WEBSITE AND MOBILE APP ACCESSIBILITY UNDER THE ADA

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Through Policies, Procedures and Website Audits) from the April 2020 updates to
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Ian C. Ballon
Greenberg Traurig, LLP

Silicon Valley:	Los Angeles:
1900 University Avenue, 5th Fl.	1840 Century Park East, Ste. 1900
East Palo Alto, CA 914303	Los Angeles, CA 90067
Direct Dial: (650) 289-7881	Direct Dial: (310) 586-6575
Direct Fax: (650) 462-7881	Direct Fax: (310) 586-0575

Ballon@gtlaw.com
<www.ianballon.net>
LinkedIn, Twitter, Facebook: IanBallon

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www.ianballon.net

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JD, LLM, CIPP/US

Ballon@gtlaw.com
LinkedIn, Twitter, Facebook: IanBallon

Silicon Valley
1900 University Avenue
5th Floor
East Palo Alto, CA 94303
T 650.289.7881
F 650.462.7881

Los Angeles
1840 Century Park East
Suite 1900
Los Angeles, CA 90067
T 310.586.6575
F 310.586.0575

Ian C. Ballon is Co-Chair of Greenberg Traurig LLP's Global Intellectual Property & Technology Practice Group and represents companies in intellectual property litigation (including copyright, trademark, trade secret, patent, right of publicity, DMCA, domain name, platform defense, fair use, CDA and database/screen scraping) and in the defense of data privacy, cybersecurity breach and TCPA class action suits.

Ian is also the author of the leading treatise on internet and mobile law, *E-Commerce and Internet Law: Treatise with Forms 2d edition*, the 5-volume set published by West (www.IanBallon.net) and available on Westlaw, which includes extensive coverage of data privacy and cybersecurity breach issues, including a novel transactional approach to handling security breaches and exhaustive treatment of trends in data privacy, security breach and TCPA class action suits. In addition, he serves as Executive Director of Stanford University Law School's Center for the Digital Economy. He also chairs PLI's annual Advanced Defending Data Privacy, Security Breach and TCPA Class Action Litigation conference. Ian previously served as an Advisor to ALI's Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transactional Disputes (ALI Principles of the Law 2007) and is a member of the consultative group for the Data Privacy Principles of Law project (ALI Principles of Law Tentative Draft 2019).

Ian was named the Lawyer of the Year for Information Technology Law in the 2021, 2020, 2019, 2018, 2016 and 2013 editions of Best Lawyers in America and was recognized as the 2012 New Media Lawyer of the Year by the Century City Bar Association. In 2020, 2019 and 2018 he was recognized as one of the Top 1,000 trademark attorneys in the world for his litigation practice by *World Trademark Review*. In addition, in 2019 he was named one of the top 20 Cybersecurity lawyers in California and in 2018 one of the Top Cybersecurity/Artificial Intelligence lawyers in California by the *Los Angeles and San Francisco Daily Journal*. He received the "Trailblazer" Award, Intellectual Property, 2017 from *The National Law Journal* and he has been recognized as a "Groundbreaker" in *The Recorder*'s 2017 Litigation Departments of the Year Awards for winning a series of TCPA cases. In addition, he was the recipient of the California State Bar Intellectual Property Law section's Vanguard Award for significant contributions to the development of intellectual property law. He is listed in Legal 500 U.S., The Best Lawyers in America (in the areas of information technology and intellectual property) and Chambers and Partners USA Guide in the areas of privacy and data security and information technology. He has been recognized as one of the Top 75 intellectual property litigators in California by the *Los Angeles and San Francisco Daily Journal* in every year that the list has been published (2009 through 2020). Ian was also listed in *Variety's* "Legal Impact Report: 50 Game-Changing Attorneys" (2012), was recognized as one of the top 100 lawyers in L.A. by the *Los Angeles Business Journal* and is both a Northern California and Southern California Super Lawyer.

Ian holds JD and LLM degrees and the CIPP/US certification from the International Association of Privacy Professionals (IAPP).

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networks is set forth in chapter 51.

48.06[3] Challenges in Controlling Corporate Communications

Network access makes it easier for employees to steal or unintentionally divulge trade secrets or other company communications, which ultimately could be circulated to third-parties or posted online. Companies likewise run into problems when employees post confidential information on securities bulletin boards and chat rooms, potentially in violation of federal securities laws.[1] Efforts to curb these problems (as well as even mundane employment disputes), in turn, may lead to the creation of employee gripe sites (much in the same way that third parties may create consumer criticism sites).[2]

Employee education, policies and procedures should attempt to limit the risk of unauthorized corporate disclosures. Security measures such as internal use of encryption and (where necessary) email monitoring also may help address the problem. A number of suggested internal policies are considered in chapter 58 in connection with intranet policies and extranet agreements.[3] Businesses also should adopt a more gentle approach to resolving both internal and external disputes, to avoid such conflicts spilling over into cyberspace.[4]

48.06[4] Website and Mobile App Accessibility Under the Americans With Disabilities Act and Related State Laws

Websites and mobile apps deemed to service (or in some circuits, to constitute) *places of public accommodation* under Title III of the Americans With Disabilities Act[1] (ADA) must be accessible to those with disabilities, including people with

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[Section 48.06[3]]

[1]*See supra* § 32.04[5].

[2]*See supra* §§ 6.14[5], 7.07[10], 7.12, 9.13, 12.03[3], 12.05[4]; *infra* chapter 57.

[3]*See infra* §§ 58.10 to 58.12.

[4]*See infra* chapter 57.

[Section 48.06[4]]

[1]42 U.S.C.A. § 12182(a). The ADA "as a whole is intended 'to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.' " *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 589 (1999), *quoting* 42 U.S.C.A. § 12101(b)(1).

impaired hearing or vision, to avoid liability under the Act. The ADA covers three main types of discrimination, each of which is addressed in one of the statute's three main subchapters: Title I prohibits discrimination in private employment; Title II prohibits discrimination by public entities (state or local governments); and Title III prohibits discrimination by a *place of public accommodation*, which is a private entity that constitutes one or more of the twelve

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Title III "advances that goal by providing 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 accommodations by any person who owns, leases (or leases to) or operates a place of public accommodation.' " *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 904 (9th Cir. 2019), *quoting* 42 U.S.C.A. § 12182(a). Discrimination under the Act encompasses the denial of the opportunity, by the disabled, to participate in programs or services, or providing them separate but unequal goods or services. *See* 42 U.S.C.A. § 12182(a). It also provides that a place of public accommodation engages in unlawful discrimination if 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 auxiliary aids and services." *Id.* § 12182(b)(2)(A)(iii); *see also id.* § 12103(1) (defining *auxiliary aids and services*); 28 C.F.R. § 36.303(a) ("A public accommodation shall take those steps that 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, unless the public accommodation can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden, *i.e.*, significant difficulty or expense."). U.S. Department of Justice (DOJ) regulations further require that a public accommodation "furnish appropriate auxiliary aids and services where necessary to ensure *effective communication* with individuals with disabilities." 28 C.F.R. § 36.303(c)(1) (emphasis added); *see also Bragdon v. Abbott,* 524 U.S. 624, 646 (1998) (holding that DOJ's administrative guidance on the ADA is entitled to deference); *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 904 (9th Cir. 2019) (same).

The DOJ defines *auxiliary aids and services* to include "accessible electronic and information technology" or "other effective methods of making visually delivered materials available to individuals who are blind or have low vision." 28 C.F.R. § 36.303(b)(2); *Robles,* 913 F.3d at 904-05 (holding that Domino's website and app constituted auxiliary aids and services that Domino's, as a place of public accommodation, was required to make accessible to those who are blind); *Reed v. CVS Pharmacy, Inc.*, Case No. CV 17–3877–MWF (SKx), 2017 WL 4457508, at *4 (C.D. Cal. Oct. 3, 2017) (holding that although "the regulations emphasize that . . . no specific auxiliary aid or service is required in any given situation, whatever auxiliary aid or service the public accommodation chooses to provide must be effective.").

statutorily enumerated commercial places available to the public.[2] Website and mobile app accessibility typically arises under Title III, although, as discussed later in this section, a small number of suits have been brought under Title II.

Title III does not mandate accessibility for all virtual locations, but it has been widely held applicable to websites and apps that service places of *public accommodation*, which is broadly defined under the statute to include locations that offer goods or services, facilities, stores, restaurants, hotels, and other places in the physical world. Where there is not a sufficient nexus between a website or app and a place in the physical world that qualifies as a place of public accommodation, an ADA Title III suit may not be maintained in a majority of circuits. A minority, however, have held that a website or app itself may constitute a place of public accommodation and therefore be subject to the ADA even if it does not service or have a nexus with a physical world location. Some state laws also potentially may require that websites and apps be accessible. Even where a business may not be legally required to do so, many have chosen to make their websites and mobile apps accessible to the deaf (through closed captioning) and blind (by making their sites compatible with screen reader software), in the interest of good customer relations.

Federal government websites must be accessible to individuals with disabilities,[3] but the ADA, which was enacted in 1990, neither expressly covers nor expressly excludes private websites.

To state a claim for an ADA violation, a plaintiff must allege (1) that the plaintiff is disabled within the meaning of the ADA, (2) that the defendant owns, leases, or operates a place of public accommodation, and (3) that the defendant discriminated against the plaintiff by denying the plaintiff a full and equal opportunity to enjoy the services the defendant provides.[4] A majority of circuit courts that have analyzed the definition of a place of *public accommodation*,[5] including the Third, Fifth, Sixth and Ninth Circuits, have held that it

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[2] *A.L. by and through D.L. v. Walt Disney Parks & Resorts US, Inc.*, 900 F.3d 1270, 1289 (11th Cir. 2018).

[3] 29 U.S.C.A. § 794(d).

[4] *E.g.*, *Camarillo v. Carrols Corp.*, 518 F.3d 153, 156 (2d Cir. 2008).

[5] The statute defines a place of public accommodation as the following (if they affect commerce):

must be a physical location.[6] By contrast, the First and

(A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

(B) a restaurant, bar, or other establishment serving food or drink;

(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;

(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

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

42 U.S.C.A. § 12181(7).

[6] *See Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612–14 (3d Cir. 1998) (rejecting the reasoning in *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Association of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994), and holding that the term *public accommodation* and the list of examples in the statute were not ambiguous and did not refer to non-physical access); *Magee v. Coca–Cola Refreshments USA, Inc.*, 833 F.3d 530, 534 & n.23 (5th Cir. 2016) (concluding that vending machines are not places of public accommodation because the ADA definition of *public accommodation* only includes actual physical spaces open to the public; "In following the Third, Sixth, and Ninth Circuits, we acknowledge our departure from the precedents of the First, Second, and Seventh Circuits, which have interpreted the term "public accommodation" to extend beyond physical places."), *cert. denied*, 138 S. Ct. 55 (2017); *Parker v. Metropolitan Life Insurance Co.*, 121 F.3d 1006, 1010-15 (6th Cir. 1997) ("The clear connotation of the words in § 12181(7) is that a public accommodation is a physical place."); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114-15 (9th Cir. 2000) (holding that "some connection between the good or service complained of and an actual physical place is required" because, based on the enumerated list set forth in 42 U.S.C. § 12181, a

Second Circuits have taken a broader view (which is also the view expressed in *dicta* in two Seventh Circuit opinions) by analyzing the nature of a travel agency and insurance office (which, unlike websites and apps, are expressly enumerated in the statutory definition of a place of public accommodation[7]).

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place of public accommodation must be an "actual, physical place . . . where goods or services are open to the public."); *see also Earll v. eBay, Inc.*, 599 F. App'x 695, 696 (9th Cir. 2015) (affirming dismissal of plaintiff's ADA claim based on *Weyer*; "Because eBay's services are not connected to any 'actual, physical place[ ],' eBay is not subject to the ADA."); Kathleen Finnerty, Paul McGrady & Christopher Marlow, *Web Access for the Disabled Under the ADA*, Greenberg Traurig Alert, Oct. 2006.

[7]*See, e.g.*, *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n*, 37 F.3d 12, 19-20 (1st Cir. 1994) (reversing the lower court's order dismissing plaintiffs' suit challenging the decision of a trade association and administering trust for a health benefit plan that limited lifetime benefits for illnesses related to AIDS because "[t]o . . . limit the application of Title III to physical structures . . . would severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public."; "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."); *Pallozzi v. Allstate Life Insurance Co.*, 198 F.3d 28, 32–33 (2d Cir. 1999) (citing the First Circuit's *Carparts* decision and holding, in the context of insurance, that "Title III's mandate that the disabled be accorded 'full and equal enjoyment of the goods, [and] services . . . of any place of public accommodation,' . . . suggests to us that the statute was meant to guarantee them more than mere physical access. . . . We believe an entity covered by Title III is not only obligated by the statute to provide disabled persons with physical access, but is also prohibited from refusing to sell them its merchandise by reason of discrimination against their disability."), *amended on denial of reh'g*, 204 F.3d 392 (2d Cir. 2000); *Morgan v. Joint Administration Board, Retirement Plan of Pillsbury Co. & American Federation of Grain Millers, AFL-CIO-CLC*, 268 F.3d 456, 459 (7th Cir. 2001) (stating in *dicta* that "[t]he defendant asks us to interpret 'public accommodation' literally, as denoting a physical site, such as a store or hotel but we have already rejected that interpretation. An insurance company can no more refuse to sell a policy to a disabled person over the Internet than a furniture store can refuse to sell furniture to a disabled person who enters the store."); *Doe v. Mutual of Omaha Insurance Co.*, 179 F.3d 557, 559 (7th Cir. 1999) (*citing* the First Circuit's *Carparts Distribution Center* case and stating in *dicta* that section 12182(a) means that "the owner or operator of a store, hotel, restaurant, dentist's office, travel agency, theater, website, 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."); *see also National Federa-*

Consequently, many courts that have considered the issue to date (including the Ninth Circuit, the Eleventh Circuit (in a non-precedential case[8]) and district courts in the Fifth, Ninth, and Eleventh Circuit) have concluded that a Title III claim may not be brought against Internet-only service providers[9] and may only be maintained over website or mobile app accessibility where there is a nexus between the website

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tion of the Blind v. Scribd Inc., 97 F. Supp. 3d 565, 568-70 (D. Vt. 2015) (observing the circuit split between the First Circuit, on the one hand, and the Third, Sixth, Seventh and Ninth Circuits).

[8]In an unreported, non-precedential case, an Eleventh Circuit panel reversed a lower court order dismissing plaintiff's ADA Title III website accessibility claim because the plaintiff plausibly alleged a nexus between its website and physical world locations. *See Haynes v. Dunkin Donuts LLC*, 741 F. App'x 752 (11th Cir. 2018). An earlier reported decision that did not involve website accessibility could also be read to support the view that a nexus is required. In *Rendon v. Valleycrest Productions, Ltd.*, 294 F.3d 1279 (11th Cir. 2002), the Eleventh Circuit held that a contestant hotline for the quiz show *Who Wants to Be a Millionaire?* was a place of public accommodation because the Eleventh Circuit panel found that the definition of discrimination in Title III covered "both tangible barriers. . . and intangible barriers, such as eligibility requirements and screening rules or discriminatory policies and procedures that restrict a disabled person's ability to enjoy the defendant entity's goods, services and privileges." *Id.* at 1283.

[9]*See, e.g.*, *Earll v. eBay, Inc.*, 599 F. App'x 695, 696 (9th Cir. 2015) (affirming dismissal of plaintiff's ADA claim, holding that the term *place of public accommodation* requires some connection between the good or service alleged to be discriminatory and a physical place; "Because eBay's services are not connected to any 'actual, physical place[ ],' eBay is not subject to the ADA.")), *aff'g*, No. 5:11–cv–00262–JF (HRL), 2011 WL 3955485, at *2 (N.D. Cal. Sept. 7, 2011) (noting that places of public accommodation are limited to physical places); *Zaid v. Smart Financial Credit Union*, Civil Action No. H-18-1130, 2019 WL 314732, at *6 (S.D. Tex. Jan. 24, 2019) (dismissing plaintiff's Title III website accessibility case because a website does not qualify as an "other service establishment" within the meaning of 42 U.S.C.A. § 12181(7)(F), which "refers only to other physical locations . . . . While websites may be affiliated with brick-and-mortar businesses that are places of public accommodation, that does not render the businesses' websites themselves places of public accommodation."); *Namisnak v. Uber Technologies, Inc.*, Case No. 17-cv-06124-RS, 2018 WL 7200717, at *3-4 (N.D. Cal. Oct. 3, 2018) (dismissing plaintiff's ADA claim under 42 U.S.C.A. § 12182 because the Uber app was not a place of public accommodation; "While 'travel service' is listed as a place of public accommodation under section 12181(7)(F), . . . [t]he fact that Uber sends cars to pick up customers at their desired location and drop them off at different locations is insufficient to qualify Uber's rideshare service as a place of public accommodation. . . . Neither the street corner where a customer hails a car-for-hire nor the cars themselves fit in the same category as the locations contemplated by *Weyer*."); *Gomez*

or app and a physical location,[10] although a number of courts

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v. Bang & Olufsen America, Inc., Case No.: 1:16-cv-23801—LENARD, 2017 WL 1957182, at *2-4 (S.D. Fla. Feb. 2, 2017) (dismissing the claim of a visually impaired plaintiff who had sued a retail store alleging that he could not access the store's website because it was not compatible with his screen reading software, where the plaintiff only alleged that he planned to order goods online; "a website that is wholly unconnected to a physical location is generally not a place of public accommodation under the ADA. However, if a plaintiff alleges that a website's inaccessibility impedes the plaintiff's 'access to a specific, physical, concrete space[,]' and establishes some nexus between the website and the physical place of public accommodation, the plaintiff's ADA claim can survive a motion to dismiss."); *Kidwell v. Florida Commission on Human Relations*, No. 16-403, 2017 WL 176897, at *4 (M.D. Fla. Jan. 17, 2017) (holding that the SeaWorld and Busch Gardens' websites were not places of public accommodations under Title III of the ADA; "Plaintiff is unable to demonstrate that either Busch Gardens' or SeaWorld's online website prevents his access to 'a specific, physical, concrete space such as particular ariline ticket counter or travel agency.' "); *Jancik v. Redbox Automated Retail, LLC*, No. SACV 13–1387–DOC (RNBx), 2014 WL 1920751, at *8–9 (C.D. Cal. May 14, 2014) (holding that a website was not a place of public accommodation because it was not a physical place and there was not a sufficient nexus between the website and physical kiosks); *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017, 1023–24 (N.D. Cal. 2012) (holding that websites were not places of public accommodation because they are not physical places), *aff'd*, 600 F. App'x 508 (9th Cir. 2015) (affirming dismissal of plaintiff's ADA-predicated California Disabled Persons Act and Unruh Civil Rights Act claims, because Netflix's services were not connected to any "actual, physical place[ ]" and therefore Netflix was not subject to the ADA in the operation of its website); *Ouellette v. Viacom*, No. CV 10–133–M–DWM–JCL, 2011 WL 1882780, at *4–5 (D. Mont. Mar. 31, 2011) (holding that a website, by itself, was not a physical place and that the plaintiff did not allege a sufficient connection between the website and a physical structure); *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1114–16 (N.D. Cal. 2011) (dismissing plaintiff's ADA claim against Facebook where the plaintiff could not allege a nexus between the Facebook website and a physical place of public accommodation, in a suit where the plaintiff had been terminated for abuse for repeatedly sending friend requests to strangers, but alleged discrimination because she was bi-polar); *Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312, 1319–21 (S.D. Fla. 2002) (rejecting the application of Title III to a website because it was not a physical location nor a means of accessing a concrete space), *appeal dismissed*, 385 F.3d 1324, 1328-29 (11th Cir. 2004) (rejecting the appeal where the appellant sought to advance a new theory not addressed below).

[10] *See, e.g.*, *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 904-05 (9th Cir. 2019) (holding that the ADA's mandate under DOJ regulations that "places of public accommodation, such as Domino's, provide auxiliary aids and services to make visual materials available to individuals who are blind" applied to Domino's website and app, even though customers predominantly accessed them while away from the physical restaurant, because "[t]he statute applies to the services *of* a place of public accom-

modation, not services *in* a place of public accommodation.") (quoting *National Federation for the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 953 (N.D. Cal. 2006)); *Haynes v. Dunkin Donuts LLC*, 741 F. App'x 752 (11th Cir. 2018) (reversing the lower court's order granting defendant's motion to dismiss because defendant's website was plausibly alleged to provide a service that facilitated use of physical world shops, which were places of public accommodation); *Jones v. Piedmont Plus Federal Credit Union*, 335 F. Supp. 3d 1278, 1281-82 (N.D. Ga. 2018) (denying defendant's motion to dismiss plaintiff's Title III website accessibility case because the plaintiff alleged a nexus between the plaintiff's website and physical location); *Gomez v. General Nutrition Corp.*, 323 F. Supp. 3d 1368, 1374-76 (S.D. Fla. 2018) (granting summary judgment for the plaintiff on liability, holding that GNC's website was subject to the ADA because of a nexus with its physical premises; "The Website facilitates the use of the physical stores by providing a store locater. Moreover, the ability to purchase products remotely is, in and of itself, a service of the physical stores. By providing information about promotions and deals in addition to information about store information, the Website operates as a gateway to the physical stores."); *Tawam v. APCI Federal Credit Union,* No. 5:18-cv-00122, 2018 WL 3723367 (E.D. Pa. Aug. 6, 2018) (denying defendant's motion to dismiss plaintiff's ADA Title III website accessibility case where the plaintiff alleged that the accessibility barriers on the defendant's website prevented him from finding and visiting the APCI's physical location or learning about services offered at APCI locations); *Price v. Everglades College, Inc*., No. 6:18-CV-492-ORL-31GJK, 2018 WL 3428156, at *3-4 (M.D. Fla. July 16, 2018) (dismissing plaintiff's claim without prejudice, explaining that there must be a nexus between a website and a brick-and-mortar place for an actionable Title III claim in the Eleventh Circuit); *Fuller v. Smoking Anytime Two, LLC*, Case No. 18-cv-60996, 2018 WL 3387692, at *2-3 (S.D. Fla. July 11, 2018) (denying defendant's motion to dismiss where the plaintiff adequately pleaded a nexus between the defendant's website and its physical stores); *Castillo v. Jo-Ann Stores, LLC*, 286 F. Supp. 3d 870, 877-83 (N.D. Ohio 2018) (denying defendant's motion to dismiss plaintiff's ADA and Unruh Act claims where the plaintiff "sufficiently alleged a nexus between Jo-Ann's website and its brick-and-mortar stores."); *Robles v. Yum! Brands, Inc.*, Case No 2:16–cv–08211–ODW(SS), 2018 WL 566781, at *4 (C.D. Cal. Jan. 24, 2018) (denying defendant's motion for summary judgment; "Acknowledging the fact that Pizza Hut's restaurants are physical, brick-and-mortar places, and that Pizza Hut's website and mobile application are services provided by Pizza Hut, the Court finds that Pizza Hut's website and mobile app are both subject to accessibility regulations under the ADA."); *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340, 1348-49 (S.D. Fla. 2017) (entering injunctive relief following a bench trial on the ADA claim of a visually impaired man who had sued over access to Winn-Dixie's website, because the site operated as a "gateway" to the physical stores and its online offerings (which included, among other things, digital coupons) were "services, privileges, advantages, and accommodations offered by Winn-Dixie's physical store locations[,]" where the plaintiff had frequented Winn-Dixie in the past, and represented that he would do so again in the future once the website became accessible to him; "The Court need not decide whether

Winn–Dixie's website is a public accommodation in and of itself, because the factual findings demonstrate that the website is heavily integrated with Winn–Dixie's physical store locations and operates as a gateway to the physical store locations."); *Gil v. Winn Dixie Stores, Inc.*, 242 F. Supp. 3d 1315, 1317-21 (S.D. Fla. 2017) (denying defendant's motion for judgment on the pleadings where the plaintiff alleged that defendant's website was "directly connected" and had a "true nexus" to Winn–Dixie's grocery and pharmacy stores and that the website augmented Winn–Dixie's physical store locations by assisting customers in finding physical store locations, educating the public about Winn–Dixie brand grocery items, and providing the public with the ability to fill and re-fill prescriptions from its pharmacy for in-store pick-up and delivery); *Rios v. N.Y. & Co.*, Case No. 2:17–cv–04676–ODW(AGRx), 2017 WL 5564530, at *3 (C.D. Cal. Nov. 16, 2017) (denying defendant's motion for judgment on the pleadings where the plaintiff alleged a nexus; "a plaintiff may challenge the online services provided by a brick-and-mortar store, so long as the plaintiff establishes a nexus between the online services and the physical place. . . . Here, Plaintiff alleges that he was unable to visit Defendant's physical locations because of his inability to utilize Defendant's website."); *Reed v. CVS Pharmacy, Inc.*, Case No. CV 17–3877–MWF (SKx), 2017 WL 4457508, at *3-4 (C.D. Cal. Oct. 3, 2017) (denying plaintiff's motion to dismiss, where the plaintiff alleged a nexus between CVS's website and mobile app and its brick and mortar locations; "according to the Complaint, CVS has not made this service available equally to people with vision impairments. People with vision impairments are not offered, for example, any alternative store locator service, or any alternative service for determining whether a particular item is in stock in a particular store."); *Gomez v. J. Lindeberg USA, LLC*, No. 16–22966, 2016 WL 9244732, at *1 (S.D. Fla. Oct. 17, 2016) (holding, in granting in part plaintiff's request for a default judgment, that plaintiff stated a claim under the ADA by alleging that the inaccessibility of the defendant's website prevented him from purchasing the defendant's clothing online and searching for physical store locations); *National Federation of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 954 (N.D. Cal. 2006) (holding that plaintiffs had alleged sufficient facts to state a claim because the website was heavily integrated with brick-and-mortar stores and operated as a gateway to those stores); *see also Jones v. Fort McPherson Credit Union*, 347 F. Supp. 3d 1351, 1353-55 (N.D. Ga. 2018) (declining to side with either the Third, Sixth and Ninth Circuits, in requiring a nexus to a physical place of accommodation, or the First, Second, and Seventh Circuits, in holding that a website itself may be a place of public accommodation, while denying defendant's motion to dismiss because, even if a nexus is required, plaintiff plausibly alleged a nexus (where the website allowed users to find the physical location of defendant's facility, provided information about the services, advantages, accommodations, and amenities, and enabled visitors to "pre-shop" before visiting the physical location), and there was no requirement that a website *enhance* a customer's experience, rather than merely facilitating use of the physical accommodation); *Jones v. Lanier Federal Credit Union*, 335 F. Supp. 3d 1273, 1277-78 (N.D. Ga. 2018) (denying defendant's motion to dismiss where plaintiff alleged a connection between defendant's website and its physical locations; "While the Eleventh Circuit has not yet

in the First and Second Circuits (and elsewhere) have concluded that the ADA applies more broadly than merely to physical spaces and that a website or mobile app itself may constitute a place of public accommodation.[11]

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considered this issue, the Court finds the outcome would be the same under either theory here . . . .").

[11]*See, e.g.*, *National Association of the Deaf v. Harvard University*, 377 F. Supp. 3d 49, 57-61 (D. Mass. 2019) (denying in relevant part Harvard's motion for judgment on the pleadings, holding that its online services constituted a place of public accommodation and that a nexus to a physical place was not required, but also holding in the alternative that there was a nexus between its online services and the university, which has a physical presence in Cambridge); *Access Living of Metropolitan Chicago v. Uber Technologies, Inc.*, 351 F. Supp. 3d 1141, 1154-56 (N.D. Ill. 2018) (acknowledging the circuit split and that the court was not bound to apply *dicta* from Seventh Circuit case, but nonetheless applying that *dicta* in holding that Uber constituted a place of public accommodation and denying in relevant part its motion to dismiss); *Del–Orden v. Bonobos, Inc.*, No. 17-cv-2744, 2017 WL 6547902, at *4-11 (S.D.N.Y. Dec. 20, 2017) (denying defendant's motion to dismiss, holding that commercial websites qualify as places of public accommodations within the meaning of the ADA, based on the court's estimation of how the Second Circuit would resolve the issue, but ruling in the alternative that the plaintiff had stated a claim based on "the online services of real-world public accommodations" because "the ADA separately is violated where failure to afford equal access to a website impairs the user's access to a traditional public accommodation, such as a merchant's brick-and-mortar stores."); *Access Now, Inc. v. Blue Apron, LLC*, Civil No. 17-cv-116-JL, 2017 WL 5186354, at *4 (D.N.H. Nov. 8, 2017) (denying defendant's motion to dismiss, holding that the plaintiff adequately pleaded that defendant's blueapron.com website met the statutory definition of a *public accommodation* as a "grocery store" within the meaning of 42 U.S.C.A. § 12181(7)(E)); *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 391-98 (E.D.N.Y. 2017) (following *Scribd* in denying defendant's motion to dismiss, holding that no nexus to a physical world store was required to state a claim, in a suit alleging that the website *dickblick.com* was a place of public accommodation, because the Second Circuit, in *Pallozi v. Allstate Life Insurance Co.*, 198 F.3d 28 (2d Cir. 1999), *amended on denial of reh'g*, 204 F.3d 392 (2d Cir. 2000), emphasized "*that it is the sale of goods and services to the public, rather than how and where that a sale is executed, that is crucial* when determining if the protections of the ADA are available . . . ;" emphasis in *Blick Art*); *Markett v. Five Guys Enterprises LLC*, No. 17-CV-788 (KBF), 2017 WL 5054568, at *2 (S.D.N.Y. July 21, 2017) (holding that a fast food restaurant's website, *Fiveguys.com*, was "covered under the ADA, either as its own place of public accommodation or as a result of its close relationship as a service of defendant's restaurants, which indisputably are public accommodations under the statute."); *Gniewkowski v. Lettuce Entertain You Enterprises, Inc.*, 251 F. Supp. 3d 908, 914-19 (W.D. Pa. 2017) (denying defendant's motion to dismiss plaintiffs' ADA Title III website accessibility claim, in a suit brought by visually impaired individu-

Courts have held that Facebook[12] and America Online chatrooms and related services,[13] which existed only online, were not places of public accommodation in the analogous context of Title II Civil Rights suits (where—as under Title III of the ADA—a plaintiff must establish that a claim involves a place of public accommodation).

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als alleging that defendant's website was inaccessible to them, because defendant AmeriServ Financial was a bank and the court found that its website was property that AmeriServ owned, operated and controlled, where discrimination was alleged to have taken place); *National Federation of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565, 568-72 (D. Vt. 2015) (denying the motion to dismiss of *Scribd*, a digital library, in a suit alleging that its website and mobile applications were places of public accommodation under Title III of the ADA because, although the examples provided in 42 U.S.C. § 12181(7) are all physical world locations, "[t]he fact that the ADA does not include web-based services as a specific example of a public accommodation is irrelevant because such services did not exist when the ADA was passed and because Congress intended the ADA to adapt to changes in technology. . . . Notably, Congress did not intend to limit the ADA to the specific examples listed and the catchall categories must be construed liberally to effectuate congressional intent. . . . [A plaintiff need] only to show that the website fell within one of the general categories enumerated in the statute . . . ."), *citing National Association of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 200-02 (D. Mass. 2012) (holding that Netflix's on-demand service website was a place of public accommodation even though its services were accessed exclusively in the home, explaining that the ADA covers not only transactions that take place by phone or mail but "applies with equal force to services purchased over the Internet."); *Straw v. American Bar Association*, No. 14 C 5194, 2015 WL 602836, at *6 (N.D. Ill. Feb. 11, 2015) (holding that even though the American Bar Association does not offer its services at a physical site, such as a store, it nevertheless could be a place of public accommodation for purposes of the ADA).

[12]*See Ebeid v. Facebook, Inc*., Case No. 18-cv-07030-PJH, 2019 WL 2059662, at *6 (N.D. Cal. May 9, 2019) (dismissing plaintiff's claim under Title II of the Civil Rights Act on multiple grounds). In *Ebeid,* the court noted that "[alt]hough plaintiff points to the physical location of Facebook's servers, plaintiff's use of and the service provided by Facebook's online platform 'is unconnected to *entry* into a public place or facility' and therefore 'the plain language of Title II makes the statute inapplicable.' " *Id.* (emphasis in original), *quoting Clegg v. Cult Awareness Network,* 18 F.3d 752, 756 (9th Cir. 1994).

[13]*See Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, 540-45 (E.D. Va. 2003), *aff'd mem.*, No. 03-1770, 2004 WL 602711 (4th Cir. Mar. 24, 2004) (dismissing plaintiff's claim because "as the relevant case law and an examination the statute's exhaustive definition make clear, 'places of public accommodation' are limited to actual, physical places and structures, and thus cannot include chat rooms, which are not actual physical facilities but instead are virtual forums for communication provided by AOL to its members.").

To understand the current split of authority on whether a website or app on its own may constitute a place of public accommodation, it is helpful to review how case law has developed in this area.

In 2004, the Eleventh Circuit rejected the argument that Southwest Airlines' travel service, to which its website was connected, constituted a place of public accommodation, but on procedural grounds (because the issue was raised for the first time on appeal).[14]

In 2006, in *National Federation of the Blind v. Target Corp.*,[15] Chief Judge Marilyn Patel of the Northern District of California ruled that the plaintiff stated an ADA claim against Target (as well as claims under California's Unruh Act[16] and Disabled Persons Act[17]) by alleging that Target Corp.'s website was incompatible with screen reader software that would allow a blind person to perceive the contents of the site by vocalizing and describing the text and contents of a website based on "alternative text" commonly embedded in website code to make sites accessible to the blind.[18] The court's rationale was that the website serviced the physical store, not that the site itself was a place of accommodation.

In *Target Corp.*, plaintiffs alleged that unequal access to the website effectively denied them equal access to Target stores, which are physical places of public accommodation. The court reasoned that off-site discrimination could be actionable because the statute applies to services *of* a place of public accommodation, not services *in* such a place. Judge Patel also noted in a footnote that it appeared that Target

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[14]*See Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324 (11th Cir. 2004). The district court had rejected the claim that the inaccessibility of *Southwest.com* prevented access to Southwest's "virtual" ticket counters because virtual ticket counters are not actual physical places. *See Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312, 1321 (S.D. Fla. 2002), *appeal dismissed,* 385 F.3d 1324 (11th Cir. 2004). On appeal, plaintiff sought unsuccessfully to broaden its claim for the first time, alleging that Southwest's overall travel service constituted a public accommodation, which the appellate court rejected because it had not been raised below. *See* 385 F.3d at 1328-29.

[15]*National Federation of the Blind v. Target Corp.*, 452 F. Supp. 2d 946 (N.D. Cal. 2006).

[16]Cal. Civ. Code § 51.

[17]Cal. Civ. Code § 54.1.

[18]*National Federation of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 949-50 (N.D. Cal. 2006).

treated *Target.com* "as an extension of its stores, as part of its overall integrated merchandising efforts."[19] The court rejected as premature Target's alternative argument that under the ADA's auxiliary aid provision, plaintiff could not prevail if the same information available on its website could be obtained in another reasonable format, such as over the phone, which the court noted was an affirmative defense.

Judge Patel subsequently granted plaintiff's motion to certify a nationwide class action[20] under Rule 23(b)(2).[21] The case ultimately settled, with Target proposing to pay up to $6 million in damages (for state claims since the ADA only provides for injunctive relief), or up to $3,500 per member of the California class, plus attorneys' fees, and pay the National Federation tens of thousands of dollars each year, for three years, to monitor its website, and $15,000 per session for training sessions that the National Federation would run for Target employees.[22] The proposed class action settlement was approved at a fairness hearing held in early 2009. Judge Patel ultimately awarded plaintiffs' counsel $3,738,864.96 in attorneys' fees and costs[23] (or roughly 62% of the maximum value of the actual settlement).

The *Target Corp.* ruling has been widely followed, including by the Ninth Circuit. In *Robles v. Domino's Pizza*,[24] the Ninth Circuit held that the ADA's mandate under U.S. Department of Justice regulations[25] that "places of public accommodation, such as Domino's, provide auxiliary aids and services to make visual materials available to individuals who are blind" applied to Domino's website and app, even though customers predominantly accessed them while away from the physical restaurant, because " '[t]he statute applies to the services *of* a place of public accommodation, not ser-

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[19]*National Federation of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 956 n.4 (N.D. Cal. 2006).

[20]*National Federation of the Blind v. Target Corp.*, 582 F. Supp. 2d 1185 (N.D. Cal. 2007).

[21]*See supra* §§ 25.07[2], 4.22 (analyzing Rule 23).

[22]*See* Evan Hill, "Settlement Over Target's Web Site Marks a Win for ADA Plaintiffs," Law.com, Aug. 28, 2008.

[23]*National Federation of the Blind v. Target Corp.*, No. C 06–01802 MHP, 2009 WL 2390261 (N.D. Cal. Aug. 3, 2009).

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

[25]*See* 28 C.F.R. § 36.303(b)(2).

vices *in* a place of public accommodation.' "[26] In *Robles,* the panel explained that the alleged inaccessibility of Domino's website and app, if true, would impede access to goods and services of its physical pizza franchises, which are places of public accommodation.[27] Critical to the court's analysis was the nexus between Domino's website and app and the physical restaurants, which customers used "to locate a nearby Domino's Restaurant and order pizzas for at-home delivery or in-store pickup."[28] Because the website and app were deemed to facilitate access to a place of public accommodation (Domino's physical restaurants), they were held to be subject to the ADA.[29]

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[26]*Robles v. Domino's Pizza, LLC,* 913 F.3d 898, 905 (9th Cir. 2019), *quoting National Federation for the Blind v. Target Corp.,* 452 F. Supp. 2d 946, 953 (N.D. Cal. 2006).

[27]*Robles v. Domino's Pizza, LLC,* 913 F.3d 898, 905 (9th Cir. 2019), *citing* 42 U.S.C.A. § 12181(7)(B) (listing a restaurant as a covered "public accommodation").

[28]*Robles v. Domino's Pizza, LLC,* 913 F.3d 898, 905 (9th Cir. 2019) (stating that "[t]his nexus between Domino's website and app and the physical restaurants . . . is critical to our analysis.").

[29]*Robles v. Domino's Pizza, LLC,* 913 F.3d 898, 905 (9th Cir. 2019). The panel distinguished *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114-15 (9th Cir. 2000), explaining:

> Because the ADA only covers "actual, physical places where goods or services are open to the public, and places where the public gets those goods or services," there had to be "some connection between the good or service complained of and an actual physical place." *Id.* at 1114. While the insurance company had a physical office, the insurance policy at issue did not concern accessibility, or "such matters as ramps and elevators so that disabled people can get to the office." *Id.* And although it was administered by the insurance company, the employer-provided policy was not a good offered by the insurance company's physical office. *Id.* at 1115. Unlike the insurance policy in *Weyer*, Domino's website and app facilitate access to the goods and services of a place of public accommodation—Domino's physical restaurants. They are two of the primary (and heavily advertised) means of ordering Domino's products to be picked up at or delivered from Domino's restaurants.

Robles, 913 F.3d at 905. In so ruling, the panel expressly approved of the analysis in *Robles v. Yum! Brands, Inc.*, Case No 2:16–cv–08211–ODW(SS), 2018 WL 566781, at *4 (C.D. Cal. Jan. 24, 2018); *Rios v. N.Y. & Co.*, Case No. 2:17–cv–04676–ODW(AGRx), 2017 WL 5564530, at *3 (C.D. Cal. Nov. 16, 2017); *Reed v. CVS Pharmacy, Inc.*, Case No. CV 17–3877–MWF (SKx), 2017 WL 4457508, at *3 (C.D. Cal. Oct. 3, 2017); *Gorecki v. Hobby Lobby Stores, Inc.*, CV 17-1131-JFW(SKx), 2017 WL 2957736, at *3–4 (C.D. Cal. June 15, 2017); *National Federation of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 953 (N.D. Cal. 2006); *Gomez v. General Nutrition Corp.*, 323 F. Supp. 3d 1368, 1375–76 (S.D. Fla. 2018); *Castillo v. Jo-Ann Stores, LLC*, 286 F.Supp.3d 870, 881 (N.D. Ohio 2018); and *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340, 1348–49 (S.D. Fla. 2017), *appeal*

By contrast, other courts have found a website itself may constitute a place of public accommodation. In explaining the basis for the circuit split, one court observed:

> This split in the circuits is premised to some extent on the invocation of competing canons of statutory construction. There are twelve "public accommodation" categories in the statute. *See* 42 U.S.C. § 12181(7). Category F includes an illustrative list of service establishments, those being "a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment." § 12181(7)(F). The First, Second, and Seventh Circuits, viewing the list of service establishments in conjunction with agency regulations, legislative history, and the broad policy goals of the ADA, concluded that the inclusion of "travel service" in the list of service establishments meant that Congress "contemplated that 'service establishments' include[d] providers of services which do not require a person to physically enter an actual physical structure." *Carparts*, 37 F.3d at 19. *Accord Pallozzi*, 198 F.3d at 32–33; *Mut. of Omaha Ins. Co*., 179 F.3d at 558–59. The Third, Fifth, Sixth, and Ninth Circuits, relying on the principle of *noscitur a sociis* ("known by its associates"), concluded that because "[e]very term listed in § 12181(7) and subsection (F) is a physical place open to public access," a place of public accommodation must be, or have a connection to, a physical place. *Parker v. Metro. Life Ins. Co*., 121 F.3d 1006, 1014 (6th Cir. 1997). *Accord Magee*, 833 F.3d at 534–35; *Weyer*, 198 F.3d at 1114; *Ford*, 145 F.3d at 613–14.[30]

When a website accessibility claim is brought against an educational institution that receives federal funds, an additional claim potentially may be asserted under section 504 of the Rehabilitation Act of 1973.[31] Section 504 and the ADA

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docketed, No. 17-13467 (11th Cir. Aug. 1, 2017). *See Robles,* 913 F.3d at 905 n.7.

[30]*National Association of the Deaf v. Harvard University,* 377 F. Supp. 3d 49, 59-60 (D. Mass. 2019).

[31]29 U.S.C.A. § 794; *National Association of the Deaf v. Harvard University*, 377 F. Supp. 3d 49, 61-63 (D. Mass. 2019) (denying in relevant part Harvard's motion for judgment on the pleadings on plaintiffs' section 504 claim based on Harvard's alleged failure to provide accurate and timely captioning of online audiovisual content hosted by the university's website); *see also National Association of the Deaf v. Massachusetts Institute of Technology,* Case No. 3:15-cv-30024-KAR, 2019 WL 1409301 (D. Mass. Mar. 28, 2019) (entering the same order, on the same grounds, as in *Harvard,* in plaintiffs' parallel lawsuit against MIT); *National As-*

are "frequently read in sync."[32] Section 504 "provides as its general rule that '[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . . ' "[33] A *program or activity* includes "all of the operations of—. . . a college, university, or other postsecondary institution."[34] Pursuant to implementing regulations,[35] at least one court has

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sociation of the Deaf v. Harvard University, Case No. 3:15-cv-30023-MGM, 2016 WL 3561622, at *5-10 (D. Mass. Feb. 9, 2016) (denying defendant's motion to dismiss plaintiffs' section 504 claim based on allegations "that much of Harvard's online video content is inaccessible to millions of deaf and hard of hearing individuals, and their identification of captioning as a reasonable accommodation that would afford them the meaningful access millions of non-hearing impaired individuals already enjoy . . . ."), *report and recommendation adopted*, 2016 WL 6540446 (D. Mass Nov. 3, 2016).

[32]*National Association of the Deaf v. Harvard University*, 377 F. Supp. 3d 49, 54-55 (D. Mass. 2019) (citing earlier cases). As explained in an earlier opinion in that case,

> to state a claim for violation[s] of Section 504 and Title III, a plaintiff must allege (1) that he or she is disabled and otherwise qualified, (2) that the defendant receives federal funding (for Section 504 purposes) and is a place of public accommodation (for ADA purposes); and (3) that the defendant discriminated against the plaintiff based on disability. *Argenyi v. Creighton Univ*., 703 F.3d 441, 447 (8th Cir. 2013) (citing *Mershon v. St. Louis Univ*., 442 F.3d 1069, 1076-77 (8th Cir. 2006)); *el Kouni v. Trs. of Boston Univ*., 169 F. Supp. 2d 1, 2-3 (D. Mass. 2001) (citing *Katz v. City Metal Co*., 87 F.3d 26, 30 (1st Cir. 1996)). There are three discrete theories available to a disability discrimination plaintiff. "First, a plaintiff can assert disparate treatment on account of disability, i.e., that the disability actually motivated the defendant's challenged adverse conduct." *Nunes v. Massachusetts Dep't of Corr*., 766 F.3d 136, 144 (1st Cir. 2014) (citing *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52–53 (2003)). Second, a plaintiff can assert disparate impact, i.e. that a defendant's challenged conduct, even if not motivated by a discriminatory animus, disparately affects the disabled. *Id*. at 145. "Finally, a plaintiff can pursue a third path, claiming that [the defendant] has refused to affirmatively accommodate his or her disability where such accommodation was needed to provide 'meaningful access . . . .' " *Id*. (citing *Henrietta D. v. Bloomberg*, 331 F.3d 261, 273–76 (2d Cir. 2003)).

National Association of the Deaf v. Harvard University, Case No. 3:15-cv-30023-MGM, 2016 WL 3561622, at *4 (D. Mass. Feb. 9, 2016) (footnote omitted), *report and recommendation adopted*, 2016 WL 6540446 (D. Mass Nov. 3, 2016).

[33]*National Association of the Deaf v. Harvard University,* 377 F. Supp. 3d 49, 55 (D. Mass. 2019), *quoting* 29 U.S.C.A. § 794(a).

[34]29 U.S.C.A. § 794(b)(2)(A).

[35]The U.S. Department of Justice (DOJ) is responsible for coordinating the implementation of section 504 among the various federal agencies that extend financial assistance. *National Association of the Deaf v.*

held that plaintiffs could state a claim for website accessibility under section 504 based on the Department of Education implementing regulation that prohibits federal fund recipients from denying qualified handicapped persons "the opportunity to participate in or benefit from provided aids, benefits, or services . . . and [from] providing qualified handicapped persons with aids, benefits, or services that are not as effective as those that are provided to others . . . ."[36] Whether failing to provide accurate and timely captioning of online audiovisual content on a university website amounts to the denial of "aids, benefits, or services" or meaningful access has yet to be ruled upon by any appellate court.

Harvard University, 377 F. Supp. 3d 49, 55 & n.4 (D. Mass. 2019), *citing* Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980). DOJ coordination regulations are found at 28 C.F.R. §§ 41.1—41.58. The U.S. Department of Energy has issued regulations implementing section 504 for the programs and activities to which it provides assistance. *See* 34 C.F.R. §§ 104.1—104.61. DOE's regulations must be consistent with the DOJ's coordination regulations. 28 C.F.R. § 41.4(a); *National Association of the Deaf v. Harvard University*, 377 F. Supp. 3d 49, 55 n.5 (D. Mass. 2019).

[36] *National Association of the Deaf v. Harvard University*, 377 F. Supp. 3d 49, 62 (D. Mass. 2019) (construing 28 C.F.R. § 41.51(b)(1)(i)-(iii); and 34 C.F.R. § 104.4(b)(i)-(iii) in denying Harvard's motion for judgment on the pleadings); *National Association of the Deaf v. Massachusetts Institute of Technology*, Case No. 3:15-cv-30024-KAR, 2019 WL 1409301 (D. Mass. Mar. 28, 2019) (entering the same order, on the same grounds, as in *Harvard*, in plaintiffs' parallel lawsuit against MIT); *National Association of the Deaf v. Harvard University*, Case No. 3:15-cv-30023-MGM, 2016 WL 3561622, at *7 (D. Mass. Feb. 9, 2016) (construing 28 C.F.R. § 41.51(b)(1)(i)-(iii); 34 C.F.R. § 104.4(b)(i)-(iii) in denying Harvard's motion to dismiss).

As explained by the court in *Harvard*:

> Section 104.4 prohibits federal fund recipients from denying qualified handicapped persons the opportunity to participate in or benefit from provided aids, benefits, and services; affording qualified handicapped persons an unequal opportunity to participate in or benefit from provided aids, benefits, or services; and providing qualified handicapped persons with aids, benefits, or services that are not as effective as those provided to others. 34 C.F.R. § 104.4(b)(1)(i)-(iii). For aids, benefits, and services to be "equally effective," they "must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement." *Id*. at § 104.4(b)(2). In other words, these regulations are consistent with the requirement of "meaningful access," and, as set forth above, Plaintiffs have adequately pleaded a lack of meaningful access. *Cf. K.M. v. Tustin Unified Sch. Dist*., 725 F.3d 1088, 1102 (9th Cir. 2013) ("[T]he 'meaningful access' standard incorporates rather than supersedes applicable interpretative regulations, and so does not preclude [plaintiffs] from litigating their claims under those regulations.' ").

National Association of the Deaf v. Harvard University, Case No. 3:15-cv-30023-MGM, 2016 WL 3561622, at *7 (D. Mass. Feb. 9, 2016), *report and recommendation adopted*, 2016 WL 6540446 (D. Mass Nov. 3, 2016).

Where a claim is directed at a public entity such as a state or local government, rather than a private company, suit potentially may be brought under Title II of the ADA, rather than Title III.[37] Title II provides that no person with a qualified disability shall "be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[38] To state a claim under Title II, a plaintiff must

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[37]*See, e.g., Price v. City of Ocala,* 375 F. Supp. 3d 1264, 1270-71, 1273-77 (M.D. Fla. 2019) (holding that Title II "undoubtedly applies to websites . . . ," but lamenting the lack of guidance from the U.S. Department of Justice "about what a government entity must do to make its website ADA compliant" and dismissing the suit of a blind Florida resident, alleging that a city's website was incompatible with his screen reader software, for lack of Article III standing, in a suit brought under Title II of the ADA and section 504 of the Rehabilitation Act); *see also Price v. Town of Longboat Key,* Case No. 8:19-cv-00591-T-02AAS, 2019 WL 2173834, at *3-6 (M.D. Fla. May 20, 2019) (dismissing plaintiff's ADA Title II and Rehabilitation Act website accessibility claims for lack of Article III standing and failure to state a claim where the plaintiff was not a town resident and did not allege concrete plans to move there or even visit, and where the town, in response to plaintiff's request, adjusted its website to accommodate screen reader software and additionally provided the requested documents via a thumb drive and, thereafter, plaintiff did not allege that he sought further accommodation); *Open Access for All, Inc. v. Town of Juno Beach, Florida*, Case No. 9:19–CV–805–18 ROSENBERG/REINHART, 2019 WL 3425090 (S.D. Fla. July 30, 2019) (applying *Price v. City of Ocala*'s analysis of Article III standing in an ADA Title II (and Rehabilitation Act) website accessibility case and holding that the plaintiffs had standing where the individually named plaintiff had concrete plans to move from Miami, was seriously considering Juno Beach as a possible new home, and needed access to information about living in Juno Beach, which was on the city's website but allegedly not accessible to him).

[38]42 U.S.C.A. § 12132. Pursuant to implementing regulations, public entities are prohibited from "providing any aid, benefit, or service" that "afford[s] a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others." 28 C.F.R. § 35.130(b)(1)(ii). They must also "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." *Id.* § 35.130(b)(7). Public entities are further required to "take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others." *Id.* § 35.160(a)(1). To accomplish this result, they are obligated to "furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities . . . an equal opportunity to participate in, and enjoy the benefits of, a

establish: (1) that the plaintiff is a "qualified individual with a disability;" (2) that the plaintiff was "excluded from participation in or . . . denied the benefits of the services, programs, or activities of a public entity" or otherwise "discriminated [against] by such entity;" (3) "by reason of such disability."[39]

Federal claims over website and app accessibility may be joined with state law causes of action. Thus, for example, suits have been brought under California's Unruh Civil Rights Act[40] and California's Disabled Persons Act (DPA).[41]

The Unruh Act provides that "[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their . . . disability . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."[42] To establish a violation of the Unruh Act independent of a claim under the ADA, a plaintiff "must 'plead and prove intentional discrimination in public accommodations in violation of the terms of the Act.' "[43] The Unruh Act "contemplates 'willful, affirmative misconduct on the part of those who violate the Act' and that a plaintiff must therefore allege, and show, more than the disparate impact of a facially neutral policy."[44]

To be actionable, an Unruch Act claim must be based on a

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service, program, or activity of a public entity." *Id.* § 35.160(b)(1).

[39]*Price v. Town of Longboat Key,* Case No. 8:19-cv-00591-T-02AAS, 2019 WL 2173834, at *2 (M.D. Fla. May 20, 2019), *citing Shotz v. Cates*, 256 F.3d 1077, 1079 (11th Cir. 2001) (quoting 42 U.S.C.A. § 12132).

[40]Cal. Civ. Code §§ 51–52.

[41]Cal. Civ. Code §§ 54, 54.1(a).

[42]Cal. Civ. Code § 51(b).

[43]*Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 425-26 (9th Cir. 2014) (finding no violation where CNN failed to include closed captioning on videos made available only on its website because the Unruh Act requires showing of intentional discrimination based on disability), *quoting Munson v. Del Taco, Inc.*, 46 Cal. 4th 661, 94 Cal. Rptr. 3d 685 (2009) (internal quotation marks omitted).

[44]*Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 425-26 (9th Cir. 2014), *quoting among others Koebke v. Bernardo Heights Country Club*, 36 Cal. 4th 824, 31 Cal. Rptr. 3d 565 (2005) (internal quotation marks omitted); *Earll v. eBay, Inc.,* 599 F. App'x 695, 696 (9th Cir. 2015) (affirming dismissal where the plaintiff had not alleged intentional discrimination).

violation that took place within California.[45]

Actually doing business is not required to state an Unruh Act violation, however. It is sufficient that a party "visited a business's website with intent to use its services and alleges that the business's terms and conditions exclude him or her from full and equal access to its services . . . ."[46]

The California Disabled Persons Act (DPA) provides that:

> Individuals with disabilities shall be entitled to full and equal access, as other members of the general public, to accommodations, advantages, facilities, . . . places of public accommodation, amusement, or resort, and other places to which the general public is invited.[47]

" 'Full and equal access' is defined by section 54.1 to mean access that complies with the regulations developed under the federal ADA or under state statutes, if the latter imposes a higher standard."[48] A DPA claim may also be based on

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[45]*See, e.g., Warner v. Tinder Inc.,* 105 F. Supp. 3d 1083, 1099 (C.D. Cal. 2015) (dismissing plaintiff's claim because it did not allege conduct that occurred in California and section 51(b) does not apply to injuries suffered outside of California).

[46]White v. Square, Inc., 7 Cal. 5th 1019, 1023, 250 Cal. Rptr. 3d 770, 771 (2019). The California Supreme Court, which was answering a certified question from the Ninth Circuit on statutory standing, explained in its brief opinion that:

> In general, a person suffers discrimination under the Act when the person presents himself or herself to a business with an intent to use its services but encounters an exclusionary policy or practice that prevents him or her from using those services. We conclude that this rule applies to online businesses and that visiting a website with intent to use its services is, for purposes of standing, equivalent to presenting oneself for services at a brick-and-mortar store. Although mere awareness of a business's discriminatory policy or practice is not enough for standing under the Act, entering into an agreement with the business is not required.

Id.

[47]Cal. Civ. Code § 54.1(a)(1).

[48]*Urhausen v. Longs Drug Stores, Inc.*, 155 Cal. App. 4th 254, 261, 65 Cal. Rptr. 3d 838, 843 (1st Dist. 2007), *quoting* Cal. Civ. Code § 54.1(a)(3); *see also Earll v. eBay, Inc.,* 599 F. App'x 695, 696 (9th Cir. 2015) (affirming dismissal of plaintiff's Disabled Persons Act claim after holding that the ADA did not apply to the eBay services at issue in the case, where the plaintiff "failed to allege violation of any separate, applicable accessibility standard . . . ."); *Robles v. Yum! Brands, Inc.*, Case No 2:16–cv–08211–ODW(SS), 2018 WL 566781, at *4 (C.D. Cal. Jan. 24, 2018) (denying defendant's motion for summary judgment; "Because Plaintiff's UCRA claim is premised on a violation of rights under the ADA, Plaintiff does not need to plead or prove intentional discrimination. . . . Because there is a triable issue as to whether Pizza Hut has violated the ADA, the Court

merely an allegedly discriminatory policy.[49]

Thus, for example, in *Earll v. eBay, Inc.*[50] and *Young v, Facebook, Inc.,*[51] where the courts had found that eBay's and Facebook's respective online-only locations were not places of public accommodation under the ADA and the plaintiffs had not alleged any facts beyond those supporting their ADA claims, the courts, as in *Target,* dismissed or affirmed dismissal of plaintiff's claims under the Unruh Act and DPA (as well as, in *Young*, for breach of contract, breach of the covenant of good faith and fair dealing and negligence).[52]

Similarly, in *Cullen v. Netflix, Inc.*,[53] an earlier case, the court dismissed (with leave to amend) plaintiff's California state law Unruh Act and DPA claims, even as it dismissed with prejudice his ADA claim based on the court's finding

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cannot grant summary judgment on the UCRA claim."); *Rios v. N.Y. & Co.*, Case No. 2:17–cv–04676–ODW(AGRx), 2017 WL 5564530, at *4 (C.D. Cal. Nov. 16, 2017) (denying defendant's motion for judgment on the pleadings where the plaintiff stated a claim under the ADA based on alleged online inaccessibility and therefore stated a claim under the Unruh Act because, among other things, the plaintiff was not required to plead intentional discrimination); *Reed v. CVS Pharmacy, Inc.*, Case No. CV 17–3877–MWF (SKx), 2017 WL 4457508, at *3-4 (C.D. Cal. Oct. 3, 2017) (denying plaintiff's motion to dismiss ADA Title III and California Unruh Act claims in a website and mobile app accessibility case where the court found a nexus between the website and mobile app and the defendant's brick and mortar locations).

[49]*Earll v. eBay, Inc.,* 599 F. App'x 695, 696 n.1 (9th Cir. 2015), *citing Hankins v. El Torito Restaurants, Inc.*, 63 Cal. App. 4th 510, 74 Cal. Rptr. 2d 684, 691–93 (1st Dist. 1998).

[50]*Earll v. eBay, Inc.,* 599 F. App'x 695, 696 (9th Cir. 2015).

[51]*Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110 (N.D. Cal. 2011).

[52]*Young* involved the alleged termination of a user for sending an excessive number of friend requests, where the user alleged she was bipolar. Although he held that plaintiff Young had not stated a cognizable claim and dismissed plaintiff's complaint in its entirety with prejudice, Judge Fogel wrote that:

> The Court is not without sympathy for Young's plight. Young was understandably frustrated that she could not discuss the termination of her account with a live person, and both this frustration and the loss of her access to Facebook's social network had a particularly acute impact on Young because of her bipolar condition. As customer service functions increasingly are handed over to automated systems, it is important that service providers . . . understand the implications that such practices can have for the less sophisticated and more vulnerable.

Young v. Facebook, Inc., 790 F. Supp. 2d 1110, 1118–19 (N.D. Cal. 2011).

[53]*Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017 (N.D. Cal. 2012), *aff'd*, 600 F. App'x 508 (9th Cir. 2015).

that Netflix's streaming video library—"a website where consumers can access videos with an internet connection" was not "an actual physical place" and therefore, under Ninth Circuit law, not a place of public accommodation. In *Cullen,* the plaintiff, a deaf man, sued to require closed captioning (or subtitles) on all videos streamed by Netflix. Citing Judge Patel's opinion in *Target,* Judge DaVila explained that Cullen potentially could pursue his discrimination claims under California law if they were asserted "as independent claims separate from an ADA violation because both the Unruh Act and the DPA apply to websites 'as a kind of business establishment and an accommodation, advantage, facility, and privilege of a place of public accommodation, respectively. No nexus to [a] physical [place] need be shown.' "[54] To establish an Unruh Act violation absent an ADA violation, however, Judge DaVila emphasized that "Cullen's claim cannot be based solely on the disparate impact of Netflix's policies on hearing-impaired individuals but must be grounded in allegations of intentional discrimination." Judge DaVila similarly cautioned that to state a DPA claim in the absence of an ADA violation, Cullen would be required to show a violation of an accessibility regulation promulgated under California law that exceeded the level of protection set by the ADA. Ultimately, the appellate court affirmed dismissal of plaintiff's Unruh Act and DPA claims because they were entirely dependent on his ADA claim.[55]

Whether California's Unruh Civil Rights Act and Disabled Persons Act apply to website and mobile app accessibility where the online location is unrelated to a brick and mortar place of public accommodation was a question certified to the California Supreme Court,[56] but the question ultimately was withdrawn when the underlying case settled.[57]

Under D.C. law, online platforms and other online services

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[54]*Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017, 1024 (N.D. Cal. 2012) (*citing National Federation of the Blind v. Target Corp.*, 582 F. Supp. 2d 1185, 1196 (N.D. Cal. 2007), *aff'd*, 600 F. App'x 508 (9th Cir. 2015)).

[55]*See Cullen v. Netflix, Inc.*, 600 F. App'x 508, 509 (9th Cir. 2015).

[56]*See Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 871 (9th Cir. 2014) (certifying the question "Does the DPA's reference to "places of public accommodation" include web sites, which are non-physical places?").

[57]*See Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.*, 769 F.3d 1004 (9th Cir. 2014) (dismissing the Ninth Circuit appeal and withdrawing the certification of questions to the California

that do not have physical locations are not places of public accommodation under the D.C. Human Rights Act, D.C. Code § 2-1402.31(a).[58]

Some states such as New York have enacted state laws that parallel the ADA and "rise or fall in tandem with disability discrimination claims brought pursuant to the federal

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Supreme Court).

[58] *See Freedom Watch v. Google, Inc.,* 368 F. Supp. 3d 30, 39-40 (D.D.C. 2019) (dismissing plaintiffs' claim and holding, in a case alleging discrimination based on political affiliation, that Google, Facebook, Apple, and Twitter, were not places of public accommodation within the meaning of D.C. Code Ann. § 2-1402.31(a), which requires that an "alleged place of public accommodation must be a physical location."). Section 1402.31(a), which also prohibits discrimination based on disability, states in relevant part that:

> It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based on the actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, genetic information, disability, matriculation, political affiliation, source of income, or place of residence or business of any individual:
>
> (1) To deny, directly or indirectly, any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodations;
>
> (2) To print, circulate, post, or mail, or otherwise cause, directly or indirectly, to be published a statement, advertisement, or sign which indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation will be unlawfully refused, withheld from or denied an individual; or that an individual's patronage of, or presence at, a place of public accommodation is objectional, unwelcome, unacceptable, or undesirable.
>
> (3) A health benefit plan or health insurer shall not establish rules for the eligibility, new or continued, of any individual or adjust premium or contribution amounts for an individual on the basis of genetic information concerning the individual or family member of the individual, including information about a request for or receipt of genetic services by an individual or the individual's family member.
>
> (4) A health benefit plan or health insurer shall not request or require an individual or the individual's family member to undergo a genetic test. Nothing in this paragraph shall:
>
> (A) Limit the authority of a health care professional who is providing health care services to an individual to request that the individual or the individual's family member undergo a genetic test;
>
> (B) Limit the authority of a health care professional who is employed by or affiliated with a health benefit plan or a health insurer and who is providing health care services to an individual to notify such individual of the availability of a genetic test or to provide information to such individual regarding such genetic test; or
>
> (C) Authorize or permit a health care professional to require that an individual undergo a genetic test.

D.C. Code Ann. § 2-1402.31(a).

ADA."[59]

Other web accessibility suits brought under state law have been dismissed as preempted.[60]

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[59]*Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 398 (E.D.N.Y. 2017), *citing Graves v. Finch Pruyn & Co.*, 457 F.3d 181, 186 n. 3 (2d Cir. 2006). In *Blick*, the court held that a legally blind plaintiff had stated a claim under the New York State Human Rights Law because a website, on its own and not ancillary to a physical location, could be a "place of public accommodation, resort or amusement" within the meaning of New York law for the same reason it qualified as a public accommodation under the ADA. *See* 268 F. Supp. 3d at 398-400. The relevant statutory provision states:

> It shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement, because of the . . . disability . . . of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof . . . .

N.Y. Exec. Law § 296(2)(a). A *place of public accommodation, resort or amusement* is defined to include "wholesale and retail stores and establishments dealing with goods or services of any kind." *Id.* § 292(9).

The court in *Blick* also had held that the plaintiff stated a claim under the New York City Human Rights Law, N.Y. C. Admin Code § 8-107, which is intended to provide broader protection than the ADA or New York Human Rights Law. *See* 268 F. Supp. 3d at 400-01.

The *Blick* case ultimately settled with the court agreeing to allow Blick to withdraw his class allegations and settle on an individual basis. *See Andrews v. Blick Art Materials, LLC*, 286 F. Supp. 3d 365 (E.D.N.Y. 2017).

[60]*See, e.g., Foley v. JetBlue Airways, Corp.*, No. C 10-3882 JCS, 2011 WL 3359730 (N.D. Cal. Aug. 3, 2011) (dismissing plaintiff's complaint for violations of California's Unruh Civil Rights Act, Disabled Persons Act and Business and Professions Code based on JetBlue allegedly operating its website and airport kiosks in such a way that they were not accessible to the visually impaired, based on the finding that the federal Air Carrier Access Act, 49 U.S.C.A. § 41705, preempts the entire field of disability non-discrimination in air travel, but rejecting the defendant's argument that the claims also were preempted by the Americans with Disabilities Act); *see also National Federation of the Blind v. United Airlines, Inc.*, 813 F.3d 718 (9th Cir. 2016) (holding that plaintiffs' claims that defendant's airport kiosks were inaccessible to the blind because they used exclusively visual computer screen prompts and touch-screen navigation, without offering a medium accessible to the blind (such as audio output), which had been brought under the Unruh Civil Rights Act and Disabled Persons Act, were impliedly field preempted by the Air Carrier Access Act (ACAA) and its implementing regulation setting forth accessibility requirements for automated airport kiosks, while rejecting the argument that the claims were expressly preempted by the ADA); *see generally Nondiscrimination on the Basis of Disability in Air Travel: Accessibility of Web Sites and Automated Kiosks at U.S. Airports*, 78 Fed. Reg. 67,882 (Nov. 12, 2013).

Some ADA claims involving access to websites also have been dismissed for lack of Article III standing (where, for example, a plaintiff could not lawfully join a defendant's credit union or had no concrete plans to move to a defendant's town or patronize a defendant's business).[61] By contrast,

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Other courts have found particular claims to have not been preempted. *See, e.g.*, *Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 428-30 (9th Cir. 2014) (finding no preemption of plaintiff's DPA claim arising out of CNN's alleged failure to include closed captioning on videos made available only on its website).

[61] *See, e.g.*, *Griffin v. Department of Labor Federal Credit Union*, 912 F.3d 649, 653-56 (4th Cir. 2019) (affirming dismissal of plaintiff's ADA claim against a credit union, based on alleged lack of access to its website for those who are blind, because plaintiff was ineligible under federal law to become a member of the credit union, and thus his alleged injury was neither concrete nor particularized); *Carroll v. Northwest Federal Credit Union*, 770 F. App'x 102 (4th Cir. 2019) (affirming dismissal of plaintiff's ADA claim alleging that the defendant's credit union failed to make its services accessible by making its website compatible with the screen reader that the plaintiff used to access the Internet, for lack of standing, because Carroll merely alleged that he intended to volunteer for an organization that would have allowed him to join the credit union, but was ineligible to join at the time he filed his amended complaint); *Carello v. Aurora Policemen Credit Union*, 930 F.3d 830 (7th Cir. 2019) (affirming the lower court's holding that the plaintiff, a blind person who alleged that as an ADA compliance tester and potential customer he was deprived access to the defendant-credit union's website because it was incompatible with screen reader software, did not have Article III standing to sue on his ADA claim because, by statute, membership in the credit union was restricted to specific groups of individuals; "a person who is *legally barred* from using a credit union's services cannot demonstrate an injury that is either concrete or particularized."); *Diaz v. The Kroger Co.,* 18 Civ. 7953 (KPF), 2019 WL 2357531 (S.D.N.Y. June 4, 2019) (dismissing plaintiff's case as moot where defendant fully addressed plaintiff's concerns, "brought the Website into compliance with Plaintiff's preferred WCAG 2.0 standard, and commit[ted] to monitoring technological developments in the future to ensure that visually-impaired individuals [would] have equal access to the Website."); *Price v. Town of Longboat Key,* Case No. 8:19-cv-00591-T-02AAS, 2019 WL 2173834, at *3-5 (M.D. Fla. May 20, 2019) (dismissing plaintiff's ADA Title II and Rehabilitation Act website accessibility claims for lack of Article III standing where the plaintiff was not a town resident and did not allege concrete plans to move there or even visit); *Price v. Escalante-Black Diamond Golf Club,* Case No: 5:19-cv-22-Oc-30PRL, 2019 WL 1905865 (M.D. Fla. Apr. 29, 2019) (dismissing plaintiff's ADA Title III website accessibility suit against a golf club for the lack of Article III standing and for failure to state a claim (because he did not plead facts showing that the Black Diamond website impeded his ability to access and enjoy the golf club)); *Price v. City of Ocala,* 375 F. Supp. 3d 1264 (M.D. Fla. 2019) (dismissing the suit of a blind Florida resident, alleging that a city's website was incompatible with his screen

where a plaintiff is a customer or potential customer, courts

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reader software, for lack of Article III standing, in a suit brought under Title II of the ADA, which addresses discrimination by state or local governments, and section 504 of the Rehabilitation Act); *Mendez v. Apple Inc.,* 18 Civ. 7550 (LAP), 2019 WL 2611168 (S.D.N.Y. Mar. 28, 2019) (dismissing plaintiff's ADA Title III website accessibility claim, and related New York state and city claims, for lack of Article III standing, because the plaintiff failed to allege an injury in fact); *Mitchell v. BMI Federal Credit Union*, 374 F. Supp. 3d 664, 668-69 (S.D. Ohio 2019) (dismissing plaintiff's Title III website accessibility case, in a suit seeking only prospective injunctive relief, because he was not and could not become a member of BMI); *Mitchell v. Buckeye State Credit Union,* Case No. 5:18-CV-875, 2019 WL 1040962 (N.D. Ohio Mar. 5, 2019) (dismissing plaintiff's Title III website accessibility claim for lack of Article III standing where the plaintiff was ineligible to join defendant's credit union); *Gastelum v. Phoenix Central Hotel Venture, LLC,* No. CV-17-04544-PHX-DLR, 2019 WL 498750, at *3-4 & n.2 (D. Ariz. Feb. 7, 2019) (granting summary judgment for the defendant, finding that the plaintiff, who had sued over 100 hotels in and around the Phoenix area in the preceding two years, lacked Article III standing because he could not allege any concrete plans to stay at the defendant's hotel; he had merely visited the property with his son and lawyer to verify whether it was ADA compliant, and the court noted that it was not even clear whether plaintiff got out of his vehicle during his visit to the property); *Price v. Orlando Health, Inc.*, No. 6:17-CV-1999-ORL-40DCI, 2018 WL 6434519, at *4 (M.D. Fla. Dec. 7, 2018) (finding plaintiff had not alleged a future injury related to a hospital website because of the distance between his house and the "place of public accommodation," his failure to travel to the area frequently, and his lack of definite plans to return); *Mitchell v. Dover-Phila Federal Credit Union,* Case No. 5:18CV102, 2018 WL 3109591, at *4 (N.D. Ohio June 25, 2018) (dismissing plaintiff's ADA claim against a credit union located 200 miles from his home, based on alleged lack of access to its website, because plaintiff was ineligible to join and expressed no intention to use its services in the future). *But see Jones v. Lanier Federal Credit Union*, 335 F. Supp. 3d 1273, 1276 (N.D. Ga. 2018) (finding standing because the injury alleged was plaintiff's inability to access defendant's website, rather than an inability to access its services, while rejecting without detailed analysis, in a brief opinion, the argument that the plaintiff was ineligible to join defendant's credit union); *Jones v. Piedmont Plus Federal Credit Union*, 335 F. Supp. 3d 1278, 1280-81 (N.D. Ga. 2018) (holding that the plaintiff had Article III standing in a website accessibility case even though he was not eligible to become a member of the credit union, in an opinion involving the same plaintiff, issued by the same judge, as *Jones v. Lanier*); *Jones v. Family First Credit Union*, 340 F. Supp. 3d 1356, 1362-63 (N.D. Ga. 2018) (holding that the plaintiff had standing to pursue damages based on the barriers he encountered when he tried to access defendant's website, but did not have standing to seek injunctive relief to prevent future harm because his complaint was devoid of allegations about his plans or intent to use defendant's services in the future).

have found Article III standing.[62] Article III standing is addressed more extensively in section 27.07 (in connection with

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[62]*See, e.g., Honeywell v. Harihar Inc.,* No. 2:18-CV-618-FTM-29MRM, 2018 WL 6304839, at *3 (M.D. Fla. Dec. 3, 2018) (denying defendant's motion to dismiss an ADA website accessibility claim for lack of Article III standing where plaintiff tried unsuccessfully to access the website for defendant's motel and alleged she was therefore deterred from visiting it, where she pleaded a future injury related to a hotel's website by alleging she intended to travel from Fort Lauderdale to Fort Myers within six months); *Wu v. Jensen-Lewis Co.,* 345 F. Supp. 3d 438, 441- 42 (S.D.N.Y. 2018) (holding that the fact that the defendant had launched a new website, which it contended was ADA compliant, did not moot the lawsuit or deny the plaintiff Article III standing); *Gomez v. General Nutrition Corp.,* 323 F. Supp. 3d 1368, 1374 (S.D. Fla. 2018) (holding, in a brief opinion, that an online shopper who was legally blind and a "tester" of website ADA compliance had Article III standing to sue a nutrition retailer, alleging that its website did not comply with Title III of the ADA); *Castillo v. Jo-Ann Stores, LLC,* 286 F. Supp. 3d 870, 873-74 (N.D. Ohio 2018) (holding that the plaintiff, who was visually impaired, had standing to bring ADA and California Unruh Act claims alleging that the defendant's website was inaccessible to her); *Gathers v 1-800-Flowers.com, Inc.,* Civil Action No. 17-cv-10273-IT, 2018 WL 839381, at *4 (D. Mass. Feb. 12, 2018) (holding that plaintiffs had standing to sue on behalf of visually impaired users of defendants' website where they alleged that buttons were missing labels necessary for screen reader software to operate properly, error messages generated when plaintiffs sought to place orders were difficult for the screen reader software to locate and read, multiple audio streams began playing automatically at the same time on defendant's customer support page, images of items for sale did not include written descriptions, the screen reader was unable to "go back," and the screen reader was unable to locate the correct field in which to insert payment information); *Gil v. Winn-Dixie Stores, Inc.,* 257 F. Supp. 3d 1340, 1344, 1347-49 (S.D. Fla. 2017) (holding that a visually impaired man had standing because Winn-Dixie's website operated as a "gateway" to the physical stores and its online offerings (which included, among other things, digital coupons) were services, privileges, advantages, and accommodations of the store, where the plaintiff had frequented Winn-Dixie in the past, and represented that he would do so again in the future once the website became accessible to him); *Suvino v. Time Warner Cable, Inc.,* No. 16 CV 7046-LTS-BCM, 2017 WL 3834777, at *1-2 (S.D.N.Y. Aug. 31, 2017) (holding that plaintiff had Article III standing and stated a claim for an ADA violation based on access to the defendant's website, where the "Website functionalities (including service selection, online bill payment and access to streaming services) are among the service features sold through the physical locations and thus are an aspect of the goods and services offered by the stores as public accommodations."); *Gniewkowski v. Lettuce Entertain You Enterprises, Inc.*, 251 F. Supp. 3d 908, 913-14 (W.D. Pa. 2017) (holding that plaintiffs suffered an injury in fact under the ADA where "Defendant's website barred Plaintiffs' screen reader software from reading the content of its website," such that "Plaintiffs were unable to conduct on-line research to compare financial services and products").

security breach cases), among other places in this treatise.

Claims brought against an interactive computer service provider alleging the inaccessibility of third party content (as opposed to content created by the site or service itself) will not be actionable because of the immunity provided by the Communications Decency Act (CDA), 47 U.S.C.A. § 230. This is true of both claims under the ADA[63] and claims under state statutes such as California's Unruh Act.[64] CDA immunity is analyzed extensively in section 37.05 in chapter 37.

The Eleventh Circuit has held that the Twenty-First Century Communications and Video Accessibility Act (CVAA), which gives the Federal Communications Commission exclusive jurisdiction over certain regulatory matters relating to closed captioning, does not bar ADA litigation by website users objecting to the lack of closed-captioning on online videos.[65]

The volume of ADA litigation over website and mobile app

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[63]*See National Association of the Deaf v. Harvard University,* 377 F. Supp. 3d 49, 64-70 (D. Mass. 2019) (holding the CDA applicable to plaintiffs' claims under section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. § 794, and Title III of the Americans with Disabilities Act of 1990, 29 U.S.C.A. §§ 12181-12189, to the extent based on third party content embedded within online content produced or created by Harvard, on Harvard's platforms); *see also National Association of the Deaf v. Massachusetts Institute of Technology,* Case No. 3:15-cv-30024-KAR, 2019 WL 1409301 (D. Mass. Mar. 28, 2019) (entering the same order, on the same grounds, in plaintiffs' parallel lawsuit against MIT).

[64]*See, e.g., Federal Agency of News LLC v. Facebook, Inc.*, Case No. 18-CV-07041-LHK, 2019 WL 3254208, at *5-7 (N.D. Cal. July 20, 2019) (dismissing without prejudice, as precluded by the CDA, the claims brought under Title II of the U.S. Civil Rights Act of 1964 and California Unruh Civil Rights Act, among others, by a Russian news site whose Facebook account was terminated in early 2018 after it was determined by Facebook that the account was controlled by the Russian government's Internet Research Agency, which according to a U.S. intelligence community report had created 470 inauthentic accounts on Facebook that were used to influence the outcome of the 2016 Presidential election); *Ebeid v. Facebook, Inc.*, Case No. 18-cv-07030-PJH, 2019 WL 2059662, at *3-5 (N.D. Cal. May 9, 2019) (dismissing plaintiff's claims under the Civil Rights Act Title II, the First Amendment to the U.S. Constitution, and California's Unruh Civil Rights Act, Cal. Civ. Code §§ 51 *et seq.*, with prejudice, and dismissing with prejudice plaintiff's related claim under California's Unlawful Business Practices Act, Cal. Bus. & Prof. Code §§ 17200 *et seq.*, to the extent it relied on allegations that Facebook removed plaintiff's posts or restricted his ability to use the Facebook platform).

[65]*See Sierra v. City of Hallandale Beach*, 904 F.3d 1343 (11th Cir.

accessibility has increased in the years since the *Target* decision. Many website and mobile app accessibility cases are filed in California, Florida and New York—often with particular industries targeted and in a number of instances with the same lawyers and/or plaintiffs seeking to bring putative class action suits against various defendants. As one federal court in Florida noted in 2019:

> Recently there have been an explosion of cases—under both Title II and III—alleging that websites violate the ADA. Usually, they arise in the context of websites either failing to be compatible with screen reader software or failing to have closed captioning for videos. Courts have struggled to apply traditional principles of standing to these website cases and have disagreed about what features a website must have to comply with the ADA. The latter is largely due to a complete lack of rules and regulations being promulgated by the Department of Justice despite being aware of this issue for years.[66]

Noting the practice of some lawyers and plaintiffs in bringing numerous ADA website accessibility claims, Senior District Court Judge Loretta Preska commented—in dismissing plaintiff's ADA Title III website accessibility claim and related New York state and city claims, for lack of Article III standing (because the plaintiff failed to allege an injury in fact)—that while there was "nothing inherently wrong with filing duplicative lawsuits against multiple defendants if the harms to be remedied do exist and are indeed identical . . . , those who live by the photocopier shall die by the photocopier."[67]

To mitigate the risk of class action litigation, businesses may choose to require customers to enter into a binding arbitration agreement. To be enforceable, however, a business must make sure that patrons with special needs in fact receive adequate notice and provide clear assent. Otherwise,

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2018).

Regulations implementing the CVAA, which took effect on January 1, 2019, may be found at 47 C.F.R. §§ 14.1 to 14.61.

[66] *Price v. City of Ocala*, 375 F. Supp. 3d 1264, 1270 (M.D. Fla. 2019) (dismissing the suit of a blind Florida resident, alleging that a city's website was incompatible with his screen reader software, for lack of Article III standing, in a suit brought under Title II of the ADA (not Title III), which addresses discrimination by state or local governments, and section 504 of the Rehabilitation Act).

[67] *Mendez v. Apple Inc.,* 18 Civ. 7550 (LAP), 2019 WL 2611168, at *4 (S.D.N.Y. Mar. 28, 2019).

the agreement will be unenforceable.[68]

Contract formation and consumer arbitration provisions are analyzed in chapters 21 and 22.

For guidance on how to make a site accessible, readers should refer to the Web Accessibility Initiative of the World Wide Web Consortium (W3C) and its Web Content Accessibility Guidelines (WCAG).[69] To be accessible to the blind, for example, WCAG provides that a website should use alternative text that allows blind users to translate website content into speech or Braille using screen reader software and special keyboards. The U.S. Department of Justice—which is charged with issuing rules to implement the ADA[70]—has neither adopted nor rejected the WCAG 2.0 standard.[71] The Eleventh Circuit, however, characterized the

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[68]*See, e.g., National Federation of the Blind v. The Container Store,* 904 F.3d 70, 84 (1st Cir. 2018) (affirming the lower court's order denying defendant's motion to compel arbitration where the plaintiffs were blind and could not access the keypad on which the terms and conditions of a loyalty program (including an arbitration provision) were displayed because they could not read them and the defendant allegedly did not have tactile keypads on its point-of-sale devices, where the plaintiffs alleged they were not told that the loyalty program was subject to an agreement to arbitrate disputes and where the defendant did not present evidence that the terms in fact were communicated to them; "Based upon the lack of any evidence that the in-store plaintiffs had any knowledge, actual or constructive, that arbitration terms applied to their enrollment in the loyalty program, we conclude that the Container Store failed to meet its burden of establishing that an agreement to arbitrate was ever consummated between it and the in-store plaintiffs.").

[69]*See* http://www.w3.org/WAI/ WCAG 2.0 guidelines are private industry standards for website accessibility developed by technology and accessibility experts. *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 902 n.1 (9th Cir. 2019). As explained by the Ninth Circuit,

> WCAG 2.0 guidelines have been widely adopted, including by federal agencies, which conform their public-facing, electronic content to WCAG 2.0 level A and level AA Success Criteria. 36 C.F.R. pt. 1194, app. A (2017). In addition, the Department of Transportation requires airline websites to adopt these accessibility standards. *See* 14 C.F.R. § 382.43 (2013). Notably, the Department of Justice has required ADA-covered entities to comply with WCAG 2.0 level AA (which incorporates level A) in many consent decrees and settlement agreements in which the United States has been a party.

Robles, 913 F.3d at 902 n.1.

[70]42 U.S.C.A. § 12186(b); *Bragdon v. Abbott*, 524 U.S. 624, 646 (1998); *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 904 (9th Cir. 2019).

[71]The DOJ announced its intention to engage in rulemaking on website accessibility in 2010, but never did so and formally withdrew its notice of proposed rulemaking in 2017. *See* Nondiscrimination on the

WCAG 2.0 web access standard in 2018 as "the recognized industry standard for website accessibility."[72]

Additional guidance on Web accessibility may be obtained from the State of California Web Accessibility Standards website.[73]

48.07 ISP Obligations

In addition to facing potential third-party liability (which is addressed in chapters 49, 50 and 51), interactive computer services are required "at the time of entering an agreement with a customer for the provision of interactive computer service" to notify the customer "in a manner deemed appropriate by the provider" that "parental controls (such as computer hardware, software, or filtering services) are commercially available" to assist the customer in limiting access

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Basis of Disability, 75 Fed. Reg. 43460-01 (July 26, 2010) (issuing Advance Notice of Proposed Rulemaking (ANPRM) to "explor[e] what regulatory guidance [DOJ] can propose to make clear to entities covered by the ADA their obligations to make their Web sites accessible"); Nondiscrimination on the Basis of Disability, 82 Fed. Reg. 60932-01 (Dec. 26, 2017) (withdrawing the ANPRM).

The Ninth Circuit has held that the DOJ's failure to issue rules for many years after the 2010 notice of proposed rulemaking on website accessibility did not amount to a denial of due process for a company sued for failing to provide website accessibility. *See Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 906-09 (9th Cir. 2019); *see also Jones v. Fort McPherson Credit Union*, 347 F. Supp. 3d 1351, 1355 (N.D. Ga. 2018) (rejecting defendant's Due Process argument where DOJ regulations provided that discrimination could be found because of the absence of auxiliary aids and services, noting screen reader software as an example of an auxiliary aid, where plaintiff, in any case, was not seeking relief for defendant's failure to comply with WCAG 2.0 but with the ADA itself). The Ninth Circuit in *Robles* speculated that DOJ may have purposefully declined to provide specific instructions to afford public accommodations maximum flexibility in meeting the statute's requirements. *Id.* at 908-09, *citing Reed v. CVS Pharmacy, Inc.,* Case No. CV 17–3877–MWF (SKx), 2017 WL 4457508, at *5 (C.D. Cal. Oct. 3, 2017); Nondiscrimination on the Basis of Disability, 82 Fed. Reg. 60932-01 (Dec. 26, 2017) (noting that DOJ "continue[s] to assess *whether specific technical standards are necessary and appropriate* to assist covered entities with complying with the ADA.") (emphasis added by the Ninth Circuit panel in *Robles*).

[72] *Haynes v. Hooters of America, LLC*, 893 F.3d 781, 783 (11th Cir. 2018).

[73] *See* https://webstandards.ca.gov/accessibility/overview/

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ABOUT THE AUTHOR

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IAN C. BALLON

Ian Ballon is Co-Chair of Greenberg Traurig LLP's Global Intellectual Property and Technology Practice Group and is a litigator in the firm's Silicon Valley and Los Angeles offices. He defends data privacy, cybersecurity breach, TCPA, and other Internet and mobile class action suits and litigates copyright, trademark, patent, trade secret, right of publicity, database and other intellectual property cases, including disputes involving safe harbors and exemptions, platform liability and fair use.

Mr. Ballon was the recipient of the 2010 Vanguard Award from the State Bar of California's Intellectual Property Law Section. He also has been recognized by *The Los Angeles and San Francisco Daily Journal* as one of the Top Intellectual Property litigators (2009-2020), Top Cybersecurity and Artificial Intelligence (AI) lawyers, and Top 100 lawyers in California.

Mr. Ballon was named a "Groundbreaker" by *The Recorder* at its 2017 Bay Area Litigation Departments of the Year awards ceremony and was selected as an "Intellectual Property Trailblazer" by the *National Law Journal*.

Mr. Ballon was selected as the Lawyer of the Year for information technology law in the 2020, 2019, 2018, 2016 and 2013 editions of *The Best Lawyers in America* and is listed in Legal 500 U.S., The Best Lawyers in America (in the areas of information technology and intellectual property) and Chambers and Partners USA Guide in the areas of privacy and data security and information technology. He also serves as Executive Director of Stanford University Law School's Center for the Digital Economy.

Mr. Ballon received his B.A. *magna cum laude* from Tufts University, his J.D. *with honors* from George Washington University Law School and an LLM in international and comparative law from Georgetown University Law Center. He also holds the C.I.P.P./U.S. certification from the International Association of Privacy Professionals (IAPP).

In addition to *E-Commerce and Internet Law: Treatise with Forms 2d edition*, Mr. Ballon is the author of *The Complete CAN-SPAM Act Handbook* (West 2008) and *The Complete State Security Breach Notification Compliance Handbook* (West 2009), published by Thomson West (www.IanBallon.net).

He may be contacted at BALLON@GTLAW.COM and followed on Twitter and LinkedIn (@IanBallon).

Contributing authors: Parry Aftab, Viola Bensinger, Ed Chansky, Francoise Gilbert, Rebekah Guyon, Tucker McCrady, Josh Raskin, & Tom Smedinghoff.

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