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# WEBSITES AS "PLACES OF PUBLIC ACCOMMODATION": AMENDING THE AMERICANS WITH DISABILITIES ACT IN THE WAKE OF *NATIONAL FEDERATION OF THE BLIND V. TARGET CORPORATION*

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*The question of whether Title III of the Americans with Disabilities Act does or should apply to websites has been an issue of public interest since the advent of the Internet. In National Federation of the Blind v. Target Corporation, the Ninth Circuit was the first to find that Title III did apply to a website. Although Target was based on a specific set of facts, the decision highlights the need for Congress to amend the Act to address websites. This Recent Development explains why it is appropriate for Congress to take action now and examines several possible approaches Congress could take in amending the Act to address its application to websites.*

## I. INTRODUCTION

In *National Federation of the Blind v. Target Corporation*,[2] Bruce Sexton,[3] a blind individual, filed suit against Target Corporation ("Target") for discriminating against disabled persons.[4] In their complaint, the plaintiffs asserted that because Target's website, Target.com, was inaccessible to the blind, the defendants violated the Americans with Disabilities Act (ADA).[5] Target filed a motion to dismiss stating the plaintiffs' claim was

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[2] 452 F. Supp. 2d 946 (N.D. Cal. 2006).

[3] Mr. Sexton was joined by the National Federation of the Blind and the National Federation of the Blind of California in this lawsuit.

[4] Nat'l Fed'n of the Blind v. Target Corp. (*Target*), 452 F. Supp. 2d 946, 949 (N.D. Cal. 2006).

[5] 42 U.S.C. §§ 12101–12213 (2006); 47 U.S.C. §§ 225, 611 (2006).

not actionable because Target.com was not a "place of public accommodation" recognized by Title III of the ADA[6] (Title III).[7] Ultimately, the court found the plaintiffs' claim viable because Target.com had a nexus to Target stores, which are places of public accommodation.[8]

*Target* highlights the need for Congress to reexamine whether websites are potential places of public accommodation,[9] and to amend the Act to address the websites to which Title III should apply. In *Target*, the Ninth Circuit became the first to allow an inaccessibility claim to proceed against a business website under Title III.[10] While the holding in *Target* was highly fact specific, the decision could have serious implications for websites or other remote access accommodations not explicitly addressed in the "public accommodation"[11] language of Title III. By amending Title III, Congress will proactively address which websites are subject to Title III. Thus, Congress should reexamine the definition of a public accommodation in the ADA and either include a clearly defined set of websites or explicitly exclude websites altogether.

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[6] 42 U.S.C. §§ 12181–12189 (2006).

[7] *Target*, 452 F. Supp. 2d at 950.

[8] *Id.* at 955 ("Defendant's argument is unpersuasive and the court declines to dismiss the action for failure to allege a denial of physical access to the Target stores.").

[9] Although Congress examined this issue in 2000, because of the number of published decisions in the past few years specifically addressing the issue of websites and the ADA, it seems appropriate to reexamine the issue again. *See infra* Section IV. *See also* Charles D. Mockbee IV, *Caught in the Web of the Internet: The Application of the Americans with Disabilities Act to Online Businesses*, 28 S. ILL. U. L.J. 553, 571 (2004).

[10] CARLA J. ROZYCKI & DARREN M. MUNGERSON, AM. SOCIETY OF ASS'N EXECUTIVES, NATIONAL FEDERATION FOR THE BLIND V. TARGET CORP.: ITS POTENTIAL IMPACT ON WEB SITES AND SERVICES (Nov. 2006), https://shop.asaenet.org/news/AL%26PNov06.htm ("The United States District Court for the Northern District of California's . . . opinion in [*Target*] is the first published decision allowing a claim of inaccessibility of a website to proceed against a private entity under Title III of the ADA.") (last visited Feb. 25, 2007) (on file with the North Carolina Journal of Law & Technology).

[11] 42 U.S.C. § 12182(a) (2006).

This Recent Development examines the need for Congress to revisit Title III to add websites as public accommodations. Part II examines the background of the ADA, including a detailed view of the language of Title III. Part III provides a review of three recent opinions that were most influential on the Ninth Circuit's decision in *Target*, and how the court reconciled these opinions to reach the *Target* decision. Part IV addresses *Target*'s implications and the questions raised by the lack of a clear rule following *Target*. Part V concludes with an examination of why Congress should amend the language of Title III to address websites, how Congress could proceed, and whether narrow or broad language addressing websites would better serve the purpose and administration of Title III.

## II. THE AMERICANS WITH DISABILITIES ACT

### A. *Background of the Americans with Disabilities Act*

People affected by disabilities most often rely on other people, businesses, and governments to make daily activities such as crossing the street, reading a menu, or using an automated teller machine ("ATM") less burdensome. Seventeen years ago, Congress passed the ADA in an effort to eliminate discriminatory barriers for the disabled in everyday living.[12] In the ADA, Congress noted that millions of Americans suffer from discrimination on the basis of their mental or physical disabilities.[13] Furthermore, the discrimination faced by this substantial minority of Americans impacts all aspects of their lives, including employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.[14] By enacting the ADA, Congress intended to provide enforceable standards to address discrimination against the disabled in these

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[12] *See* 42 U.S.C. § 12101(b)(1) (2006). The Act invoked Federal authority to enforce the standards outlined in the ADA against private entities and states through the Commerce Clause and the Fourteenth Amendment. 42 U.S.C. § 12101(b)(4).

[13] 42 U.S.C. § 12101(a) (2006).

[14] *Id.*

areas, and to vest the enforcement role in the Federal Government.[15]

## B. *Title III and "Place of Public Accommodation"*

Title III addresses discrimination in the context of public accommodations.[16] It prohibits a place of public accommodation from denying disabled persons the "full and equal enjoyment" of that public accommodation.[17] Title III is different from other anti-discrimination statutes because it requires places of public accommodation to take affirmative action to prevent discrimination against the disabled.[18]

The statute identifies four contexts in which discrimination by a place of public accommodation could exist.[19] First, discrimination will occur when an accommodation imposes eligibility criteria which either "screen out or tend to screen out"

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[15] 42 U.S.C. § 12101(b)(2)–(3).

[16] *See* 42 U.S.C. §§ 12181–12189 (2006).

[17] 42 U.S.C. § 12182(a) ("No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."). Title III explicitly defines a "public accommodation" to include: (1) hotels and other similar places of lodging, (2) restaurants and other places serving food or drink, (3) movie theaters or other places of entertainment, (4) auditoriums, convention centers, or lecture halls, (5) grocery stores, shopping centers, and other sales establishments, (6) laundromats, banks, professional offices, or other service establishments, (7) any station used for specified public transportation, (8) museums, libraries, or other places of public display, (9) zoos and places of recreation, (10) places of education, (11) social services establishments, and (12) places of exercise or recreation. *See* 42 U.S.C. § 12181(7). For purposes of Title III and this Recent Development, the phrases "accommodation," "public accommodation," and "place of public accommodation" are used interchangeably to refer to the accommodations defined within the statute.

[18] *Target*, 452 F. Supp. 2d 946, 951 (N.D. Cal. 2006) (citing H.R. Rep. No. 101-485, pt. 2, at 104 (1990)); 42 U.S.C. § 12182(b)(2)(A)(ii)–(iv) (2006) ("The ADA thus departs from certain anti-discrimination statutes in requiring that places of public accommodation take affirmative steps to accommodate the disabled.").

[19] *See* 42 U.S.C. § 12182(b)(2)(A).

disabled people from equal enjoyment of the accommodation.[20] For example, requiring someone to be able to walk as a prerequisite for being a contestant on a television game show would be discrimination under Title III.[21] Such eligibility criteria are allowed only to the extent they are necessary for the provision of goods or services being offered by the public accommodation.[22] It is not necessary that contestants be ambulatory for a game show to provide the services it offers to the public.

Second, discrimination under Title III occurs if a public accommodation fails to make reasonable modifications to its policies or procedures in order to make its services or goods available to the disabled.[23] However, modifications that would alter the nature of the services or goods offered by the accommodation are not required.[24] In other words, a bookstore may be required to make its facilities handicapped accessible, but it would not be required to start selling books printed in Braille because such a modification alters "the nature or mix of goods" being offered by the book store.[25]

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[20] 42 U.S.C. § 12182(b)(2)(A)(i) (imposing "eligibility criteria that screen out or tend to screen out an individual . . . or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations").

[21] *See, e.g.*, Rendon v. Valleycrest Prod., Ltd., 294 F.3d 1279, 1285 (11th Cir. 2002) (stating that the screening out of otherwise qualified persons on the basis of a disability would violate the ADA).

[22] 42 U.S.C. § 12182(b)(2)(A)(i) (2006) (disallowing eligibility criteria "unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations").

[23] 42 U.S.C. § 12182(b)(2)(A)(ii).

[24] *Id.* (stating reasonable modifications are necessary "unless the entity can demonstrate that making such modifications would fundamentally alter such nature of the goods, services, facilities, privileges, advantages, or accommodations" of the entity).

[25] *See* Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35,544, 35,571 (July 26, 1991) (codified at 28 C.F.R. pt. 36). The Department of Justice stated:

> The purpose of the ADA's public accommodations requirements is to ensure accessibility to the goods offered by a public accommodation, not to alter the nature or mix of goods that the public accommodation has typically provided. In other words, a bookstore, for example, must

Third, discrimination includes failure of a public accommodation to take necessary steps to ensure disabled persons are not denied services or segregated because there are no auxiliary aids or services available at the accommodation.[26] Providing auxiliary aids or services is not necessary when such a provision would fundamentally alter the goods or services of the accommodation, or would result in an undue burden.[27] However, the auxiliary aid or services requirement is most concerned with ensuring the public accommodation communicates effectively with customers.[28] For example, if a restaurant server is available to read the menu to blind patrons, failing to provide a menu printed in Braille is not discrimination under Title III.[29]

Finally, discrimination includes a public accommodation's failure to remove structural barriers when removal is possible.[30] Removal of barriers may require any number of actions, including installation of a ramp, rearranging tables or chairs, or repositioning telephones.[31] For example, existing and new banks would be

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> make its facilities and sales operations accessible to individuals with disabilities, but is not required to stock Brailled or large print books.

*Id.*

[26] 42 U.S.C. § 12182(b)(2)(A)(iii).

[27] *Id.* (stating the provision of auxiliary aids and services is required "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").

[28] 56 Fed. Reg. 35,544, 35,566 (July 26, 1991) (codified at 28 C.F.R. pt. 36) ("The auxiliary aid requirement is a flexible one. A public accommodation can choose among various alternatives as long as the result is effective communication.").

[29] *Id.* As noted by the Department of Justice:

> [A] restaurant would not be required to provide menus in Braille for patrons who are blind, if the waiters in the restaurant are made available to read the menu. Similarly, a clothing boutique would not be required to have Brailled price tags if sales personnel provide price information orally upon request; and a bookstore would not be required to make available a sign language interpreter, because effective communication can be conducted by notepad.

*Id.*

[30] 42 U.S.C. § 12182(b)(2)(A)(iv) (2006).

[31] *See* 28 C.F.R. § 36.304(b) (2000). Additional examples of actions which may be required to remove barriers include: making curb cuts in sidewalks and

required to adjust the height of ATMs to make them accessible to people in wheelchairs.[32] However, an existing bank's need to remove barriers will be assessed in light of the expense associated with such an alteration, while new banks would have to make ATMs "readily accessible to and usable by persons with disabilities."[33]

In addition to defining what constitutes discrimination by a public accommodation, Title III also lists twelve general categories[34] qualifying as public accommodations for purposes of the statute, to the extent that their operations "affect commerce."[35] The categories include a variety of brick and mortar structures ranging from hotels and stores to schools and fitness centers.[36] However, Title III does not expressly include websites as places of public accommodation.[37]

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entrances, repositioning shelves, adding raised markings on elevator control buttons, installing flashing alarm lights, widening doors, installing offset hinges to widen doorways, eliminating a turnstile or providing an alternative accessible path, installing accessible door hardware, installing grab bars in toilet stalls, or rearranging toilet partitions to increase maneuvering space. *Id.*

[32] 56 Fed. Reg. at 35,568.

[33] *Id.* (internal quotes omitted).

[34] *See* 42 U.S.C. § 12182(a) (2006).

[35] 42 U.S.C. § 12181(7) (2006).

[36] *Id.*

[37] It should be noted that Congress has amended other Federal statutes to apply to websites and other forms of information technology. *See, e.g.*, The Rehabilitation Act of 1973 (29 U.S.C. § 794d), as amended by the Workforce Investment Act of 1998 (Aug. 7, 1998). The amended Rehabilitation Act requires Federal departments and agencies to make their "electronic and information technology" accessible to "individuals with disabilities who are members of the public seeking information or services from a Federal department or agency." 29 U.S.C. § 794d(a)(1)(A) (2006).

## III. INTERPRETATIONS OF "PLACE OF PUBLIC ACCOMMODATION"

Three cases[38] were instrumental to the *Target* court's holding that Target.com was subject to Title III in certain contexts.[39] These cases, when combined with *Target*, illustrate a split among circuits in the interpretation and application of the place of public accommodation standard.

### A. *Pre-*Target *Decisions*

#### 1. Stoutenborough v. National Football League, Inc.

In *Stoutenborough*, a group of hearing impaired individuals sued the National Football League (NFL) claiming "the [NFL's] 'blackout rule,' which [prohibited] the live local broadcast of home football games . . . before game-time, [violated] the [ADA]."[40] The plaintiffs stated the blackout rule discriminated against them "in a disproportionate way because they [had] no other means of accessing the football game[s] 'via telecommunication technology.'"[41] For this reason, the plaintiffs claimed they were being denied the "substantially equal" access the ADA required.[42] Additionally, the plaintiffs argued the services provided through the television broadcast were offered as "services, benefits, or privileges in places of public accommodation."[43]

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[38] *See* Access Now, Inc. v. Southwest Airlines, Co., 227 F. Supp. 2d 1312 (S.D. Fla. 2002), *appeal dismissed*, 385 F.3d 1324 (11th Cir. 2004); Rendon v. Valleycrest Prod., Ltd., 294 F.3d 1279 (11th Cir. 2002); Stoutenborough v. Nat'l Football League, Inc., 59 F.3d 580 (6th Cir. 1995).

[39] *See Target*, 452 F. Supp. 2d 946, 956 (N.D. Cal. 2006).

> [T]o the extent . . . Target.com impedes the full and equal enjoyment of goods and services offered in Target stores, the plaintiffs state a [Title III] claim . . . . To the extent that Target.com offers information and services unconnected to Target stores, which do not affect the enjoyment of goods and services offered in Target stores, the plaintiffs fail to state a claim under Title III of the ADA.

*Id.*

[40] *Stoutenborough*, 59 F.3d at 582.

[41] *Id.*

[42] *Id.*

[43] *Id.*

The Sixth Circuit held that the plaintiffs failed to state a claim for relief, and granted the NFL's motion to dismiss.[44] Persuaded by the defendants'[45] argument, the court held the blackout rule was not discriminatory because "it [applied] equally to *both* the hearing and hearing-impaired."[46] Since all viewers were prevented from watching a blackout game, the plaintiffs did not have a viable discrimination claim.[47]

Significantly, the Sixth Circuit found none of the defendants were entities to which Title III applied.[48] Moreover, the plaintiffs sought a service, a televised broadcast, which in no way involved a place of public accommodation.[49] The game the plaintiffs wanted to view was played in a place of public accommodation;[50] however, the challenged service (i.e., the television broadcast) was not *provided by* the place of public accommodation. Therefore, Title III did not apply.[51]

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[44] *Id.* at 584.

[45] The Cleveland Browns, a number of broadcasting companies, and several television stations were also defendants in this suit.

[46] Stoutenborough v. Nat'l Football League, Inc., 59 F.3d 580, 582 (6th Cir. 1995) (emphasis added).

[47] *Id.* The court also adopted the defendants' argument that it was irrelevant whether a blacked out game was broadcast via radio (i.e., giving the hearing another option to a televised broadcast), stating: "[T]he [blackout] rule . . . impacts only the televised broadcast of home football games." *Id.* In addition, the court noted that "the advent of devices that make radio transmission accessible to persons with hearing impairments, [make it possible] for the hearing and the hearing-impaired populations [to] attain equal footing as the radio broadcasts become available to both." *Id.*

[48] *Id.* at 583 (citing 42 U.S.C. § 12181(7) (1994)) ("[N]one of the defendants falls within any of the twelve 'public accommodation' categories identified in the [ADA].").

[49] *Id.* ("[T]he 'service' . . . does not involve a 'place of public accommodation.'").

[50] Here, the football stadium where the Cleveland Browns played.

[51] Stoutenborough v. Nat'l Football League, Inc., 59 F.3d 580, 583 (6th Cir. 1995). None of the parties the plaintiffs filed suit against fell within the definition of a "place of public accommodation." *See id.* Although the football game was played in a stadium, which would be a place of public accommodation, it was the restrictions on the broadcast which the plaintiffs challenged. Thus, because the entities offering (or not offering) the broadcast were not denying equal access to a place of public accommodation, the

2. Rendon *and* Access Now, Inc.

In *Rendon v. Valleycrest Productions, Ltd.*,[52] a group of hearing and mobility impaired plaintiffs brought suit against Valleycrest Productions Limited and American Broadcasting Company (ABC). The *Rendon* plaintiffs, who were either hearing impaired or suffered from a condition that limited their finger mobility, claimed the defendants' telephone selection process for "Who Wants to be a Millionaire" ("Millionaire") violated Title III because it tended to screen out disabled people.[53] Specifically, the selection process required potential contestants to call a toll-free telephone number and use a telephone keypad to answer a series of pre-recorded questions.[54]

The district court dismissed the plaintiffs' complaint because the telephone selection process was "not conducted at a physical location."[55] For this reason, the selection process was not a place of public accommodation covered by Title III.[56] Therefore, the issue on appeal in *Rendon* was whether Title III could be applied to a *process* preventing the disabled from participating in competitions held in a public accommodation.[57]

On appeal, the *Rendon* defendants asserted the screening hotline was not a public accommodation or a "*physical* barrier to entry erected at a public accommodation."[58] Furthermore, the hotline did not prevent the plaintiffs from gaining access to the public accommodation—the studio where the show was recorded.[59]

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plaintiffs' case failed to state a claim as it related to both the NFL and the broadcasting companies. *See id.*

[52] 294 F.3d 1279, 1280 (11th Cir. 2002).

[53] *Id.* at 1281.

[54] *Id.* at 1280–81.

[55] *Id.* at 1281.

[56] *Id.*

[57] *Id.* at 1282.

[58] Rendon v. Valleycrest Prod., Ltd., 294 F.3d 1279, 1283 (11th Cir. 2002) (emphasis added).

[59] *Id.*

The defendants argued that, because the screening process posed no physical barrier, it could not be subject to a Title III claim.[60]

The court of appeals rejected the defendants' argument,[61] holding that Title III also applies to "intangible barriers," which include discriminatory procedures that restrict a disabled person's "ability to enjoy the defendant entity's *goods*, *services and privileges*."[62] Pointing to decisions from other circuits,[63] the Eleventh Circuit held that the telephone selection process used by the defendants was an intangible barrier[64] depriving the plaintiffs of the "opportunity to compete for the privilege of being a contestant on Millionaire,"[65] which occurred at a place of public accommodation.[66] The telephone screening process was an intangible barrier to a privilege offered by a place of public accommodation; thus, the process was subject to Title III.[67]

*Access Now v. Southwest Airlines, Co.* was the first judicial opinion that addressed Title III in the context of business

[60] *Id.* The defendants also attempted to use *Stoutenborough* to assert that the ADA should not apply to television broadcasts because they are not a service "operate[d] from a 'place' of 'public accommodation.'" *See id.* at 1284 (quoting *Stoutenborough*, 59 F.3d at 583). The court rejected this argument stating the *Rendon* plaintiffs did not bring suit to *view* a show. *Id.* Instead, the plaintiffs wanted the privilege of competing on a show in a place of public accommodation. *See id.*

[61] *See id.* at 1283–84.

[62] *Id.* at 1283 (citing 42 U.S.C. § 12182(b)(2)(A)(i)–(ii) (2000)) (emphasis added).

[63] *See id.* at 1285 (citing Ferguson v. City of Phoenix, 157 F.3d 668 (9th Cir. 1998); Bartlett v. N.Y. State Bd. of Law Exam'rs, 226 F.3d 69 (2nd Cir. 2000)) (arising under the ADA where discrimination occurred "at a distance").

[64] Examples include discriminatory screening mechanism, policy or procedure.

[65] Rendon v. Valleycrest Prod., Ltd., 294 F.3d 1279, 1286 (11th Cir. 2002). In reaching this decision, the court rejected the defendants' implied assertion that "so long as discrimination occurs off site, it does not offend Title III." *Id.* at 1285. The court noted that reading Title III to allow offsite discrimination would be "misreading the relevant statutory language" and "contradicting numerous judicial opinions dealing with discrimination perpetrated 'at a distance.'" *Id.*

[66] *Id.* at 1283.

[67] *Id.* at 1286.

websites.[68] The plaintiffs, Access Now, Inc., a non-profit access advocacy organization for disabled individuals, and a blind individual named Robert Gumson, filed suit against Southwest Airlines ("Southwest") for violation of Title III on the grounds that the company's website, southwest.com, made its "virtual ticket counters" inaccessible to blind people.[69] The plaintiffs noted that assistive technology, which can aid blind people in navigating the Internet, is readily available through various types of computer software.[70] The effectiveness of an assistive technology requires that a website be programmed to interact with the technology,[71] but southwest.com and Southwest's virtual ticket counters were not programmed to be accessible to blind people who rely on assistive technologies.[72] The plaintiffs claimed the denial of access deprived the blind of equal access to the airline's virtual ticket counters, which they argued were places of public accommodation.[73]

The *Access Now* court cited two reasons for dismissing the plaintiffs' complaint. First, southwest.com[74] was not a place of public accommodation under Title III.[75] The court pointed to the twelve listed categories of public accommodation in Title III,[76] stating that the congressional intent was for the statute to apply

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[68] *See* Michael Goldfarb, *Access Now, Inc. v. Southwest Airlines, Co.—Using the "Nexus" Approach to Determine Whether a Website Should be Governed by the Americans with Disabilities Act*, 79 ST. JOHN'S L. REV. 1313, 1319 (2005).

[69] Access Now, Inc. v. Southwest Airlines, Co., 227 F. Supp. 2d 1312, 1314 (S.D. Fla. 2002).

[70] *Id.* Specifically, the plaintiffs noted assistive technologies currently made available to the creators of websites by a number of computer software companies include: voice-dictation software, voice-navigation software, and magnification software. *Id.* The assistive technologies help "visually impaired persons in navigating through varying degrees of text and graphics found on different websites." *Id.* In addition, the plaintiffs noted that over 15% of the visually impaired people in the United States use the Internet. *Id.*

[71] *See id.* at 1314–15.

[72] *Access Now*, 227 F. Supp. 2d at 1316.

[73] *Id.* at 1315.

[74] Reference to southwest.com includes the website's "virtual ticket counters," in dispute in *Access Now*.

[75] Access Now, Inc. v. Southwest Airlines, Co., 227 F. Supp. 2d 1312, 1314 (S.D. Fla. 2002).

[76] *Id.* at 1317 (citing 42 U.S.C. § 12181(7) (2000)).

only to "access to *physical*, *concrete* places of public accommodation."[77] Second, there was no nexus between southwest.com and a place of public accommodation.[78] Because southwest.com and the virtual ticket counters were not "in any particular geographic location," the plaintiffs could not prove a nexus between a challenged service and "a specific, physical, concrete space."[79] Thus, the Eleventh Circuit distinguished the telephone screening process in *Access* from *Rendon* because southwest.com was not a physical space under Title III.[80]

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[77] *Id.* at 1318–19 (emphasis added) ("[T]his [c]ourt cannot properly construe 'a place of public accommodation' to include Southwest's Internet website, southwest.com").

[78] *Id.* at 1321. Title III explicitly excludes commercial aircraft from the definition of a public accommodation. *See* 42 U.S.C. § 12181(10) (2006). Air travel was excluded because it was protected under a different statute, the Air Carrier Access Act of 1986. *See* National Council on Disability, When the Americans with Disabilities Act Goes Online: Application of the ADA to the Internet and the Worldwide Web (July 10, 2003), http://www.ncd.gov/newsroom/publications/2003/adainternet.htm (on file with the North Carolina Journal of Law & Technology); *see also* H.R. Rep. 101-485, Part II at 87, 1990 WL 125563.

[79] Access Now, Inc. v. Southwest Airlines, Co., 227 F. Supp. 2d 1312, 1321 (S.D. Fla. 2002) (indicating that, if the plaintiffs had shown the website impeded access to an actual airline ticket counter or travel agency, then there might have been a nexus).

[80] *Id.* at 1320–21 ("[T]he Supreme Court and the Eleventh Circuit have both recognized that the Internet is 'a unique medium—known to its users as 'cyberspace'—located in no particular geographic location but available to anyone, anywhere in the world, with access to the Internet.'") (citations omitted).

B. Target *and the Ninth Circuit*

In the *Target* case, Bruce Sexton, a blind man, filed suit against Target for discrimination in violation of federal and state laws.[81] In their complaint, the plaintiffs claimed that because Target's website, Target.com, was inaccessible to the blind, they were "denied full and equal access to Target stores" in violation of Title III.[82]

The Ninth Circuit denied Target's motion to dismiss based on the company's interpretations of *Rendon*, *Access Now*, and *Stoutenborough*. In its motion, Target first argued that the ADA requires actionable discrimination to occur on the premises of the public accommodation ("on-site").[83] Second, Target argued the discrimination must have the effect of denying physical entry to the public accommodation.[84]

In response, the Ninth Circuit first noted that Title III prohibits disability-based discrimination "'in the full and equal enjoyment of the goods, services, . . . or accommodations *of* any place of public accommodation.'"[85] The defendant's interpretation of the statute, requiring discrimination to occur on-site or *in* a place of public accommodation, "contradict[ed] the plain meaning of the statute."[86] For this reason, the Ninth Circuit held discrimination need not occur *on-site* for the plaintiffs' claim to be viable.[87]

Second, the Ninth Circuit held that actionable discrimination under Title III is not limited to denial of physical access to public accommodations.[88] Title III encompasses more than "mere

[81] *Target*, 452 F. Supp. 2d 946, 949 (N.D. Cal. 2006). This Recent Development will only examine the plaintiffs' claims for violation of federal law.
[82] *Id.* at 949–50.
[83] *Id.* at 953.
[84] *Id.* (stating that the defendant's contention was that precedent "stand[s] for the proposition that the ADA prohibits only discrimination occurring on the premises of a place of public accommodation, that 'discrimination' is limited to denial of physical entry to, or use of, a space").
[85] *Id.* (quoting 42 U.S.C. § 12182(a) (2000)) (emphasis in original).
[86] *Id.*
[87] *Target*, 452 F. Supp. 2d 946, 953 (N.D. Cal. 2006).
[88] *Id.*

physical access," reaching "actions or omissions which impair a disabled person's 'full enjoyment' of services or goods of a covered accommodation."[89] If a nexus exists between a challenged service and a place of public accommodation, a claim may be actionable even when the challenged service does not prevent *physical access* to a public accommodation.[90] Thus, the *Target* court found the discrimination actionable because there was a nexus between the challenged service, Target.com, and the plaintiffs' full enjoyment of the services of the public accommodation, Target's brick-and-mortar stores.[91]

### C. *How is* Target *Different?—Reconciling the Split*

*Target* is the first published decision allowing a Title III claim of website inaccessibility against a private entity to proceed against a defendant.[92] The Ninth Circuit previously declined to expand the meaning of a "place of public accommodation" beyond the stated categories noted in Title III—a place of public accommodation is a "physical place."[93] In *Target*, the defendant relied on *Stoutenborough*, *Rendon*, and *Access Now* to argue that a website was not an actionable place of public accommodation under Title III.[94] Applying this "physical place" approach to *Target*, the Ninth Circuit might not have entertained a Title III claim against a website. However, the Ninth Circuit allowed Title III claims when there is "unequal access" to a public accommodation's *service*, if a plaintiff can prove a nexus between the service and the public accommodation.[95] Thus, because the *Target* court did find a nexus between the services offered by a website and the public

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[89] *Id.* at 954.

[90] *See id.* at 953–54.

[91] *Id.* at 955 ("[The] inaccessibility of Target.com denies the blind the ability to enjoy the services of Target stores.").

[92] ROZYCKI & MUNGERSON, *supra* note 10.

[93] *Id.* at 952 (citing Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999); Carparts Distrib. Ctr., Inc. v. Auto. Wholesalers Assoc. of New England, Inc., 37 F.3d 12, 19–20 (1st Cir. 1994)) ("The Ninth Circuit has declined to join those circuits which have suggested that a 'place of public accommodation' may have a more expansive meaning.").

[94] *Target*, 452 F. Supp. 2d 946, 953 (N.D. Cal. 2006).

[95] *Id.* at 952.

accommodation with which the website was "heavily integrated," the plaintiffs' claim was viable.[96]

The *Target* court stated three reasons for how its decision could be reconciled with the Title III precedents to find a nexus between Target and Target.com. First, the court found that Target.com's services were offered *by* Target, a place of public accommodation.[97] Second, even though the challenged service did not prevent physical access to Target stores, inaccessibility to Target.com did affect equal enjoyment of services offered by Target.[98] Finally, there was a connection between the challenged service, Target.com, and the Target stores.[99]

In *Stoutenborough*, there was no Title III liability because, although the game the plaintiffs wished to watch was played in a place of public accommodation, the actual service[100] "[did] not involve a 'place of public accommodation.'"[101] The broadcast may have been "offered through the defendants," but "not as a service of [a] public accommodation."[102] Target tried to argue that, like the NFL in *Stoutenborough*, Target.com was a service offered through, but not by, Target.[103]

The Ninth Circuit, however, found that "many of the benefits and privileges of [Target.com] are services of the Target stores."[104] Unlike the Sixth Circuit in *Stoutenborough*, where the public accommodation, a stadium, was not offering the challenged broadcast, Target stores were offering the services of Target.com.[105] Because the challenged service in *Target* was "heavily integrated with the brick-and-mortar stores and operate[d]

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[96] *Id.* at 955.
[97] *Id.* at 954.
[98] *Id.* at 953, 955.
[99] *Target*, 452 F. Supp. 2d 946, 954 (N.D. Cal. 2006).
[100] The actual service was the actual television broadcast.
[101] Stoutenborough v. Nat'l Football League, Inc., 59 F.3d 580, 583 (6th Cir. 1995).
[102] *Id.* at 583.
[103] *Target*, 452 F. Supp. 2d at 954.
[104] *Id.*
[105] *Id.* at 954–55.

in many ways as a gateway to the stores," Target.com was a service offered by Target.[106]

In *Rendon*, the Eleventh Circuit Court of Appeals held that a challenged service—a telephone screening process—occurring outside a place of public accommodation could be in violation of Title III without denying physical access to the accommodation.[107] Under *Rendon*, intangible barriers may diminish the "full and equal enjoyment" of the services or privileges of a place of public accommodation, and thus, are a sufficient basis for a claim under Title III.[108] In *Target*, the Ninth Circuit found that, like the telephone screening process in *Rendon*, the "inaccessibility of Target.com denies the blind the ability to enjoy the services of Target stores."[109]

Unlike *Stoutenborough* and *Rendon*, *Access Now* did not involve a physical place of public accommodation. The *Access Now* plaintiffs argued that inaccessibility to a website, southwest.com, was depriving blind people access to "virtual ticket counters."[110] The plaintiffs did not demonstrate the website "impeded" access to a physical location.[111] Since there was no potential link to a *physical* place of public accommodation, the court did not find a nexus between the challenged services of

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[106] *Id.* at 955. In recounting the background of the case, the court also noted:

> Target.com is a website owned and operated by Target. By visiting Target.com, customers can purchase many of the items available in Target stores. Target.com also allows a customer to perform functions related to Target stores. For example, through Target.com, a customer can access information on store locations and hours, refill a prescription or order photo prints for pick-up at a store, and print coupons to redeem at a store.

*Id.* at 949.

[107] Rendon v. Valleycrest Prod., Ltd., 294 F.3d 1279, 1283–84 (11th Cir. 2002).

[108] *Id.* at 1286.

[109] *Target*, 452 F. Supp. 2d 946, 955 (N.D. Cal. 2006).

[110] Access Now, Inc. v. Southwest Airlines, Co., 227 F. Supp. 2d 1312, 1321 (S.D. Fla. 2002).

[111] *Id.* ("[B]ecause the Internet website, southwest.com, does not exist in any particular geographical location, Plaintiffs are unable to demonstrate that Southwest's website impedes their access to a specific, physical, concrete space such as a particular airline ticket counter or travel agency.").

southwest.com and a Title III "public accommodation."[112] In *Target*, by contrast, the physical presence of Target stores and the integration between the stores and Target.com provided grounds for a nexus, thereby giving the plaintiffs a viable Title III claim.[113]

The *Target* court was the first to bring business websites within the reach of Title III by finding a nexus between Target.com and Target stores.[114] *Target*, however, is a fact-specific holding, making it difficult to predict its impact on other cases involving websites as places of public accommodation. Part IV examines the implications and scope of the *Target* decision, concluding that, after seventeen years, Title III should be amended by Congress to address websites. By addressing these guidelines now, Congress will simply be acknowledging the pervasive role of the Internet and join other nations that have already addressed websites in comparable statutes.[115] Furthermore, amending the ADA will obviate the need for disability advocacy groups and small businesses to rely on organized litigation to answer the question: to which websites does Title III apply?

## IV. TITLE III AND BUSINESS WEBSITES POST-*TARGET*

Although the Ninth Circuit has not yet determined whether Target violated Title III for failure to make Target.com accessible to the blind, allowing the claim to proceed is significant because it demonstrates judicial willingness to bring websites within the jurisdiction of Title III.[116] However, while the Ninth Circuit found a nexus in *Target* because of the integrated services of Target.com

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[112] *Id.* The *Access Now* plaintiffs did not allege or prove there was a nexus between southwest.com and Southwest's physical ticket counters. The plaintiffs only claimed southwest.com impeded their access to the company's "virtual ticket counters." *See id.* ("Plaintiffs are unable to demonstrate that Southwest's website impedes their access to a specific, physical, concrete space such as a particular airline ticket counter or travel agency.").

[113] *Target*, 452 F. Supp. 2d at 954–55.

[114] *See* ROZYCKI & MUNGERSON, *supra* note 10.

[115] *See* National Council on Disability, When the Americans with Disabilities Act Goes Online: Application of the ADA to the Internet and the Worldwide Web (July 10, 2003), http://www.ncd.gov/newsroom/publications/2003/adainternet.htm (on file with the North Carolina Journal of Law & Technology).

[116] *See Target*, 452 F. Supp. 2d 946, 955–56 (N.D. Cal. 2006).

and Target stores, it did not state a rule regarding the degree of integration necessary to find a nexus.[117]

The *Target* court opened the door for Title III claims related to business websites by establishing the other end of the spectrum from the Eleventh Circuit in *Access Now*, where the court found no nexus because no public accommodation was involved.[118] In defining the other end of the spectrum, the Ninth Circuit addressed only the facts of *Target* and did not address the potential fact scenarios that are likely to arise in the area between the spectrum's endpoints. The "heavily integrated" and "gateway to the stores" language of *Target* provides an unformulated standard and will require other circuits to define points on the continuum between the endpoints as they address future Title III claims.[119]

### A. *The "Heavily Integrated" Facts of* Target

The degree of integration between the services of Target stores and Target.com was crucial to the *Target* decision. Target shoppers have the ability to use Target.com to get information about locations and hours of operation, order prescription refills, order photos online, or print coupons to redeem at a store.[120]

The Ninth Circuit's decision implies that websites of other major retailers, such as Wal-Mart and K-Mart, may have a sufficient nexus to brick-and-mortar stores to support Title III claims.[121] It is not unreasonable to anticipate that other circuits will be willing to adopt an approach similar to the *Target* court—finding websites of large retailers have a nexus to the storefronts and, therefore, are actionable under Title III. However, the extension of the Ninth Circuit's reasoning to retailers with website services less integrated to storefronts remains unclear.

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[117] *Id.* at 955 (stating the website in Target's case was "heavily integrated" to the actual stores, and that it served as a "gateway to the stores").

[118] *See* Access Now, Inc. v. Southwest Airlines, Co., 227 F. Supp. 2d 1312, 1321 (S.D. Fla. 2002).

[119] *Target*, 452 F. Supp. 2d at 955.

[120] *Id.* at 949.

[121] This outcome assumes individual courts would be willing to find the same nexus as the court did in *Target*.

### B. *How Significant Does the Integration Need to Be?*

Over the last few years, the evolution of the Internet has transformed the way many companies do business.[122] For example, numerous businesses operate exclusively online, selling products from their website and keeping inventory at a warehouse.[123] Moreover, most traditional retailers also have websites that supplement their physical presence by offering the same inventory sold in their physical stores.[124] While it is difficult to predict how narrowly courts will interpret and apply the Ninth Circuit's integration standard, if left to judicial discretion, it is possible that many small businesses with websites will be found to have a nexus between their storefronts and their websites—opening these businesses to unanticipated Title III liability.

The *Target* holding was limited to cases where the website offers information and services *connected* to storefronts.[125] Based on the required connection, it seems an online-only retailer would not be vulnerable to a Title III action against its website.[126] Since the warehouse is not a place of public accommodation falling within any of the twelve enumerated categories in Title III, the connection or integration necessary to create a nexus would not exist.[127] The Ninth Circuit, however, did not indicate the degree of connection or integration necessary for a nexus to exist between a website and a storefront.[128]

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[122] As of 2005, "online retailing" had been in existence for about ten years with online retail sales reaching $89.0 billion, excluding travel. *See* National Retail Federation, *Online Retail Sales, Profitability Continue Climb*, SHOP.ORG/FORRESTER RESEARCH, May 24, 2005, http://www.shop.org/press/05/052405.asp (on file with the North Carolina Journal of Law & Technology).

[123] Examples include Amazon.com, 1-800-FLOWERS.COM, Drugstore.com, eBay, Netflix, and Overstock.com.

[124] In other words, there are no integration of services between the website and the brick-and-mortar presence (unlike the situation in *Target*).

[125] *Target*, 452 F. Supp. 2d 946, 965 (N.D. Cal. 2006) ("To the extent that Target.com offers information and services unconnected to Target stores, which do not affect the enjoyment of goods and services offered in Target stores, the plaintiffs fail[ed] to state a claim under Title III of the ADA.").

[126] *See id.* at 954–55.

[127] *See* 42 U.S.C. § 12181(7) (2006).

[128] *Target*, 452 F. Supp. at 955.

While it is clear from *Target* that heavily integrated services will meet the nexus requirement, the court implies that any connection between a store and website that affects the enjoyment of the goods and services of a store may be sufficient to find a nexus. There are numerous small businesses with websites offering similar types of information and benefits that Target.com offers to its customers. For example, most retailers with websites provide information regarding store location and hours of operation. In addition, like Target.com, many retailers offer coupons through their websites which can be redeemed in stores.

Providing store location and hours of operation through a website may not constitute information and services affecting the enjoyment of the goods and services of the actual store. Using *Target* as an example, a small retailer that offers coupons to customers through a website not accessible to the visually impaired could easily be seen as affecting the enjoyment of the goods and services of the brick-and-mortar store. Ultimately, the outcome of Title III's application to small businesses for inaccessible websites will depend on judicial interpretation of *Target*.

While the issue has not yet been litigated, the *Target* plaintiffs argued that the costs associated with making a website user-friendly for the blind are "not economically prohibitive."[129] Costs of making websites accessible to the blind may be the main issue for large-scale retailers,[130] but the costs are only one of the concerns for small businesses faced with Title III claims. Another

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[129] *Id.* at 949.

[130] In its Fiscal Year 2007, Target had total revenues of $59.5 billion and expenses of $54.4 billion. *See* Press Release, Target Corporation, Target Corporation Fourth Quarter Earnings Per Share $1.29 (Feb. 27, 2007), http://investors.target.com/phoenix.zhtml?c=65828&p=irol-newsArticle&ID=967693&highlight= (on file with the North Carolina Journal of Law & Technology). Target reportedly received an estimate of $90,000 for the necessary alterations to make Target.com fully accessible for disabled people. *See* John Grossman, *Welcome! No, Not You: American business moves fitfully toward website accessibility for the disabled*, INC.COM, Feb. 2007, http://www.inc.com/magazine/20070201/features-criterion-508-accessibility.html (last visited Mar. 6, 2007) (on file with the North Carolina Journal of Law & Technology). This makes the estimated one-time cost of these accessibility changes less than 0.002% of Target's annual expenses.

challenge for small businesses is understanding this requirement in the first place. As the ADA and Title III stand today, there is no language that provides notice to small business owners that their websites must be made accessible to the blind. Further, in the wake of *Target*, it is not clear how the different circuits will choose to apply Title III to business websites. However, without the clarity provided by statutory language, even if circuits aligned uniformly on the application of Title III to websites, through no fault of their own, the uninformed, small business person would face a high risk of litigation for ignorance of the common law.

## V. PROVIDING UNIFORM FUTURE TREATMENT BY ADDRESSING WEBSITES IN TITLE III TODAY

### A. *Websites as Places of Public Accommodation*

In order to understand why Congress should act now to amend Title III to address websites, it is first necessary to examine how the connection between websites and Title III has been viewed by the government since the ADA was enacted seventeen years ago.

Evidence from as early as 1996 indicates that, on behalf of their constituents, senators were communicating with the Department of Justice regarding website accessibility for the disabled.[131] In 1996, the Internet was in its initial phases of becoming a commonly-used public resource, so it is understandable that Congress chose to wait for the Internet to develop further before conducting an formal inquiry on adding websites to the language of the ADA.

Congress undertook its first organized inquiry on this issue in 2000.[132] During that inquiry, the House Subcommittee on the

[131] Letter from the Assistant Attorney General for Civil Rights to Senator Tom Harkin, (Sept. 9, 1996), http://www.usdoj.gov/crt/foia/tal712.txt (on file with the North Carolina Journal of Law & Technology).

[132] *Hearing on the Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites Before the House Subcommittee on the Constitution of the House Committee on the Judiciary*, 106th Congress (2000) [hereinafter *Hearing*], *available at* http://commdocs.house.gov/committees/judiciary/hju65010.000/hju65010_0f.htm (on file with the North Carolina Journal of Law & Technology).

Constitution heard testimony from a number of legal and technology experts on the potential ramifications of extending Title III to apply to private websites.[133] In addition, the hearings noted that the Department of Justice had already independently concluded that the ADA applied to private websites.[134] After the 2000 hearing, Congress presumably opted not to add language addressing websites to the ADA, and has not made another formal inquiry into the issue over the past seven years.

*Access Now* and *Target* demonstrate that the issue of website inaccessibility for the disabled has remained a topic of interest for both the general public and the disability advocacy community since the Congressional hearings in 2000.[135] The National Council on the Disability (NCD) was established as an independent federal agency in 1998 "to promote policies, programs, practices, and procedures that guarantee equal opportunity for all individuals with disabilit[ies]."[136] In 2003, the NCD analyzed whether the ADA applied to commercial and other private sector websites.[137] Ultimately, the NCD concluded that the ADA is applicable to these websites and that the Department of Justice was in a position to lead efforts to propose a change.[138] In December 2006, after *Target*, the NCD recommended a number of action items related to identified technology trends, including "ensur[ing] that access to

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[133] *Id.*

[134] *Id.* (opening statement of Rep. Charles T. Canady, Chairman, Subcomm. on the Constitution).

[135] The first known complaint regarding website accessibility was when National Federation of the Blind brought suit against America Online in 1999. *See* Lex Frieden, National Council on Disability, When the Americans with Disabilities Act Goes Online: Application of the ADA to the Internet and the Worldwide Web (2003), http://www.ncd.gov/newsroom/publications/2003/adainternet.htm (last visited Mar. 6, 2007) (on file with the North Carolina Journal of Law & Technology). Ultimately, the complaint was voluntarily dismissed, and the parties entered into an agreement.

[136] 29 U.S.C. § 780(a)(2)(A) (2006).

[137] *See* Frieden, *supra* note 135.

[138] *Id.*

the Internet and other virtual environments is provided, as it has been to physical places of public accommodation."[139]

The ten-year documented history of interest in website accessibility under the ADA and the evidence that litigation regarding website accessibility for the disabled continues to gain momentum indicate that this issue is not one likely to dissipate with time. Rather, it must again be formally reviewed by Congress.

B. *Why Now? Why Congress?*

Recommendations by the NCD since the 2000 hearings, as well as recent activity in the courts related to website accessibility for the disabled,[140] support a call for Congress to consider incorporating language addressing websites into Title III.

Examining why Congress did not take action to incorporate websites into the "places of public accommodation" list in 2000 makes clear why taking such action now is appropriate. First, the 2000 hearings occurred towards the end of the dot-com boom. There was a feeling, as evidenced by some of the testimony at the hearings, that placing accessibility standards on websites would hinder the continuing growth of e-commerce and the proliferation of the Internet which was already waning.[141] In addition, while not clear from testimony, Congress may have been wary of the future of the Internet as signs of a downturn in the dot-com market started to appear. Perhaps Congress believed e-commerce might not recover from severe market fallout, and the Internet would return to pre-boom popularity levels—no longer a formidable commerce engine worthy of Title III consideration. While Congress opted not to add language to the Title III after the 2000 hearings, this

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[139] JOHN VAUGHN, NATIONAL COUNCIL ON DISABILITY, OVER THE HORIZON: POTENTIAL IMPACT OF EMERGING TRENDS IN INFORMATION AND COMMUNICATION TECHNOLOGY ON DISABILITY POLICY AND PRACTICE 41 (Dec. 19, 2006), http://www.ncd.gov/newsroom/publications/2006/pdf/emerging_trends.pdf (on file with the North Carolina Journal of Law & Technology).

[140] *See Target*, 452 F. Supp. 2d 946 (N.D. Cal. 2006); Access Now, Inc. v. Southwest Airlines, Co., 227 F. Supp. 2d 1312 (S.D. Fla. 2002).

[141] *Hearing*, *supra* note 132 (statement of Dr. Steven Lucas, Chief Information Officer and Senior Vice President, Privaseek, Inc.).

decision should not be seen as the final word of Congress on the importance of website accessibility as it relates to Title III, as much has changed since 2000.

The time is right for Congress to add language addressing websites to Title III for several reasons. First, as it relates to the lifetime of the Internet, a substantial amount of time has passed since the 2000 hearings. The continued growth of e-commerce and the proliferation of the Internet are not in doubt now as they were in 2000. Second, the issue of website accessibility for the disabled has become an organized movement with disability advocacy groups, and, as a result, it is an issue courts will repeatedly address in the near-term. Finally, as litigation in the area of Title III claims related to websites continues, it is the optimal time for Congress to provide small business owners with a statutory answer for whether their websites need to be ADA compliant. While the *Target* decision defined one end of the spectrum for applying Title III to business websites, the spectrum does not provide small business owners with sufficient notice as to how or whether their websites must be changed, if at all. Moreover, small business owners do not have the legal resources of a multi-billion dollar corporation to advise them on how to comply with the unclear *Target* standard in order to avoid Title III liability. By waiting for the Supreme Court to address and possibly clarify the *Target–Access Now* spectrum, Congress is exposing otherwise ADA-compliant businesses to costly and unnecessary litigation.

### C. *Proposed Language Changes*

There are three primary ways Congress can alter the language of Title III to address websites. First, exclusionary language could be added to the end of 42 U.S.C. § 12181(7) stating: websites are not considered public accommodations for purposes of Title III. In the alternative, Congress could add language allowing application of Title III to websites having specific relationships or affiliations with a place of public accommodation.[142] Finally, language could

[142] Congress could also choose to find that all private websites are subject to Title III as places of public accommodation. However, if Congress chooses to have 42 U.S.C. § 12181(7) apply to *all* private websites (commercial websites

be added to bring all business websites within the meaning of a Title III place of public accommodation, regardless of an affiliation with a physical space.

If Congress reviews this issue and again decides to exclude websites from Title III, exclusionary language should be added to 42 U.S.C. § 12181(7). However, if Congress adopts a language change to address websites that have a connection with a place of public accommodation, the language addition will require more explicit guidelines to avoid merely replicating the existing spectrum.

First, certain large e-commerce retailers, like Amazon.com, are not currently affiliated with a place of public accommodation, and, thus, do not share a nexus with a public accommodation which would require Title III compliance. However, to enable e-commerce-only retailers to be free of Title III compliance because they do not have a physical presence gives them a competitive advantage in cyberspace over retailers that do.[143] More importantly, it deprives the disabled from taking advantage of the

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and personal websites), then it could be overstepping the authority to enforce and enact the ADA through the Commerce Clause because many private websites are not related to commerce in any way. *See* Goldfarb, *supra* note 68, at 1335 (stating that many non-retail and non-commercial websites that are either personal in nature or merely provide information would probably not satisfy the necessary relationship to interstate commerce).

[143] Websites like Amazon.com do have agreements with retailers to provide the front-end of the virtual stores of these retailers. *See* Martin Wolk, *Toys 'R' Us wins suit against Amazon.com*, MSNBC.COM, Mar. 2, 2006, http://www.msnbc.msn.com/id/11641703/ (discussing Amazon.com's "brick-and-click" partnerships with retailers) (on file with the North Carolina Journal of Law & Technology). While the storefronts of these retailers would qualify as public accommodations, Amazon.com only provides front-end, online access to the goods of the retailers. Unlike Target's relationship with Target.com, Amazon.com is a service offered through the retailers, not by the retailers. *See Target*, 452 F. Supp. 2d 946, 954 (N.D. Cal. 2006) (comparing the Target.com and Target connection to the NFL connection with the television broadcast in *Stoutenborough v. Nat'l Football League, Inc.*). Thus, because Amazon.com is not offering its own goods and services in connection with its own public accommodation, the connection with a public accommodation for purposes of Title III liability does not exist. *See, e.g.*, Stoutenborough v. Nat'l Football League, Inc., 59 F.3d 580, 583 (6th Cir. 1995).

goods or services of these e-commerce-only retailers. In expanding the language of Title III to address websites affiliated with certain places of public accommodation, language must also be added to ensure that website-only businesses, such as retailers, schools, or pharmacies, are effectively considered places of public accommodation by the nature of their interaction with the public as one of the already enumerated entities included in 42 U.S.C. § 12181(7).

Second, Congress should include language addressing the post-*Target* issue of the degree of connection needed between a public accommodation and a website to establish a nexus, and thus, subjecting the website to Title III. By adding language to 42 U.S.C. § 12181(7), Congress could take the opportunity to redefine what constitutes the currently judicially-defined nexus to include any website that is affiliated with or sponsored by a place of public accommodation as defined by the statute. This would eliminate the need to examine what offerings are on a website, and how those offerings are connected to the public accommodations before determining if the website must be Title III compliant. In addition, there would no longer be a post-*Target* grey area and small businesses would be provided with a clear rule to follow when establishing a website affiliated with the business.

If Congress chooses to offer a blanket application of Title III to websites merely affiliated with places of public accommodation, it could adopt language putting Title III closer to the *Target* "connection" standard. For example, a standard that would find a sufficient nexus with a place of public accommodation where a website offers *some* degree of direct shopping capabilities or coupons for use at the physical store. This standard would require setting out clear percentages as to how much of a retailer's products or services must be made available online for the website to be considered sufficiently connected to a public accommodation for Title III to apply. In the alternative, the standard could be based on the percentage of a company's sales generated through its website. Additionally, Congress should clarify whether retailers that offer only items such as coupons through a website, and opt not to sell goods online, would be considered connected enough with a public accommodation for purposes of Title III.

The effect of this approach is likely to require far fewer websites to be compliant with Title III than the affiliation or sponsorship by a public accommodation standard. Using a percentage of products, services, or sales standard enables a business to offer just under the requisite percentage of goods online or limit online sales in order to avoid the Title III compliance requirement. Unless the percentage hurdle is very low,[144] many businesses may simply opt to alter the amount of products offered through the website so that the website falls just under the hurdle for Title III compliance. The percentage standard lends itself to more manipulation by businesses, whereas the affiliation or sponsorship standard forces businesses to consider the inherent value of a website to their customer relationships and revenue generation. Further enabling businesses to manipulate their need to comply with Title III runs counter to the spirit of the ADA.

Finally, if Congress wishes to have Title III include all websites affiliated with a business in *any* way, it can add business websites to the list of places of public accommodation. This would avoid the confusion inherent in requiring a certain type of affiliation with one of the already defined places of public accommodation. Applying Title III to all business websites will impose additional costs upon even more businesses than the preceding proposal and, for that reason, may face more challenges from businesses. However, this would provide a standard that will be easier to apply and is consistent with the purpose of the ADA.

In adding language to Title III to address websites, Congress should give either a blanket exclusion to all websites or require all business websites to comply with Title III, including e-commerce-only retailers. Either approach has the ability to provide a far clearer standard than presently exists. However, applying Title III to business websites is the option that best embraces the purpose of the ADA and brings Title III into the twenty-first century.

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[144] For example, five to ten percent of total products or services offered by the business could be a low enough hurdle such that no business currently offering a substantial amount of products through its website would be willing to manipulate its online product offerings down to the level necessary to avoid having to make its website Title III compliant.

## VI. CONCLUSION

Since its enactment, courts have interpreted Title III to cover services having a nexus to a place of public accommodation.[145] If a service prevents disabled individuals from taking advantage of the privileges or equal enjoyment of the place of public accommodation, then there is a nexus. The nexus standard has enabled courts to apply Title III to services clearly linked to a statutory "public accommodation,"[146] even though the challenged services are not directly offered by the public accommodation.[147]

Prior to *Target*, no court had allowed an inaccessibility claim against a business's website under Title III.[148] However, the Ninth Circuit found that the connection between Target's website and stores comprised a nexus necessary for a Title III claim.[149] Although the court's decision was based on a very specific set of facts, the *Target* decision had the effect of creating a nexus-spectrum for Title III lawsuits involving websites. On one end of the spectrum is the Ninth Circuit stating a website with heavily-integrated services connected to the equal enjoyment of services of a place of public accommodation creates a nexus and viable Title III claim against a website.[150] On the other end of the spectrum is the Eleventh Circuit's assertion that if there is no place of public accommodation, there is no nexus, and a Title III claim against the website is not viable.[151] By not stating the minimum connection or integration required to find the necessary nexus between a website and public accommodation for Title III to apply,

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[145] *See, e.g.*, Rendon v. Valleycrest Prod., Ltd., 294 F.3d 1279 (11th Cir. 2002); Stoutenborough v. Nat'l Football League, Inc., 59 F.3d 580, 583 (6th Cir. 1995). *But see* Kolling v. Blue Cross & Blue Shield, 318 F.3d 715 (6th Cir. 2003); Access Now, Inc. v. Southwest Airlines, Co., 227 F. Supp. 2d 1312 (S.D. Fla. 2002).

[146] *See* 42 U.S.C. § 12181(7) (2006).

[147] *See, e.g.*, Rendon v. Valleycrest Prod., Ltd., 294 F.3d 1279 (11th Cir. 2002). *But see* Stoutenborough v. Nat'l Football League, Inc., 59 F.3d 580, 583 (6th Cir. 1995).

[148] ROZYCKI & MUNGERSON, *supra* note 10.

[149] *Target*, 452 F. Supp. 2d 946, 956 (N.D. Cal. 2006).

[150] *Id.*

[151] Access Now, Inc. v. Southwest Airlines, Co., 227 F. Supp. 2d 1312, 1321 (S.D. Fla. 2002).

*Target* provides an unclear standard in a time when Title III litigation against websites appears to be gaining momentum.

In an effort to avoid the confusion that businesses and other Title III places of public accommodation may face in the wake of *Target*, Congress should amend the language of 42 U.S.C. § 12181(7) to address the issue of websites as places of public accommodation. Although Congress addressed this issue in 2000, the Internet has continued to evolve since that time, and the increased growth in website related Title III claims puts a number of small businesses at risk for litigation because there is no clear rule. By adding language to Title III to exclude websites explicitly, to broaden its application to e-commerce-only retailers and websites affiliated with a place of public accommodation, or to apply to all business websites, Congress will provide a clear answer to the question remaining after *Target*: to which websites does Title III apply?