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### Accessible Websites and Mobile Applications Under the ADA: The Lack of Legal Guidelines and What This Means for Businesses and Their Customers

Josephine Meyer  
*Seattle University*

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# Accessible Websites and Mobile Applications Under the ADA: The Lack of Legal Guidelines and What This Means for Businesses and Their Customers

*Josephine Meyer\**

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## INTRODUCTION

In 2019, the United States Court of Appeals for the Ninth Circuit reaffirmed in *Robles v. Domino’s Pizza, LLC* that Title III of the Americans with Disabilities Act (ADA) does not only apply to physical “places” of public accommodation but also to the websites and mobile applications of these places.<sup>1</sup> Guillermo Robles, the plaintiff in the case, was unable to order a customized pizza from Domino’s online website because he was blind.<sup>2</sup> Robles’s lawsuit was based on Domino’s failure to “design, construct, maintain, and operate its [website and app] to be fully

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\*J.D. Candidate, Seattle University School of Law. I would like to thank the Seattle University Law Review editors for helping this Comment to reach its full potential, as well as the mentors, friends, and family who have been by my side over the past three years.

1. *See* *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898 (9th Cir. 2019); *see also* Nat’l Fed’n of the Blind v. Target Corp., 452 F. Supp. 2d 946 (N.D. Cal. 2006); *Gorecki v. Hobby Lobby Stores, Inc.*, 2017 WL 2957736, at \*5 (C.D. Cal. June 15, 2017); *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340 (S.D. Fla. 2017).

2. *Robles*, 913 F.2d at 902.

accessible to and independently usable by Mr. Robles and other blind or visually-impaired people[.]”<sup>3</sup> In response, Domino’s argued that the ADA did not cover Domino’s website or mobile application; that in fact, applying the ADA violated Domino’s due process rights because the ADA lacks helpful guidance for places of public accommodation regarding website accessibility.<sup>4</sup>

The court was unconvinced by Domino’s arguments. As the court explained, Title III “applies to the services *of* a place of public accommodation, not services *in* a place of public accommodation.”<sup>5</sup> Therefore, under Title III of the ADA, a person with a disability may sue a place of public accommodation for having an inaccessible website or mobile application.<sup>6</sup> The court further concluded that Domino’s due process rights were not violated, reasoning that “[t]he ADA articulates comprehensible standards to which Domino’s conduct must conform.”<sup>7</sup> In response to Domino’s contention that Robles sought to impose liability based on Domino’s failure to comply with the Web Content Accessibility Guidelines (WCAG) 2.0,<sup>8</sup> a set of parameters in which Domino’s had not received fair notice of its obligation to comply with,<sup>9</sup> the court stated:

Robles does not seek to impose liability based on Domino’s failure to comply with WCAG 2.0. Rather, Robles merely argues—and we agree—that the . . . court can order compliance with WCAG 2.0 as an equitable remedy if, after discovery, the website and app fail to satisfy the ADA.<sup>10</sup>

Places of public accommodation (PPAs) do not have clear federal guidelines—in particular, PPAs do not have clear federal guidelines with the force of law on how to comply with the ADA in making their websites and mobile applications accessible to individuals with disabilities. Yet, federal courts have held that the lack of legal guidelines does not amount to a due process violation.<sup>11</sup> However, even if the lack of legal guidelines does not meet the technical standard of violating PPAs’ due process, PPAs need the opportunity to evaluate accessibility to websites and mobile

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3. *Id.*

4. *Id.* at 902–03.

5. *Nat’l Fed’n of the Blind*, 452 F. Supp. 2d at 953 (emphasis in original) (internal citation omitted) (as quoted in *Robles*, 913 F.3d at 905).

6. *See Robles*, 913 F.2d 898.

7. *Id.* at 906.

8. The Web Content Accessibility Guidelines (WCAG) explain how to make web content more accessible to people with disabilities. *See infra* note 92.

9. *Robles*, 913 F.2d at 907.

10. *Id.*

11. *See Robles*, 913 F.2d 898; *see also* *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381 (E.D.N.Y. 2017).

applications early on before they find themselves to be defendants in complex lawsuits.

The World Wide Web Consortium (WC3)<sup>12</sup> Recommendations, which include the WCAG 2.0 recommendations, have been referred to as a guide. However, they are not legally mandated, and their necessity has not been sufficiently promoted to the public. It has been argued that the ADA intends to give PPAs maximum flexibility in meeting the requirements under Title III for website and mobile application accessibility.<sup>13</sup> The reality is that PPAs who are given specific guidelines may be more motivated to comply with the guidelines in order to avoid the consequences. Moreover, it would not be necessary for legal regulations to be rigid to the point of not allowing any flexibility.

Part I of this Comment lays out the historical and textual authority for the application of Title III to websites and applications. Part II provides a brief history regarding the lack of an official law in the area of Title III application to websites and mobile applications. Part III describes the negative impacts that certain groups of people face due to the lack of official law. Part IV lays out the current guidelines recommended for PPAs to follow. Part V recommends a law based on these recommended guidelines in combination with a required educational course, which would give PPAs the tools and information they need in order to provide equal service to all members of their communities. Part VI concludes by considering potential issues with making an official law and suggests a requirement that PPAs complete an educational course.

#### I. HISTORICAL AND TEXTUAL AUTHORITY SUPPORTING THE APPLICATION OF TITLE III TO WEBSITE AND MOBILE APPLICATION ACCESSIBILITY

The ADA intends “to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.”<sup>14</sup> When the measure that would implement the ADA was stalled for several months in 1990, over 1,000 protestors came to Washington, D.C. to urge Congressional approval.<sup>15</sup> As explained by one of the protestors, “We’re not asking for any favors. . . . We’re

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12. See *Accessibility Principles*, W3C WEB ACCESSIBILITY INITIATIVE (WAI) (May 10, 2019), <https://www.w3.org/WAI/fundamentals/accessibility-principles/> [<https://perma.cc/3RPH-3PS7>].

13. See *Reed v. CVS Pharm., Inc.*, No. 17-CV-3877, 2017 WL 4457508, at \*5 (C.D. Cal. Dec. 8, 2017).

14. *About the ADA National Network*, ADA NAT’L NETWORK, <https://adata.org/about-ada-national-network> [<https://perma.cc/6SJJ-NFQ7>].

15. See Stephen Kaufman, *They Abandoned Their Wheelchairs and Crawled Up the Capitol Steps*, SHARE AM. (Mar. 12, 2015), <https://share.america.gov/crawling-up-steps-demand-their-rights/> [<https://perma.cc/KM6D-4669>].

simply asking the same rights and equality any other American has.”<sup>16</sup> With the goal of symbolizing the barriers confronting disabled people, “more than 60 activists abandoned their crutches, wheelchairs, powerchairs and other mobility-assistance devices and began crawling up the 83 steps that lead to the Capitol.”<sup>17</sup> This moment in history became known as the “Capitol Crawl.”<sup>18</sup>

Within four months, the added attention and pressure caused by the Capitol Crawl pushed Congress to pass the ADA, which “outlawed discrimination based on physical or mental disability in employment and ensured access to buildings and public and private transportation.”<sup>19</sup> This was a monumental moment in history as Congress recognized, as laid out in the United States Code, that “disabilities in no way diminish a person’s right to fully participate in all aspects of society[.]”<sup>20</sup> At the signing of the ADA on July 26, 1990, President George H.W. Bush announced: “With today’s signing of the landmark Americans for Disabilities Act, every man, woman, and child with a disability can now pass through once-closed doors into a bright new era of equality, independence, and freedom.”<sup>21</sup> President Bush further directed that “the shameful wall of exclusion finally come tumbling down.”<sup>22</sup>

The ADA guarantees disabled Americans the same opportunities as non-disabled Americans to participate in mainstream American life by enjoying employment opportunities, the purchasing of goods and services, and participation in government programs and services.<sup>23</sup> Modeled after the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973, “the ADA is an ‘equal opportunity’ law for people with disabilities.”<sup>24</sup> One has a “disability” under the ADA if an individual “(A) [has] a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) [has] a record of such an impairment; or (C) [is] regarded as having such an impairment.”<sup>25</sup> “Major life activities” under the ADA

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16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. 42 U.S.C. § 12101(a)(1) (1990).

21. George H.W. Bush, U.S. President, Remarks of President George Bush at the Signing of the Americans with Disabilities Act (July 26, 1990), [https://www.ada.gov/ghw\\_bush\\_ada\\_remarks.html](https://www.ada.gov/ghw_bush_ada_remarks.html) [<https://perma.cc/RE8F-42LP>].

22. *Id.*

23. See *Introduction to the ADA*, ADA.GOV, [https://www.ada.gov/ada\\_intro.htm](https://www.ada.gov/ada_intro.htm) [<https://perma.cc/4XBW-MG2N>].

24. *Id.*

25. 42 U.S.C. § 12102(1) (1990).

include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working . . . a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.<sup>26</sup>

“[I]f [an] individual establishes that he or she has been subjected to an action prohibited under [the ADA] because of “actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity[.]” then that individual is considered impaired under the ADA.<sup>27</sup> Subsection (C), as noted above, does not apply to impairments that are transitory and minor—a transitory impairment has an actual or expected duration of six months or less.<sup>28</sup>

Title III of the ADA provides that individuals shall not be discriminated on the basis of disability in their “full and equal enjoyment of the “goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”<sup>29</sup> Under Title III, no one should be *denied* participation in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity on the basis of disability. No one should be given an *unequal opportunity* to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations. Furthermore, no one should be provided with a good, service, facility, privilege, advantage, or accommodation that is *different or separate* from that provided to other individuals, “unless such action is necessary to provide the individual or class of individuals with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.”<sup>30</sup> “Discrimination” includes:

(ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of

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26. *Id.* § 12102(2).

27. *Id.* § 12102(3)(A).

28. *Id.* § 12102(3)(B).

29. 42 U.S.C. § 12182(a) (1990).

30. *Id.* §§ 12182(b)(1)(A)(i–iii).

such goods, services, facilities, privileges, advantages, or accommodations; [and]

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden[.]<sup>31</sup>

A PPA is liable for 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.”<sup>32</sup> The United States Code lists the categories of businesses that qualify as “places of “public accommodation.”<sup>33</sup> “The 12 categories are exhaustive, and the scope of covered entities within each category is very broad.”<sup>34</sup> Federal regulations require that a PPA “furnish appropriate auxiliary aids and services where necessary to ensure *effective communication* with individuals with disabilities.”<sup>35</sup> The Department of Justice’s (DOJ’s) definition of “auxiliary aids and services” includes ““accessible electronic and information technology’ or ‘other effective methods of making visually delivered materials available to individuals who are blind or have low vision.’”<sup>36</sup> While the DOJ lays out broad regulations regarding what a PPA may be held liable for, no official law is provided to guide these PPAs in developing and maintaining accessible websites and mobile applications.

## II. A BRIEF LEGISLATIVE HISTORY

In 2010, the DOJ indicated that it was considering amending its regulations to require website accessibility, going so far as to seek public comment for what standards it should adopt.<sup>37</sup> Five years later, the DOJ stated that it would publish a Notice of Proposed Rulemaking (NPRM) addressing website accessibility pursuant to Title III of the ADA, and that

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31. *Id.* §§ 12182(b)(2)(A)(ii–iii).

32. *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898, 904 (9th Cir. 2019) (quoting 42 U.S.C. § 12182(b)(2)(A)(iii) (1990)).

33. 42 U.S.C. § 12181(7) (1990).

34. LaLonnice Gray, *Are Websites Subject to the ADA?*, 47 *COLO. LAW.* 42, 43 (2018).

35. 28 C.F.R. § 36.303(c)(1) (1991) (emphasis added) (as quoted in *Robles*, 913 F.3d at 904).

36. *Id.* § 36.303(b)(2) (as quoted in *Robles*, 913 F.3d at 904–05).

37. See *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations*, 75 Fed. Reg. 43,460 (proposed July 26, 2010) (to be codified at 28 C.F.R. pts. 35, 36).

it expected to publish this NPRM in 2016.<sup>38</sup> This NPRM was never published. Instead, in 2017, the DOJ withdrew two previously announced Advanced Notices of Proposed Rulemaking (ANPRMs) in regard to Title III and website accessibility.<sup>39</sup> The same year, the U.S. House of Representatives introduced the ADA Education and Reform Act of 2017 (the Act).<sup>40</sup>

Section 2 of the proposed act required the DOJ to develop an educational program about promoting access to PPAs,<sup>41</sup> but disability rights activists strongly opposed Sections 3 and 5. Under Section 3, civil actions based on the failure to remove an architectural barrier in order to make a PPA accessible would be prohibited unless the aggrieved person writes a specific notice to the PPA regarding the barrier, is ignored by the PPA for 60 days after receipt of the notice, and the PPA fails to make substantial improvements to the barrier for *another* 60 days.<sup>42</sup> Under Section 5, the Judicial Conference of the United States would be required to develop a model program to promote alternative dispute resolution mechanisms to resolve such claims.<sup>43</sup> One opposing argument was that Congress was effectively narrowing remedies available under the ADA.<sup>44</sup> Activists in opposition further argued that these Sections “would impose a burdensome process before people with disabilities could file a civil action for an accessibility violation in a public accommodation case” and “would remove incentives for businesses to comply . . . unless and until people with disabilities are denied access and submit the requisite notice.”<sup>45</sup>

As more cases began to be filed regarding the right to website and mobile application accessibility under the ADA,<sup>46</sup> Congressional members

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38. See DEP’T OF JUST., FALL 2015 STATEMENT OF REGULATORY PRIORITIES, [https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201510/Statement\\_1100.html](https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201510/Statement_1100.html) [<https://perma.cc/YW2T-W5GF>] (discussing publishing an NPRM for the same issue in regard to Title II of the ADA).

39. See Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions; *see also* Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of Public Accommodations, 75 Fed. Reg. 43460-01 (proposed July 26, 2010) (to be codified at 28 C.F.R. pts. 35, 36).

40. See *generally* ADA Education and Reform Act of 2017, H.R. 620, 115th Cong. (2017).

41. *Id.* § 2.

42. *Id.* § 3.

43. *Id.* § 5.

44. Susan S. Steinman, *A Congress of Small Ideas*, TRIAL, Apr. 2018, at 22.

45. Letter from Vanita Gupta, Leadership Conference on Civil and Human Rights, to Paul Ryan, Speaker for U.S. H.R., and Nancy Pelosi, Minority Leader for U.S. H.R. (Feb. 14, 2018), <http://civilrightsdocs.info/pdf/policy/letters/2018/oppose-hr-620-ada-education-reform.pdf> [<https://perma.cc/639Q-88PA>].

46. See, e.g., *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340 (E.D.N.Y. 2017); *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381 (S.D. Fla. 2017); *Carroll v. ABNB Fed. Credit Union*, No. 2:17CV521, 2018 WL 1180317, at \*1 (E.D. Va. Mar. 5, 2018); *Markett v. Five Guys Enterprises LLC*, No. 17-CV-788, 2017 WL 5054568 (S.D.N.Y. July 21, 2017).



wrote letters to then-U.S. Attorney General Jeff Sessions.<sup>47</sup> These letters urged the DOJ to resolve uncertainty regarding website accessibility obligations under the ADA:

[B]usinesses of every shape and size throughout the country are being threatened with legal action by private plaintiffs for unsubstantiated violations of the ADA . . . unresolved questions about the applicability of the ADA to websites as well as the Department’s abandonment of the effort to write a rule defining website accessibility standards, has created a liability hazard that directly affects businesses in our states and the customers they serve.<sup>48</sup>

The DOJ took no material action in response. Instead, Assistant Attorney General Stephen E. Boyd communicated the Attorney General’s Office’s belief that this uncertainty was not a major issue. He stated “the Department has consistently taken the position that the absence of a specific regulation does not serve as a basis for noncompliance with a statute’s requirements” and “noncompliance with a voluntary technical standard for website accessibility does not necessarily indicate noncompliance with the ADA.”<sup>49</sup> As a result, over two years have gone by since these communications occurred and the issue remains: there is no legal standard for businesses to adhere to, for people with disabilities to be sufficiently protected by, and for courts to efficiently follow.

### III. NEGATIVE IMPACTS IN THE ABSENCE OF OFFICIAL LAW

The lack of a legal standard is not helpful to anyone, especially people with disabilities. Access to information and communication technologies is a basic human right.<sup>50</sup> As our world changes, “being unable to access Web sites puts individuals [with disabilities] at a great disadvantage in today’s society”<sup>51</sup> as we live in a country in which

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47. See generally Congress of the United States Letter to Att’y Gen. Jeff Sessions (June 20, 2018) [hereinafter U.S. Congress Letter to A.G. Jeff Sessions], <https://www.adatitleiii.com/wp-content/uploads/sites/121/2018/06/ADA-Final-003.pdf> [<https://perma.cc/ZLK9-SV4H>]; United States Senate Letter to Att’y Gen. Jeff Sessions (July 30, 2019), <https://www.grassley.senate.gov/sites/default/files/documents/2019-07-30%20Grassley%20et%20al%20to%20DOJ%20-%20ADA%20Website%20Accessibility.pdf> [<https://perma.cc/L973-LSKH>].

48. U.S. Congress Letter to A.G. Jeff Sessions, *supra* note 47.

49. Letter from Office of the Assistant Attorney General to Congressman Ted Budd (Sept. 25, 2018) [hereinafter Letter to Congressman Budd], <https://images.cutimes.com/contrib/content/uploads/documents/413/152136/adaletter.pdf> [<https://perma.cc/68EK-76RT>].

50. See U.N. Convention on the Rights of Persons with Disabilities, *Enhancing the Accessibility of Information and Technology and Inclusive Development*, U.N. Doc. CRPD/CSP/2016/4 (Mar. 29, 2016) [hereinafter U.N. Convention on the Rights of Persons with Disabilities].

51. Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43,460.

approximately 88.5% of the population uses the internet.<sup>52</sup> Why should a person be excluded from receiving the many benefits of the internet merely because they have a disability? Among other countless uses, people use the internet every day to interact with others, purchase items they may not otherwise be able to purchase, find jobs, and educate themselves on what is going on in the world.

Especially given the rise of COVID-19 and everchanging social distancing measures currently in-place, the internet is an individual's lifeline to the rest of the world.<sup>53</sup> With the increase in the percentage of people with disabilities in the United States to 12.8% as of 2016<sup>54</sup> and 15% of the overall global population disabled,<sup>55</sup> access to technology must be accorded as a basic human right. Accessibility on the internet can provide equal access and opportunity to individuals with disabilities.<sup>56</sup> Recognizing that life and internet have become intermingled, Nicola Lucchi explains:

A full range of human activities are [sic] now intimately connected to online services: finding and applying for a job, doing research, completing education, taking part in social communication, participating in politics, finding legislative information, enjoying entertainment, and participating in commerce. It is therefore clear that access to the Internet is becoming a fundamental instrument for active, democratic participation in public life and broader society.<sup>57</sup>

Although the United Nations expanded the concept of human rights to include the right to use technologies in 1975,<sup>58</sup> access to technology is clearly not being treated as a basic human right when 12.8% of the United

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52. See *Internet Users By Country (2016)*, INTERNET LIVE STATS, <https://www.internetlivesstats.com/internet-users-by-country/> [<https://perma.cc/7H8K-4LGC>]; see also Gray, *supra* note 43, at 43.

53. Eleanor Sarpong, *Covid-19 Shows Why Internet Access Is a Basic Right. We Must Get Everyone Connected*, WORLD WIDE WEB FOUND. (Apr. 15, 2020), <https://webfoundation.org/2020/04/covid-19-shows-why-internet-access-is-a-basic-right-we-must-get-everyone-connected/> [<https://perma.cc/U69S-EDHZ>].

54. L. Kraus, E. Lauer, R. Coleman, and A. Houtenville, UNIV. OF N.H. INST. ON DISABILITY, 2017 DISABILITY STATISTICS ANNUAL REPORT 2 (2017).

55. *Disability Inclusion*, WORLD BANK (Oct. 2, 2019), <https://www.worldbank.org/en/topic/disability> [<https://perma.cc/WH36-4JMM>].

56. Oyetoke Tobi Emmanuel, *Why Web Accessibility Is Important and How You Can Accomplish It*, MEDIUM (Feb. 7, 2018), <https://medium.com/fbdevclagos/why-web-accessibility-is-important-and-how-you-can-accomplish-it-4f59fda7859c> [<https://perma.cc/3ZNF-KC34>].

57. Nicola Lucci, *Internet Content Governance and Human Rights*, 16 VAND. J. ENT. & TECH. L. 809, 822 (2014); see also Victoria Smith Ekstrand, *Democratic Governance, Self-Fulfillment and Disability: Web Accessibility Under the Americans with Disabilities Act and the First Amendment*, 22 COMM. L. & POL'Y 427, 455 (2017).

58. See G.A. Res. 3384 (XXX), Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind, at 86 (Nov. 10, 1975) (acknowledging access to technology as a human right).

States does not have full access to technology.<sup>59</sup> Individuals with many different types of disabilities are negatively impacted by inaccessible websites and mobile applications. These disabilities include auditory disabilities; cognitive, learning, and neurological disabilities; physical disabilities; speech disabilities; and visual disabilities.<sup>60</sup> Auditory disabilities may range from moderate hearing loss in one or both ears to permanent hearing loss in both.<sup>61</sup> Inaccessible websites and mobile applications create barriers for individuals with auditory disabilities like audio content without captions or transcription, or media players with no captions or volume controls.<sup>62</sup>

Disabilities vary and affect individuals in a multitude of ways. For example, an inaccessible website led plaintiffs that were deaf to sue the Board of Regents of the University System of Maryland.<sup>63</sup> Passionate about keeping up with the successes of the university's sports teams, the plaintiffs attempted to watch videos on the university's athletics website.<sup>64</sup> None of the videos—including videos of individuals discussing game highlights, interviews with athletes, and sometimes complete games—were captioned.<sup>65</sup> Because “[n]one of the audio was captioned[.]” the plaintiffs were unable to enjoy the website's videos.<sup>66</sup>

Cognitive, learning, and neurological disabilities are comprised of “neurodiversity and neurological disorders, as well as behavioral and mental health disorders that are not necessarily neurological.”<sup>67</sup> These disabilities “may affect any part of the nervous system and impact how well people hear, move, see, speak, and understand information.”<sup>68</sup> Examples of these disabilities are attention deficit hyperactivity disorder (ADHD), autism spectrum disorder (ASD), intellectual disabilities, learning disabilities, mental health disabilities, memory impairments, multiple sclerosis, neurodiversity, perceptual disabilities, and seizure disorders.<sup>69</sup> Barriers created by inaccessible websites and mobile

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59. Notably, the United States is a member state of the United Nations and is therefore likely in violation of G.A. Res. 3384. *See generally Member States*, UNITED NATIONS, <https://www.un.org/en/member-states/> [<https://perma.cc/4WVG-Z7BK>].

60. *Diverse Abilities and Barriers*, W3C WEB ACCESSIBILITY INITIATIVE (WAI) (May 15, 2017), <https://www.w3.org/WAI/people-use-web/abilities-barriers/> [<https://perma.cc/GT3G-XFJE>].

61. *Id.*

62. *Id.* Other examples include media players with no options to adjust the text size and color for captions, services that rely on voice-only interaction, or lack of sign language to supplement hard to read text. *Id.*

63. *Innes v. Bd. of Regents of the Univ. Sys. of Md.*, 29 F. Supp. 3d 566, 569 (D. Md. 2014).

64. *Id.* at 570.

65. *Id.* at 569.

66. *Id.*

67. *Diverse Abilities and Barriers*, *supra* note 60.

68. *Id.*

69. *Id.*

applications include: “Complex navigation mechanisms” and difficult-to-use page layouts; difficult-to-read sentences and words; “[l]ong passages of text without . . . illustrations to highlight the context[; moving, blinking, or flickering content[;] background audio that cannot be turned off”; lack of “mechanisms to suppress animations[; and v]isual page designs that cannot be adapted.”<sup>70</sup>

Physical or motor disabilities involve an absence of coordination, weak or limited muscle control or sensation, pain inhibiting movement, missing limbs, and joint disorder.<sup>71</sup> Examples of physical disabilities include amputation, arthritis, fibromyalgia, rheumatism, reduced dexterity, muscular dystrophy, repetitive stress injury (RSI), and tremor and spasms.<sup>72</sup> Barriers created by inaccessible websites and mobile applications include: lack of “full keyboard support[; i]nsufficient time limits to respond or to complete tasks”; controls “that do not have equivalent text alternatives” (i.e., links with images of text); “[m]issing visual and non-visual orientation cues”; and “[i]nconsistent, unpredictable, and overly complicated navigation mechanisms and page functions.”<sup>73</sup>

Speech disabilities may amount to trouble speaking in a way that other people, or voice recognition software, recognize.<sup>74</sup> “For example, the loudness or clarity of someone’s voice might be difficult to understand.”<sup>75</sup> Examples of speech disabilities are apraxia of speech (AOS), cluttering (or “tachyphemia”), dysarthria, speech sound disorder, stuttering, and muteness (or “mutism”).<sup>76</sup> Barriers created by inaccessible websites and mobile applications include web services that only rely on voice for interaction and websites that only offer phone numbers as a means of communicating with the organization.<sup>77</sup>

“Visual disabilities range from mild or moderate vision loss in one or both eyes (‘low vision’) to substantial and uncorrectable vision loss in both eyes (‘blindness’).”<sup>78</sup> In addition, “[s]ome people have reduced or lack of sensitivity to certain colors (‘color blindness’), or increased sensitivity to bright colors.”<sup>79</sup> Examples of barriers created by inaccessible websites and mobile applications include:

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70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

Images, controls, and other structural elements that do not have equivalent text alternatives[; t]ext, images, and page layouts that cannot be resized, or that lose information when resized[; m]issing visual and non-visual orientation cues, page structure, and other navigational aids[; v]ideo content that does not have text or audio alternatives . . . [; i]nconsistent, unpredictable, and overly complicated navigation mechanisms and page functions[; t]ext and images with insufficient contrast between foreground and background color combinations . . . [; and w]ebsites, web browsers, and authoring tools that do not provide full keyboard support.<sup>80</sup>

The many people with disabilities facing barriers created by inaccessible websites and mobile applications make it clear that absent legal regulations protecting the right to access technology, we face a human rights problem. PPAs will be more inclined to change their websites and mobile applications in response to the creation of legal regulations that provide guidance on website accessibility, and such changes will benefit people with disabilities. Furthermore, implementing clear legal regulations would assist PPAs in avoiding unintentional discrimination as well as lengthy, expensive lawsuits. “The number of ADA Title III lawsuits filed in federal court in 2018 hit a record high . . .”

<sup>81</sup> In 2013, only 2,722 lawsuits were filed, and a mere 7,663 lawsuits were filed in 2017. By contrast, in 2018, the number of lawsuits filed increased by 34% to 10,163.<sup>82</sup> Out of the 10,163 lawsuits filed, at least 2,258 were website accessibility lawsuits<sup>83</sup>—a 177% increase from “814 such lawsuits in 2017.”<sup>84</sup> Many United States-based PPAs are aware that they could be sued on the basis of having a website or mobile application that is inaccessible to a person with a disability.<sup>85</sup> However, an official law laying out what is required in order for a website or mobile application to be “accessible” does not yet exist.<sup>86</sup>

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80. *Id.*

81. Minh N. Vu, Kristina M. Launey & Susan Ryan, *Number of ADA Title III Lawsuits Filed in 2018 Tops 10,000*, SEYFARTH (Jan. 22, 2019), <https://www.adatitleiii.com/2019/01/number-of-ada-title-iii-lawsuits-filed-in-2018-tops-10000/> [<https://perma.cc/6J7R-7B53>].

82. *Id.*

83. Minh N. Vu, Kristina M. Launey & Susan Ryan, *Number of Federal Website Accessibility Lawsuits Nearly Triple, Exceeding 2250 in 2018*, SEYFARTH (Jan. 31, 2019), <https://www.adatitleiii.com/2019/01/number-of-federal-website-accessibility-lawsuits-nearly-triple-exceeding-2250-in-2018/> [<https://perma.cc/6Z8L-7TUH>].

84. *Id.*

85. *See generally* 42 U.S.C. § 12181(7) (1990) (listing what is considered to be a place of “public accommodation” under Title III of the ADA—in other words, what types of businesses may be held liable for having inaccessible websites).

86. *See* *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898, 910 (9th Cir. 2019); *see also* MELANIE A. CONROY, *WHEN GOOD SITES GO BAD: THE GROWING RISK OF WEBSITE ACCESSIBILITY LITIGATION* (2019).

As the prevalence of the internet continues to grow rapidly—and it is not slowing down anytime soon—an official and detailed law would prepare PPAs for both the present and future of technological growth.<sup>87</sup> Furthermore, PPAs’ potential customer pool may decrease because the lack of clear legal guidelines renders PPAs unable to format accessible websites, in turn hindering disabled customers access to their products.<sup>88</sup> It is imperative that Congress pass a law which provides clear guidelines for PPAs in regard to required website and mobile application accessibility. While it is logical that there have not been legal guidelines in the past—due to the fact that the use of the internet was non-existent and not widespread,<sup>89</sup>—the internet has been a huge part of everyday life in the United States for quite some time now. In other words, the federal government’s time stalling has expired.

#### IV. THE W3C RECOMMENDATIONS

Currently, the guidelines recommended for PPAs to follow in order to comply with the ADA are referred to as the W3C Recommendations.<sup>90</sup> The W3C Recommendations emphasize the dependence of web accessibility on several components of web development and interaction working together, and the different sets of guidelines that apply: Web Content Accessibility Guidelines (WCAG), Authoring Tools Accessibility Guidelines (ATAG), and User Agent Accessibility Guidelines (UAAG).<sup>91</sup> WCAG is a technical standard that explains how to make web content more accessible to people with disabilities.<sup>92</sup> This standard is primarily intended for the use of “[w]eb content developers . . . [, w]eb authoring tool developers[, w]eb accessibility evaluation tool developers[, and o]thers who want or need a standard for web accessibility[.]”<sup>93</sup> WCAG 2.1, published in June of 2018, is the most recent version of WCAG.<sup>94</sup> WCAG lays out guidelines organized under four basic principles: perceivable,

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87. See Mike Cristancho, *How to Make Your Site ADA Compliant*, SHERO (Aug. 18, 2017), <https://gauge.agency/articles/how-to-make-your-site-ada-compliant/> [https://perma.cc/2QWC-Z5S5].

88. See *id.* (explaining that by making its website accessible, a business can increase its potential customer pool).

89. See generally David Redl, *New Data Show Substantial Gains and Evolution in Internet Use*, NAT’L TELECOMMUNICATIONS AND INFO. ADMIN. (June 6, 2018), <https://www.ntia.doc.gov/blog/2018/new-data-show-substantial-gains-and-evolution-internet-use> [https://perma.cc/Z4WM-YSYR] (showing that as of November 2017, 78% of Americans aged three and older used the Internet).

90. See *Essential Components of Web Accessibility*, W3C WEB ACCESSIBILITY INITIATIVE (Feb. 27, 2018), <https://www.w3.org/WAI/fundamentals/components/> [https://perma.cc/5DVY-B3CR].

91. *Id.*

92. *Web Content Accessibility Guidelines (WCAG) Overview*, W3C WEB ACCESSIBILITY INITIATIVE (June 22, 2018), <https://www.w3.org/WAI/standards-guidelines/wcag/> [https://perma.cc/PW67-JKZ2].

93. *Id.*

94. *Id.* (WCAG 2.2 is scheduled to be published in 2021).

operable, understandable, and robust.<sup>95</sup> “[T]estable success criteria” are provided for each guideline.<sup>96</sup>

For a website or application to be perceivable, “users must be able to perceive the information being presented[; the information cannot] be invisible to all of their senses[.]”<sup>97</sup> The guidelines under the *perceivable* principle are: (1) text alternatives, (2) time-based media, (3) adaptable, and (4) distinguishable.<sup>98</sup> Text alternatives must be provided “for any non-text content so that it can be changed into other forms people need, such as large print, braille, speech, symbols or simpler language.”<sup>99</sup> Alternatives must be provided for time-based media.<sup>100</sup> For example, captions must be “provided for all live audio content in synchronized media.”<sup>101</sup> To be adaptable, the content must be able to “be presented in different ways . . . without losing information or structure.”<sup>102</sup> In order for the information to be distinguishable, it must be easy “for users to see and hear content including separating foreground from background.”<sup>103</sup>

For a website or application to be *operable*, “users must be able to operate the interface[;] the interface cannot require interaction that a user cannot perform[.]”<sup>104</sup> The guidelines under the *operable* principle are: (1) keyboard accessible, (2) enough time, (3) seizures and physical reactions, (4) navigable, and (5) input modalities.<sup>105</sup> For the interface to be keyboard accessible, all functionality must be available from a keyboard.<sup>106</sup> Users must also be provided with enough time to read and use the content.<sup>107</sup> Importantly, content must not be designed “in a way that is known to cause seizures or physical reactions.”<sup>108</sup> Under the guideline of navigable, ways must be provided to help users “navigate, find content, and determine

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95. See *Web Content Accessibility Guidelines (WCAG) 2.1*, W3C WEB ACCESSIBILITY INITIATIVE, §§ 1–5 (June 5, 2018) [hereinafter *WCAG Guidelines*], <https://www.w3.org/TR/WCAG21/> [<https://perma.cc/3C8F-32NK>].

96. *Id.* § 0.2.

97. *Introduction to Understanding WCAG 2.1*, W3C WEB ACCESSIBILITY INITIATIVE (Jan. 11, 2020) [hereinafter *Introduction to Understanding WCAG 2.1*], <https://www.w3.org/WAI/WCAG21/Understanding/intro#understanding-the-four-principles-of-accessibility> [<https://perma.cc/3REU-XBH2>].

98. *WCAG Guidelines*, *supra* note 95, §§ 1.1, 1.2, 1.3, 1.4.

99. *Id.* § 1.1

100. *Id.* § 1.2.

101. *Id.* § 1.2.4. “Synchronized media” is defined as “audio or video synchronized with another format for presenting information and/or with time-based interactive components, unless the media is a media alternative for text that is clearly labeled as such.” *Id.* § 6.

102. *Id.* § 1.3.

103. *Id.* § 1.4.

104. *Introduction to Understanding WCAG 2.1*, *supra* note 97.

105. *WCAG Guidelines*, *supra* note 95, §§ 2.1, 2.2, 2.3, 2.4, 2.5.

106. *Id.* § 2.1.

107. See *id.* § 2.2.

108. See *id.* § 2.3.

where they are.”<sup>109</sup> As for input modalities, it must be easy for users to operate functionality through various inputs beyond keyboard.<sup>110</sup>

For a website or application to be *understandable*, “users must be able to understand the information as well as the operation of the user interface[;] the content or operation cannot be beyond their understanding[.]”<sup>111</sup> The guidelines under the *understandable* principle are: (1) readable, (2) predictable, and (3) input assistance.<sup>112</sup> Text content must be “readable and understandable[.]”<sup>113</sup> and web pages must be made to “appear and operate in predictable ways.”<sup>114</sup> Under the guideline of input assistance, users must be helped in avoiding and correcting mistakes.<sup>115</sup> Likewise, for a website or application to be *robust*, “users must be able to access the content as technologies advance[;] as technologies and user agents evolve, the content should remain accessible[.]”<sup>116</sup> The guideline under the *robust* principle is compatible—compatibility must be maximized “with current and future user agents, including assistive technologies.”<sup>117</sup>

In regard to ATAG, the software and services used by authors to produce web content are known as authoring tools.<sup>118</sup> ATAG is primarily for developers of authoring tools and explains how to (1) “make the authoring tools themselves accessible, so that people with disabilities can create web content,” and (2) “help authors create more accessible web content—specifically, enable, support, and promote the production of content that conforms to [WCAG].”<sup>119</sup> The UAAG explains how to make user agents accessible to people with disabilities:

User agents include browsers, browser extensions, media players, readers and other applications that render web content. Some accessibility needs are better met in the browser than in the web content, such as text customization, preferences, and user interface accessibility. A user agent that follows UAAG . . . will improve accessibility through its own user interface and its ability to communicate with other technologies, including assistive

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109. *See id.* § 2.4.

110. *See id.* § 2.5.

111. *Introduction to Understanding WCAG 2.1*, *supra* note 97.

112. *WCAG Guidelines*, *supra* note 95, §§ 3.1, 3.2, 3.3.

113. *See id.* § 3.1.

114. *See id.* § 3.2.

115. *See id.* § 3.3.

116. *Introduction to Understanding WCAG 2.1*, *supra* note 97.

117. *WCAG Guidelines*, *supra* note 95, § 4.1.

118. *Authoring Tool Accessibility Guidelines (ATAG) Overview*, W3C WEB ACCESSIBILITY INITIATIVE (July 1, 2020) [hereinafter *ATAG Overview*], <https://www.w3.org/WAI/standards-guidelines/atag/> [https://perma.cc/4D3J-4FFS].

119. *Id.*



technologies (software that some people with disabilities use to meet their requirements).<sup>120</sup>

“UAAG is primarily for developers of Web browsers, browser extensions, media players, readers and other applications that render web content.”<sup>121</sup> Also, “people who want to choose user agents that are more accessible can use UAAG to evaluate user agents[,]” and “people who want to encourage their existing user agent developer to improve accessibility in future versions can file bugs against UAAG or can refer the user agent vendor to UAAG.”<sup>122</sup> The WCAG, ATAG, and UAAG can serve as extremely beneficial guidelines for PPAs. Therefore, it is important that these guidelines be enforced and explained in a federal statute.

#### V. RECOMMENDATIONS

It is imperative that lawmakers pass an official law in order to ensure that we are actively working towards a world where (1) people with disabilities have equal access to the websites and mobile applications of PPAs, and (2) PPAs are fully aware of how they can assist in providing people with disabilities that equal access. An official law should detail required guidelines about how PPAs can make their websites and mobile applications accessible. This law should be based off of the WC3 Recommendations because the WC3 Recommendations address a multitude of disabilities and outline ways in which websites should be accessible to people who have all different types of disabilities.

If lawmakers utilize the WC3 Recommendations in creating legal guidelines, PPAs will be more likely to feel that they are on notice regarding website accessibility under the ADA, rectifying the due process issue Domino’s raised in the *Robles* case.<sup>123</sup> In turn, a PPA accused of violating the ADA for having an inaccessible website or mobile application will be less likely to argue that it was not given due process, therefore conserving courts’ time. Furthermore, giving detailed legal guidelines to PPAs will motivate them to fix inaccessibility issues where necessary, in avoidance of lawsuits. Rather than remain unsure of which inaccessibility issues are necessary to focus on, PPAs have the right to be provided with clear legal guidelines regarding website accessibility under the ADA and how they should devote their resources to offering accessible

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120. *User Agent Accessibility Guidelines (UAAG) Overview*, W3C WEB ACCESSIBILITY INITIATIVE (May 2016), <https://www.w3.org/WAI/standards-guidelines/uaag/> [https://perma.cc/TCY9-HNZP].

121. *Id.*

122. *Id.*

123. *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898, 902–03 (9th Cir. 2019).

websites. Additionally, people with disabilities have the right to website accessibility—the product of this heightened motivation of PPAs in meeting accessibility needs under the ADA.

True website accessibility under the ADA would involve complicated technical requirements. Though the ATAG are helpful in explaining how to make user agents accessible to people with disabilities,<sup>124</sup> it is possible that after passing an official law detailing accessibility guidelines, some PPAs would not feel technologically confident in making their websites compliant. This potential problem can be solved by requiring an online educational course for attorneys of PPAs, as well as technology officers. Requiring an online educational course for PPAs—which would outline the various things PPAs can do to become compliant with the ADA if they are not already, as well as how to get to this point of compliance—may ensure that PPAs, in good faith, would do whatever they need to provide accessible websites to all customers.

As with any solution, there are potential issues to consider with passing an official law in the area of website accessibility under the ADA, as well as with requiring a related educational course for PPAs. Potential issues include financial implications and a lack of flexibility. Financial implications may comprise the fact that PPAs would have to use their financial resources to ensure that their websites and mobile applications are compliant. “The average cost to make a small or medium-sized eCommerce store ADA accessible ranges between \$27,000 and \$50,000, depending on the size of the website.”<sup>125</sup> However, the cost of making a website accessible is an investment of sorts. By putting in the financial resources sooner rather than later, a PPA avoids expensive lawsuits and gains a larger customer base.<sup>126</sup> Also, as previously explained, access to the internet is a basic human right<sup>127</sup> deserving of a PPAs’ financial resources.

Furthermore, the financial implications of a PPA ensuring its websites and apps are compliant may actually be minor—PPAs which fall under the definition of “eligible small businesses”<sup>128</sup> have the ability to

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124. See generally *ATAG Overview*, *supra* note 118.

125. Crisanchio, *supra* note 87.

126. *Id.*

127. U.N. Convention on the Rights of Persons with Disabilities, *supra* note 50; see also *supra* Part III.

128. I.R.C. § 44(b) (defining “eligible small business” as any person if either “(A) the gross receipts of such person for the preceding taxable year did not exceed \$1,000,000, or (B) in the case of a person to which subparagraph (A) does not apply, such person employed not more than 30 full-time employees during the preceding taxable year, and (2) such person elects the application of this section for the taxable year.”).

take advantage of government incentives.<sup>129</sup> “Qualifying businesses . . . may claim a one-time tax credit to cover up to 50% of eligible costs. These tax credits apply to expenses between \$250 and \$10,250, and cover costs like interpreters, acquiring or modifying equipment or devices, and other auxiliary aids.”<sup>130</sup>

Another financial implication to consider is that under the suggestion given in this Comment, the federal government would be responsible for paying for an online educational program to provide PPAs with direction in making their websites accessible. However, actively working to increase accessibility should always be considered a public welfare responsibility, and while many government agencies have responsibilities under the ADA,<sup>131</sup> none of them have stepped up to fund an educational program for PPAs. To ensure that the promises of the ADA fought for by advocates who crawled up the Capitol Hill steps are fully realized in a modern world, funding an online educational program with the objective of increasing web accessibility should be of high priority for the federal government.

Perhaps another argument against passing an official law in the area of website accessibility under the ADA is found in Assistant Attorney General Stephen E. Boyd’s 2018 response letter to Congressman Ted Budd.<sup>132</sup> Boyd remarked: “Absent the adoption of specific technical requirements for websites through rulemaking, [PPAs] have flexibility in how to comply with the ADA’s general requirements of nondiscrimination and effective communication. Accordingly, noncompliance with a voluntary technical standard for website accessibility does not necessarily indicate noncompliance with the ADA.”<sup>133</sup> In other words, the Attorney General Office’s position is that adopting specific technical requirements would cause PPAs to have little flexibility in how to comply with the ADA, and that noncompliance with a recommended standard does not necessarily lead to a finding of noncompliance with the ADA.

On the other hand, it may be argued that the “flexibility” spoken of by Boyd is actually a false sense of flexibility. A PPA which elects to make its website accessible in some ways but not in others is likely to—at some point—find itself in a legal battle whether or not the PPA feels that it has done “enough.” Furthermore, Boyd’s argument that noncompliance with a recommended standard does not necessarily lead to a finding of

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129. See generally I.R.C. § 44 (outlining tax incentives available to eligible small businesses for providing access to disabled individuals).

130. Cristancho, *supra* note 87; see also I.R.C. § 44(a).

131. *Federal ADA and Disability Resources*, ADA.GOV, [https://www.ada.gov/ada\\_fed\\_resources.htm](https://www.ada.gov/ada_fed_resources.htm) [<https://perma.cc/A7D2-5RC8>].

132. Letter to Congressman Budd, *supra* note 49.

133. Letter to Congressman Budd, *supra* note 49.

noncompliance with the ADA goes against the very purpose of the ADA if a person does not have equal access to a website. After all, the ADA was intended “to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.”<sup>134</sup>

#### CONCLUSION

The federal government has not sufficiently addressed the ever-growing prevalence of the internet in relation to people with disabilities. Because this major change has not been sufficiently addressed with the force of law, PPAs continue to lack clear guidelines for how to comply with the ADA in making their websites and mobile applications accessible. Simultaneously, the amount of website accessibility litigation continues to increase.<sup>135</sup> It is imperative that the federal government pass an official, detailed law regarding website and mobile application accessibility requirements under the ADA in order to protect the rights of both people with disabilities and PPAs. This law should be based on the WC3 Recommendations, which address accessibility needs for people with many different types of disabilities. In conjunction with the passing of this law, online educational programs should be provided to PPAs in order to ensure that the technical requirements under the law are actually understood by PPAs.<sup>136</sup> Now is the time to make web accessibility a priority for all.

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134. *About the ADA National Network*, *supra* note 14.

135. *See supra* Part III.

136. *See supra* Part V.