society.[169] For example, in 2019, people engaged in online shopping at least one time per week was 11.6%.[170] In 2020, however, when COVID-19 emerged, this number skyrocketed to 51.2%.[171] As e-commerce is starting to become a norm, it presents an alarming reality for customers with blind or visually-impaired disabilities who cannot access and enjoy online-only business websites.[172]

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[164] Maggie Murphy, *The Impact the Pandemic Has Had on California Businesses*, CAL. BUS. J., https://calbizjournal.com/the-impact-the-pandemic-has-had-on-california-businesses (last visited [last visited date, time AM/PM]) (explaining the severe hit that California's economy took with businesses closing, particularly highlighting that one third of the state's restaurants were forced to shut down due to the pandemic).

[165] *Id.*

[166] Gus Alexiou, *Retailers to Lose $828 Million of Sales Over Christmas Due to Inaccessible Websites*, FORBES (Dec. 19, 2021, 8:00 AM), https://www.forbes.com/sites/gusalexiou/2021/12/19/retailers-to-lose-828-million-of-sales-over-christmas-due-to-inaccessible-websites/. This article highlights the economic concept that when customers do not have an enjoyable shopping experience due to accessibility issues, they will abandon their online shopping carts and stop shopping on that website. *See id.* To explain this further, if a blind person who relies on screen reading software to access websites cannot access a specific website to engage in e-commerce, that company will inevitably lose business profits from the absence of the user. *Id.*

[167] *See generally* Martinez, *supra* note 8; *see also* Robles, *supra* note 76.

[168] *See generally* Martinez, *supra* note 8.

[169] Mischa Young, Jaime Soza-Parra & Giovanni Circella, *The Increase in Online Shopping During COVID-19: Who is Responsible, Will it Last, and What Does it Mean for Cities?*, REG'L SCI. POL'Y & PRAC. (Jan. 31, 2022), https://doi.org/10.1111/rsp3.12514.

[170] *Id.*

[171] *Id.*

[172] *Id.*

It is equally as important to recognize that e-commerce is the future, and it is certainly not going away any time soon in the United States.[173] In the United States, retail e-commerce sales are projected to rise from 875 billion dollars in 2022 to 1.3 trillion dollars in 2025.[174] E-commerce sales expect to make up 20.8% of retail sales worldwide in 2023 and increase up to 24% of retail sales worldwide in 2026.[175] Additionally, estimates indicate that 218.8 million United States consumers will shop online in the year 2023.[176] By 2026, projections show that there will be 230.6 million United States consumers who will shop online; that is significantly higher than the 208.1 million United States consumers who shopped online in the year 2020.[177] Given these statistics about e-commerce throughout the United States, the inaction from Congress is unacceptable.[178] This inaction impliedly encourages contrasting viewpoints to emerge amongst varying Federal Circuit Courts on whether websites constitute places of public accommodation, thus hindering the equal opportunity and access protections that Title III of the ADA is *supposed* to provide to individuals with disabilities.[179]

The decision in *Martinez* carries a tremendously detrimental impact that has paved a controversial pathway for future California courts and Ninth Circuit courts more broadly.[180] After *Martinez* and Ninth Circuit court decisions, future courts will likely be encouraged to adhere to a "nexus standard" in holding that online-only business websites absent an actual, physical location cannot be deemed places of public

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[173] Adeel Qayum, *The Future of Ecommerce: How Ecommerce will Change in 2023*, OBERLO (Dec. 14, 2022), https://www.oberlo.com/blog/future-of-ecommerce.

[174] Statista Research Department, *E-Commerce in the United States: Statistics and Facts*, STATISTA (Nov. 23, 2022), https://www.statista.com/topics/2443/us-ecommerce/#topicOverview.

[175] Thomas J. Law, *19 Powerful Ecommerce Statistics That Will Guide Your Strategy in 2023*, OBERLO (Nov. 7, 2022), https://www.oberlo.com/blog/ecommerce-statistics.

[176] *Id.*

[177] *How Many People Shop Online in the US? (2020-2026)*, OBERLO, https://www.oberlo.com/statistics/how-many-people-shop-online-in-the-us.

[178] *Id.*; Thomas J. Law, *19 Powerful Ecommerce Statistics That Will Guide Your Strategy in 2023*, OBERLO (Nov. 7, 2022), https://www.oberlo.com/blog/ecommerce-statistics.

[179] *See supra* Part IV (explaining the prominent Federal Circuit split regarding places of public accommodation).

[180] Martinez v. Cot'n Wash, Inc., 297 Cal. Rptr. 3d 712, 722 (Ct. App. 2022).

accommodation in accordance with Title III of the ADA.[181] This observation is noticeable from *Martinez* citing to *Robles* in its opinion that the rationale set forth in the *Martinez* decision about websites not constituting places of public accommodation absent some sort of physical location is analogous to that in *Robles*.[182] Since the *Martinez* decision arose from the California Court of Appeals for the Second District, it is not necessarily bound by the Ninth Circuit's precedent set forth by *Robles*.[183] However, even though the Ninth Circuit *Robles* decision is only persuasive authority for California Court of Appeal cases,[184] this *Martinez* decision has clearly taken the pathway set forth by *Robles*.[185] Until the Supreme Court of the United States speaks on the matter, or until Congress acts to amend the ADA itself, the pathway that California Courts may choose to take will have a disproportionate impact on online-only businesses engaging in e-commerce.[186]

VII. CONCLUSION

Although the *Robles* decision was powerful in making one single website more accessible to individuals with disabilities, that was only possible because Domino's had a physical location associated with its website.[187] The *Martinez* decision highlights the devastating reality that individuals with disabilities face if they desire to engage in e-commerce and access websites of online-only businesses that lack such a physical location.[188] As noted in this article, there is a significant portion of the US population—a portion of the population that is increasing by the year—who is visually impaired or legally blind.[189] Guaranteeing individuals access to places of public accommodation means granting people the right to operate and enjoy online, non-physical locations.[190] Narrowing the scope of Title III's categorical definition of a place of public accommodation to only account for physical locations is discriminatory, unjust, and unfair.[191] Given the rise in e-commerce and the confusion

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[181] *Id.*
[182] *Id.*
[183] *Legal Research: An Overview: Mandatory v. Persuasive Authority*, UCLA SCH. OF L., (last updated Feb. 14, 2023, 5:03 PM), https://libguides.law.ucla.edu/c.php?g=686105&p=5160745.
[184] *Id.*
[185] *Martinez*, 297 Cal. Rptr. 3d at 722.
[186] *Id.*
[187] *See* Robles v. Domino's Pizza, L.L.C., 913 F.3d 898, 905 (9th Cir. 2019).
[188] *Martinez*, 297 Cal. Rptr. 3d at 732.
[189] Varma, *supra* note 161.
[190] *See supra* Part II.
[191] *Id.*

resulting from this prominent Federal Circuit split, it seems mandatory for Congress to expand its definition of a *place of public accommodation* to allow individuals with disabilities greater access to the goods and services of online-only businesses.[192]

It is the opinion of this article that the Ninth Circuit should join its sister circuits, the First, Fourth, and Seventh Courts, in holding that stand-alone websites for businesses *should* constitute places of public accommodation under Title III of the ADA.[193] The *Martinez* decision will have a damaging impact on individuals with disabilities, specifically those who are blind or have vision-impaired disabilities and still wish to enjoy the goods and services offered from e-commerce platforms or any other stand-alone website for a business.[194] With the rise and prominence of e-commerce in American society today, Title III ADA claims, as well as UCRA claims in California, will certainly emerge with great frequency and ferocity.[195] To respect the Congressional intent behind the Americans with Disabilities Act, future courts within the Ninth Circuit should interpret Title III's ambiguous language loosely, to include online-only business websites as places of public accommodation.[196] By refusing to resolve this ambiguity, future courts will continue to depart from what Congress intended when it created the ADA to prohibit disability discrimination in America.

[192] *See supra* Part III.
[193] *See supra* Part IV.
[194] *See supra* Part VII.
[195] *See supra* Part VII.
[196] *See supra* Part III.