

# INTANGIBLE INACCESSIBILITY: HOW *WAYFAIR* PAVES THE WAY FOR AN EXPANDED ADA\*

## I. INTRODUCTION

Take a moment to bask in the nostalgia of childhood in the 1990s: the comedy of *Kenan and Kel*;<sup>1</sup> the sweet, jarring taste of Surge;<sup>2</sup> and the rhythmic tones of dial-up internet connecting to AOL framed summer afternoons. The children of the 1990s have grown up, established professions, and started families, all while adjusting to the technologies and breakthroughs of today's world. Another child of the 1990s, the Americans with Disabilities Act (ADA),<sup>3</sup> remains stuck in the past.

Although the ADA has improved accessibility to public accommodations for millions of individuals with disabilities, often in the form of alterations to physical locations like ramps, elevators, and braille signs,<sup>4</sup> it has not been explicitly expanded to cover websites and apps as public accommodations.<sup>5</sup> Courts, faced with claims from consumers with disabilities who are attempting to use inaccessible websites and mobile apps, are split as to how to apply the ADA to emerging technologies.<sup>6</sup> In some areas of the country, consumers with disabilities are living under a 1990s-era ADA, in which inaccessibility to a physical location is needed to make a claim.<sup>7</sup> In other areas, consumers with disabilities can use the ADA as protection against companies using more modern technologies without a physical location.<sup>8</sup> The Supreme Court has refused to address this geographic disparity regarding who can combat discrimination against the disabled.<sup>9</sup>

This Comment analyzes the circuit split regarding the ADA's applicability to emerging technologies and proposes that the Supreme Court use similar reasoning to its

---

\* Cassidy C. Duckett, J.D. Candidate, Temple University Beasley School of Law, 2021. The author expresses immense gratitude to Sean Britt, Maryellen Kennedy Duckett, Randall Duckett, Jim Kennedy, and Kat Contreras for their endless support in the matters of law school and life.

1. *Kenan and Kel* (Nickelodeon television broadcast 1996–2000).

2. Surge is a citrus soda originally produced in the 1990s by Coca-Cola. *About Surge*, SURGE, <http://www.surge.com/surge.html/> [<https://perma.cc/Y5CS-JZWP>] (last visited Apr. 1, 2021).

3. 42 U.S.C. §§ 12101–213 (2018).

4. See NAT'L COUNCIL ON DISABILITY, THE IMPACT OF THE AMERICANS WITH DISABILITIES ACT: ASSESSING THE PROGRESS TOWARD ACHIEVING THE GOALS OF THE ADA 45–53 (2007).

5. See *infra* Part II.A for a discussion of the ADA's current state.

6. See *infra* Part II.B for a discussion of the circuit split.

7. See *infra* Part II.B.3.

8. See *infra* Part II.B.1.

9. See, e.g., *Domino's Pizza, LLC v. Robles*, 140 S. Ct. 122, 122 (2019) (mem.); see also Jennifer S. Rusie, *The Domino's Effect—What to Expect as a Result of SCOTUS's Denial of Cert*, NAT'L L. REV. (Oct. 8, 2019), <https://perma.cc/CW8J-NQBT> (“[T]he Supreme Court's decision (to not make a decision) has the effect of maintaining the status quo with respect to website accessibility, which varies by jurisdiction and is frustratingly unspecific throughout the United States.”).

decision in *South Dakota v. Wayfair, Inc.*<sup>10</sup> to extend the ADA to intangible places of public accommodation. Section II discusses the circuit split, as well as the role of emerging technologies in modern life and the Court's decision in *Wayfair*. Section III demonstrates why the Court should apply the *Wayfair* Court's framing of physicality to extend the ADA's definition of "public accommodations."

## II. OVERVIEW

The ADA requires covered entities 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>11</sup> One of the requirements to make a claim under the ADA is to allege that "defendants own, lease, or operate a place of public accommodation."<sup>12</sup>

This Section proceeds in four Parts. Part II.A discusses the evolving applicability of the ADA to websites and apps as places of public accommodation, the current state of the ADA, and the flexibility in compliance. Part II.B outlines the current circuit split regarding the accessibility requirements of new technologies under the ADA. Part II.C details online entities' continuing disruption of traditional brick-and-mortar industries. Finally, Part II.D discusses the Supreme Court's 2018 decision in *Wayfair*, which eliminated the requirement for retailers to be physically present in a state in order to be taxed there.

### A. *The Current State of the Americans with Disabilities Act and Business Compliance*

To make a successful claim under the ADA, a plaintiff must establish a defendant owns, leases, or operates a place of public accommodation.<sup>13</sup> Because the ADA was enacted before the internet and smartphones were widely accessible, the Act does not specifically address how the public accommodation requirement applies to auxiliary aids and services on internet sites, smartphone apps, or other emerging technologies.<sup>14</sup>

---

10. 138 S. Ct. 2080 (2018).

11. 42 U.S.C. § 12182(b)(2)(A)(iii) (2018).

12. *Camarillo v. Carrolls Corp.*, 518 F.3d 153, 156 (2d Cir. 2008); see 42 U.S.C. § 12182(a); Daniel Sorger, *Writing the Access Code: Enforcing Commercial Web Accessibility Without Regulations Under Title III of the Americans with Disabilities Act*, 59 B.C. L. REV. 1121, 1126 (2018) ("To promote the ADA's broad remedial purpose, the list of [public accommodations] is intentionally expansive, ranging from dining establishments to private educational institutions and social service centers.").

13. *Camarillo*, 518 F.3d at 156.

14. See Elizabeth Sheerin, Note, *Inaccessible Websites Are Discriminating Against the Blind: Why Courts, Websites, and the Blind Are Looking to the Department of Justice for Guidance*, 92 ST. JOHN'S L. REV. 573, 574–75 (2018).

Through letters to Congress,<sup>15</sup> amicus briefs,<sup>16</sup> and settlements with private entities,<sup>17</sup> the Department of Justice (DOJ) has “repeatedly affirmed” the application of the ADA to websites and to businesses that provide services only on the internet.<sup>18</sup> However, the DOJ has not exercised its formal rulemaking authority to issue regulations regarding website accessibility.<sup>19</sup> Further, Congress has not amended the Act to include specific regulations about website accessibility.<sup>20</sup>

In 2017, the Trump DOJ withdrew the 2010 Advanced Notice of Proposed Rulemaking regarding website accessibility under the ADA.<sup>21</sup> It asserted that it was “evaluating whether promulgating regulations about the accessibility of [w]eb information and services is necessary and appropriate.”<sup>22</sup> The withdrawal reflects President Trump’s efforts to eliminate governmental regulations.<sup>23</sup> Because private entities are not entitled to specific guidelines about compliance with the ADA,<sup>24</sup> these entities, Congress, the courts, and the general public are left in a legal grey area regarding the standard of accessibility for websites and apps.<sup>25</sup>

With no new regulations or clear-cut rules, private entities are facing an increasing number of ADA lawsuits for disability discrimination on websites and apps.<sup>26</sup> CVS,

---

15. See, e.g., Letter from Stephen E. Boyd, Assistant Attorney Gen., U.S. Dep’t of Justice, to Ted Budd, U.S. Representative, U.S. House of Representatives (Sept. 25, 2018).

16. See, e.g., 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, 43,464 (July 26, 2010) (to be codified at 28 C.F.R. pts. 35–36) (listing several amicus briefs that DOJ has authored, arguing for the extension of ADA accessibility requirements to entities existing solely online).

17. See, e.g., Arjeta Albani, Comment, *Equality in the Age of the Internet: Websites Under Title III of the Americans with Disabilities Act*, 13 J. BUS. & TECH. L. 97, 113–14 (2017) (“From 2014 to 2016, the DOJ entered into settlements with Peapod.com, Carnival Cruise Lines, and edX Incorporated, requiring those entities to make their websites accessible to individuals with disabilities.”).

18. Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. at 43,464.

19. Trevor Crowley, *Wheelchair Ramps in Cyberspace: Bringing the Americans with Disabilities Act into the 21st Century*, 2013 BYU L. REV. 651, 658.

20. *Id.* at 658–59.

21. See Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions, 82 Fed. Reg. 60,932 (Dec. 26, 2017) (to codified at 28 C.F.R. pts. 35–36).

22. *Id.* at 60,932.

23. See, e.g., Reducing Regulation and Controlling Regulatory Costs, Exec. Order No. 13771, 82 Fed. Reg. 9339 (Jan. 30, 2017).

24. See *Robles v. Domino’s Pizza, LLC*, 913 F.3d 898, 909 (9th Cir. 2019) (“Domino’s has received fair notice that its website and app must provide effective communication and facilitate ‘full and equal enjoyment’ of Domino’s goods and services to its customers who are disabled. Our Constitution does not require that Congress or DOJ spell out exactly how Domino’s should fulfill this obligation.”).

25. See Kristina M. Launey, *Senators Send AG Sessions Letter Seeking Clarity on Website Accessibility Under ADA*, SEYFARTH: ADA TITLE III (Sept. 13, 2018), <http://www.adatitleiii.com/2018/09/senators-send-ag-sessions-letter-seeking-clarity-on-website-accessibility-under-ada/> [<https://perma.cc/CU8M-BRPV>].

26. See Shannon Behnken, *Businesses ‘Sitting Ducks’ for Lawsuits Because Websites Aren’t ADA Compliant*, WFLA (Feb. 7, 2019, 11:45 AM), <http://www.wfla.com/8-on-your-side/better-call-behnken/businesses-sitting-ducks-for-lawsuits-because-websites-arent-ada-compliant/> [<https://perma.cc/3ACN-AS4H>] (“[In 2018], there were 2,285 ADA website lawsuits filed in federal courts . . . an increase of . . . 181 percent from 2017.”); Hugo Martín, *Lawsuits Targeting Business Websites Over ADA Violations Are on the Rise*, L.A. TIMES (Nov. 11, 2018, 4:00 AM), <http://www.latimes.com/business/la-fi-hotels-ada-compliance-20181111>

Hulu, Hooters, Domino's Pizza (Domino's), and Winn Dixie have been sued for accessibility problems including issues with audio translation for the blind, written descriptions of videos and closed captioning for the deaf, and interactive content keyboard commands for those who cannot use a mouse.<sup>27</sup> In 2019, technology-related lawsuits were filed at a rate of one per hour.<sup>28</sup> Many website accessibility lawsuits settle,<sup>29</sup> leaving few judicial interpretations of the standard for accessibility and what businesses should do to comply. Private entities must make the choice to either code their websites so that interactive content is accessible or be repeatedly subject to litigation until they reach an acceptable level of compliance.<sup>30</sup> Depending on the complexity of the site, the former option could cost between "several thousand dollars to a few million dollars."<sup>31</sup>

The burden of a lack of specific regulations collides with a benefit for private entities under the ADA: flexibility in compliance.<sup>32</sup> The ADA was constructed to preserve this flexibility, which courts have stated is a "feature, not a bug" of the Act.<sup>33</sup> The DOJ has relied on public accommodations' flexibility in compliance to justify its withdrawal of rulemaking related to website accessibility under the ADA.<sup>34</sup> The closest standards for private entities with websites and apps looking to comply with the ADA are the Web Content Accessibility Guidelines (WCAG) 2.0 and 2.1, which have been widely adopted by public agencies; the DOJ has used them as a means of compliance in its consent decrees with public entities.<sup>35</sup>

WCAG 2.0 and 2.1 are "private industry standards for website accessibility developed by technology and accessibility experts."<sup>36</sup> Despite the DOJ's use of these rules to order compliance by private entities in consent decrees, Assistant Attorney General Stephen Boyd stated that "noncompliance with a voluntary technical standard

---

-story.html [https://perma.cc/9HKZ-H9RK] (stating that a projected two thousand lawsuits were to be filed in federal court for alleged website violations under the ADA in 2018, "up [ninety percent] from 2017").

27. Martín, *supra* note 26; *see also* Behnken, *supra* note 26.

28. USEABLENET, 2019 END OF YEAR WEB ACCESSIBILITY LAWSUIT RECAP REPORT (2019), <http://cdn2.hubspot.net/hubfs/3280432/2019EndOfYearRecap.pdf> [https://perma.cc/N5CL-C9VC].

29. Toni Cannady, *Avoiding the Website Accessibility Shakedown*, ABA BANKING J. (Feb. 6, 2017), <http://bankingjournal.aba.com/2017/02/avoiding-the-website-accessibility-shakedown/> [https://perma.cc/GET6-FNJ7] ("Many cases settle after receipt of the demand letter without suit being filed. However, in some cases where no settlement is reached, plaintiffs have proceeded to court . . . [B]anks and other companies have typically quickly settled to avoid further litigation costs as attempts to dismiss the suit are often, if not always, denied."); *see also* Behnken, *supra* note 26.

30. *See* Sara Randazzo, *Lawsuits Surge Over Websites' Access for the Blind*, WALL STREET J. (Feb. 17, 2019, 10:00 AM), <http://www.wsj.com/articles/lawsuits-surge-over-websites-access-for-the-blind-11550415600> [https://perma.cc/65WB-MKLP] ("[Twenty percent] of the website lawsuits filed in 2018 were against companies that had already been sued.").

31. Martín, *supra* note 26.

32. *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 908 (9th Cir. 2019) (quoting *Reed v. CVS Pharmacy, Inc.*, No. CV 17-3877-MWF (SKx), 2017 WL 4457508, at \*5 (C.D. Cal. Oct. 3, 2017)).

33. *Id.* (quoting *Reed*, 2017 WL 4457508, at \*5).

34. *See* Letter from Stephen E. Boyd, *supra* note 15.

35. *Robles*, 913 F.3d at 902 n.1; *see also* *Web Content Accessibility Guidelines (WCAG) 2.1*, W3C (June 5, 2018), <http://www.w3.org/TR/WCAG21/> [https://perma.cc/YV5L-RG63].

36. *Robles*, 913 F.3d at 902 n.1; *see also* *Web Content Accessibility Guidelines (WCAG) 2.1*, *supra* note 35.

for website accessibility [WCAG 2.1] does not necessarily indicate noncompliance with the ADA.”<sup>37</sup> The combination of the DOJ’s withdrawal, increased litigation under the ADA regarding website and app accessibility, and ever-evolving technological innovations has left the question of accessibility under the ADA for courts to resolve.<sup>38</sup>

*B. Current Circuit Split: The Issue of Physicality*

Circuit courts are split on how the ADA applies to consumers’ accessibility of websites or apps if those interfaces do not have a connection to a physical place.<sup>39</sup> For example, while the Dunkin’ Donuts website on a consumer’s phone can lead them to accessing the physical stores by providing hours and location information,<sup>40</sup> the Netflix app on a consumer’s smart television has no connection to a physical brick-and-mortar location.<sup>41</sup> The circuit split centers on how to interpret “public accommodation” in the ADA as applied to modern technology and whether plaintiffs need to identify a connection to a physical place to make an accessibility claim.<sup>42</sup> On October 7, 2019, the Supreme Court declined to resolve the split when it denied certiorari to a corporate defendant whose website was determined to be inaccessible under the ADA.<sup>43</sup>

This Part proceeds as follows: Part II.B.1 discusses circuits that have rejected the requirement that plaintiffs demonstrate a connection between a website and a physical place to make a claim under the ADA. Part II.B.2 details other circuits’ slightly narrower interpretation of the physical place requirement, in which a “nexus” between a website and physical place is required. Part II.B.3 discusses the narrowest decisions surrounding the physicality of public accommodations, in which circuits have held a physical place is required to make an actionable ADA claim.

1. No Requirement for a Physical Location To Make an ADA Accessibility Claim

The Seventh and First Circuits have expressly held that the ADA applies to websites even if the site at issue does not have a connection to a physical space.<sup>44</sup> The Seventh Circuit has rejected defendants’ pleas for the court to interpret the term “public accommodation” as denoting a physical site.<sup>45</sup> Judge Posner cited the purposes of the

---

37. Letter from Stephen E. Boyd, *supra* note 15.

38. See Martín, *supra* note 26.

39. See *infra* Part II.B for a discussion of the circuit split.

40. Haynes v. Dunkin’ Donuts LLC, 741 F. App’x. 752, 754 (11th Cir. 2018).

41. See Nat’l Ass’n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 200 (D. Mass. 2012).

42. Christopher Mullen, Comment, *Places of Public Accommodation: Americans with Disabilities Act and the Battle for Internet Accessibility*, 11 DREXEL L. REV. 745, 756 (2019).

43. See *Domino’s Pizza, LLC v. Robles*, 140 S. Ct. 122, 122 (2019); see also Rusie, *supra* note 9 (“[T]he Supreme Court’s decision (to not make a decision) has the effect of maintaining the status quo with respect to website accessibility, which varies by jurisdiction and is frustratingly unspecific throughout the United States.”).

44. See, e.g., *Morgan v. Joint Admin. Bd., Ret. Plan of the Pillsbury Co.*, 268 F.3d 456, 459 (7th Cir. 2001); *Carparts Distribution Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New England, Inc.*, 37 F.3d 12, 20 (1st Cir. 1994).

45. *Morgan*, 268 F.3d at 459 (“An insurance company can no more refuse to sell a policy to a disabled person over the Internet than a furniture store can refuse to sell furniture to a disabled person who enters the store.”).

ADA in rejecting this physicality requirement: “The site of the sale is irrelevant to Congress’s goal of granting the disabled equal access to sellers of goods and services. What matters is that the good or service be offered to the public.”<sup>46</sup>

In *Carparts Distribution Center, Inc. v. Automotive Wholesaler’s Ass’n of New England*,<sup>47</sup> the First Circuit also considered the plain language and purposes of the ADA when it rejected the need for a connection to a physical place to make a valid ADA discrimination claim.<sup>48</sup> The court wrote:

Neither Title III nor its implementing regulations make any mention of physical boundaries or physical entry. Many goods and services are sold . . . with customers never physically entering the premises of a commercial entity to purchase the goods or services. To exclude this broad category of businesses from the reach of Title III and limit the application of Title III to physical structures which persons must enter to obtain goods and services would run afoul of the purposes of the ADA and would severely frustrate Congress’s intent that individuals with disabilities fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public.<sup>49</sup>

District courts in the First Circuit have applied *Carparts*’ reasoning to modern accessibility claims relating to the internet, including a 2012 suit against Netflix alleging its services are not accessible to deaf and hard of hearing people.<sup>50</sup>

In *National Ass’n of the Deaf v. Netflix*,<sup>51</sup> the court stated that Congress did not intend to limit the ADA to only the examples listed in the definition of “public accommodation” and that a plaintiff must “show only that the web site [sic] falls within a general category listed under the ADA.”<sup>52</sup> Netflix’s “Watch Instantly” site,<sup>53</sup> which includes closed captioning for only a “small portion” of its titles,<sup>54</sup> was found to fall under the “service establishment,” “place of exhibition or entertainment,” and “rental establishment” categories of the ADA.<sup>55</sup> Despite the at-home access to Netflix, its lack of physical location, and its unspecified categorization in the ADA, the district court determined that “Watch Instantly” is a public accommodation and Netflix could not discriminate in providing the service.<sup>56</sup>

---

46. *Id.* (determining that the retirement plan in question was not offered to the public, therefore plaintiffs’ public accommodations claim failed).

47. 37 F.3d 12 (1st Cir. 1994).

48. *Carparts*, 37 F.3d at 19–20.

49. *Id.* at 20.

50. See, e.g., *Nat’l Ass’n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 200 (D. Mass. 2012).

51. 869 F. Supp. 2d 196 (D. Mass. 2012).

52. *Netflix*, 869 F. Supp. 2d at 201.

53. In 2012, “Watch Instantly” was used to refer to Netflix’s internet streaming service for television shows and movies. See Richard Lawler, *Netflix Watch Instantly Streaming Coming to Norway, Denmark, Sweden and Finland this Year*, ENGADGET (Aug. 15, 2012), <http://www.engadget.com/2012-08-15-netflix-watch-instantly-streaming-scandinavia.html> [<https://perma.cc/B627-2XWP>].

54. *Netflix*, 869 F. Supp. 2d at 199.

55. *Id.* at 201.

56. *Id.* at 201–02.

In 2017, another district court followed *Carparts* in considering whether plaintiffs had a viable claim under the ADA against Blue Apron.<sup>57</sup> Plaintiffs alleged that Blue Apron's website was not compatible with screen-reader software and was therefore discriminatory.<sup>58</sup> The court denied defendants' motion to dismiss, following the precedent set forth in *Carparts* and *Netflix*.<sup>59</sup> Additionally, while acknowledging the circuit split and an alternative construction of "public accommodation," the court in *Access Now, Inc. v. Blue Apron*<sup>60</sup> reiterated that a plaintiff in the First Circuit must only show that a website falls into a category of public accommodation under the ADA.<sup>61</sup> The court relied on the common-sense interpretation of the ADA from *Carparts*, citing a logic-based sentiment from the case: "[i]t would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not."<sup>62</sup>

Both the Seventh and First Circuits have established precedents that regard the ADA's categorization of public accommodations as evolving given emerging technologies and the modern realities of disabled individuals.<sup>63</sup> These decisions rely on statutory interpretation and history, both in reading the plain text of the ADA<sup>64</sup> and in considering the intended flexibility of the Act to adapt to changes over time.<sup>65</sup>

## 2. Requirement for "Nexus" Between Technology and the Physical Location

The Ninth and Eleventh Circuits have relied on the "nexus" test to resolve the question of applicability of the ADA to websites and apps.<sup>66</sup> To find a plaintiff's website or app accessibility claim viable under the ADA, courts using this test must identify a connection "between the goods or services being offered online and an actual, physical place."<sup>67</sup> In 2019, the Ninth Circuit expressly relied on the nexus test in determining

---

57. See *Access Now, Inc. v. Blue Apron, LLC*, No. 17-cv-116-JL, 2017 WL 5186354, at \*3–4 (D.N.H. Nov. 8, 2017).

58. *Id.* at \*1.

59. See *id.* at \*3–4, \*11.

60. No. 17-cv-116-JL, 2017 WL 5186354 (D.N.H. Nov. 8, 2017).

61. See *Access Now*, 2017 WL 5186354, at \*3–4. See 42 U.S.C. §§ 12181(7) (2018), for a list of the ADA's twelve categories of public accommodations. These private commercial entities include movie theaters, concert and lecture halls, places of recreation, and sales or rental establishments. *Id.*

62. *Access Now*, 2017 WL 5186354, at \*1 (alteration in original) (quoting *Carparts Distribution Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994)).

63. See *supra* Part II.B.1.

64. *Carparts*, 37 F.3d at 19 ("The plain meaning of the terms do not require 'public accommodations' to have physical structures for persons to enter. Even if the meaning of 'public accommodation' is not plain, it is, at worst, ambiguous."); Nat'l Ass'n of the Deaf v. *Netflix, Inc.*, 869 F. Supp. 2d 196, 201 (D. Mass. 2012) ("The ADA covers the services 'of' a public accommodation, not services 'at' or 'in' a public accommodation. This distinction is crucial." (citation omitted)).

65. *Netflix*, 869 F. Supp. 2d at 200–01 ("[T]he legislative history of the ADA makes clear that Congress intended the ADA to adapt to changes in technology . . . . [T]he Committee intends that the types of accommodations and services provided to individuals with disabilities, under all titles of this bill, should keep pace with the rapidly changing technology of the times." (citation omitted) (internal parentheses omitted) (quoting H.R. REP. NO. 101-485, pt. 2, at 108 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 391)).

66. See, e.g., *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 905 (9th Cir. 2019); *Haynes v. Dunkin' Donuts LLC*, 741 F. App'x 752, 754 (11th Cir. 2018).

67. Mullen, *supra* note 42, at 758.

whether the Domino's app qualified as a public accommodation under the ADA.<sup>68</sup> The court held that the website and app at issue, which allowed consumers to order products to be picked up or delivered from physical Domino's stores, "facilitate[d] access to the goods and services of a place of public accommodation."<sup>69</sup> Thus, the inaccessibility of the technology services "impede[d] access to the goods and services of its . . . places of public accommodation."<sup>70</sup> The court relied on its decision in *Weyer v. Twentieth Century Fox Film Corp.*,<sup>71</sup> in which it did not find the necessary nexus to make a claim under the ADA.<sup>72</sup> Instead, the insurance policy in question was not a good offered by a physical office and did "not concern accessibility."<sup>73</sup>

The Eleventh Circuit uses a similar nexus requirement.<sup>74</sup> In 2018, it considered a claim in which a blind man alleged that Dunkin' Donuts violated the ADA by offering no screen reading software<sup>75</sup> on its website.<sup>76</sup> Because the website facilitated the use of physical doughnut shops, which are places of public accommodation, "[t]he failure to make those services accessible to the blind can be said to exclude, deny, or otherwise treat blind people 'differently than other individuals because of the absence of auxiliary aids and services.'"<sup>77</sup> The plaintiff alleged a plausible claim under the ADA even though the service being used was intangible—but only because the service facilitated the use of physical, tangible locations.<sup>78</sup>

In 1999, the Second Circuit—in *Pallozzi v. Allstate Life Insurance Co.*<sup>79</sup>—endorsed the requirement that a nexus must exist between a physical space and the discriminatory, intangible offering.<sup>80</sup> The married plaintiffs alleged that Allstate discriminated against them when the company refused to sell them a joint life insurance policy because of their respective mental disabilities.<sup>81</sup> Upon considering whether the defendant's extension of insurance policies was discriminatory under the ADA, the court addressed the joint life insurance policy's existence outside of an established place of public

---

68. *Robles*, 913 F.3d at 905.

69. *Id.* at 905.

70. *Id.*

71. 198 F.3d 1104 (9th Cir. 2000).

72. *See Weyer*, 198 F.3d at 1114–15; *see also Robles*, 913 F.3d at 905.

73. *Robles*, 913 F.3d at 905 (citing *Weyer*, 198 F.3d at 1114).

74. *See Haynes v. Dunkin' Donuts LLC*, 741 F. App'x 752, 754 (11th Cir. 2018).

75. "Screen readers are software programs that allow blind or visually impaired users to read the text that is displayed on the computer screen with a speech synthesizer or braille display." *Screen Readers*, AM. FOUND. FOR THE BLIND, <http://www.afb.org/blindness-and-low-vision/using-technology/assistive-technology-products/screen-readers> [<https://perma.cc/H3KS-TWGN>] (last visited Apr. 1, 2021). According to the 2010 Census, 8.1 million Americans have difficulty seeing. Two million are blind or unable to see. *Nearly 1 in 5 People Have a Disability in the U.S., Census Bureau Reports*, U.S. CENSUS BUREAU (July 25, 2012), <http://www.census.gov/newsroom/releases/archives/miscellaneous/cb12-134.html> [<https://perma.cc/CBA6-3G7V>].

76. *Haynes*, 741 F. App'x at 752–53.

77. *Id.* at 754 (quoting 42 U.S.C. § 12182(b)(2)(A)(iii) (2018)).

78. *See id.*

79. 198 F.3d 28 (2d Cir. 1999).

80. *See Pallozzi*, 198 F.3d at 31–33, 32 n.3.

81. *Id.* at 30.



accommodation: the “insurance office.”<sup>82</sup> It found that Section 302 of the ADA barred a “place of public accommodation” from “discriminat[ing] against [an individual] on the basis of disability in the full and equal enjoyment of [its] *goods* [and] *services*.”<sup>83</sup> The goods here—insurance policies—were offered by the place of public accommodation, which was the physical insurance office.<sup>84</sup> The Second Circuit thus determined an adequate connection must exist between the physical location and the intangible offering to allow the ADA to cover insurance underwriting in some circumstances.<sup>85</sup>

More recently, however, the Second Circuit’s district courts have departed from *Pallozzi*’s strict adherence to a physical location in considering modern claims of discrimination under the ADA. In 2015, the District of Vermont rejected a defendant’s argument that the ADA does not apply to websites without publicly accessible physical locations that offer goods and services.<sup>86</sup> In the first case in the circuit in which “a defendant operated no physical space open to the public but nevertheless provided goods and services to the public,” the district court extended *Pallozzi* to cover the digital library service’s discrimination of the blind.<sup>87</sup> Like the Seventh and First Circuits, the District of Vermont considered the ADA’s statutory language and history to resolve the ambiguity of the term “public accommodations.”<sup>88</sup> It ultimately relied on the categorization method used in *Netflix*, in which a service is considered a public accommodation if it falls within any of the general categories of accommodations in the statute.<sup>89</sup>

Just two years later, in *Markett v. Five Guys Enterprises*,<sup>90</sup> the Southern District of New York cited *Pallozzi* when it found that an ADA claim made against Five Guys regarding the accessibility of its online ordering website was actionable.<sup>91</sup> The court determined the connection between the website and physical storefront was present but *not* required, as the website was covered under the ADA “either as its own place of public accommodation or as a result of its *close relationship* as a service of defendant’s restaurant[.]”<sup>92</sup>

### 3. Without a Physical Location There Can Be No Actionable Claim

The narrowest reading of “public accommodation” under the ADA occurs in the Sixth and Third Circuits. The Sixth Circuit established its precedent on the issue in 1997, when it considered an ADA claim by an employee with severe depression who received

---

82. *See id.* at 31–33.

83. *Id.* at 31 (alterations in original) (quoting 42 U.S.C. § 12182(a)).

84. *Id.*

85. *Id.* at 32–33, 32 n.3.

86. *See Nat’l Fed’n of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565, 572–76 (D. Vt. 2015).

87. *Id.* at 571 (“However, *Pallozzi* arguably could be extended to a company’s refusal to sell a disabled person its merchandise on the Internet and, by extension, imposing barriers that have essentially the same effect. Otherwise, a company could freely refuse to sell its goods or services to a disabled person as long as it did so online rather than within the confines of a physical office or store.”).

88. *Id.* at 571–76.

89. *Id.* at 575–76.

90. No. 17-cv-788 (KBF), 2017 WL 5054568 (S.D.N.Y. July 21, 2017).

91. *See Markett*, 2017 WL 5054568, at \*2.

92. *Id.* (emphasis added).

shorter insurance coverage than employees with physical disabilities.<sup>93</sup> In *Parker v. Metropolitan Life Insurance*,<sup>94</sup> the court found that the insurance policy was not a good offered by a physical insurance office but instead by the employer.<sup>95</sup> After evaluating the statute's text, the court concluded, "a public accommodation is a physical place."<sup>96</sup> The Sixth Circuit's interpretation of "public accommodation" rested on its reading of the ADA's definition in *Stoutenborough v. National Football League, Inc.*<sup>97</sup>:

[W]e held that "the prohibitions of Title III are restricted to 'places' of public accommodation. . . ." A "place," as defined by the applicable regulations, is "a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the twelve 'public accommodation' categories." "Facility," in turn, is defined as "all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located."<sup>98</sup>

In 1998, the Third Circuit expressly "part[ed] company" with the First Circuit's *Carparts* decision and followed the Sixth Circuit's *Parker* holding.<sup>99</sup> In *Ford v. Schering-Plough Corp.*,<sup>100</sup> the Third Circuit also considered an ADA claim regarding an alleged disparity in employee insurance coverage among individuals with mental or physical disabilities.<sup>101</sup> The court stated that it did not find "public accommodation" to "refer to non-physical access or even to be ambiguous as to [its] meaning."<sup>102</sup> Unlike its fellow circuits, the Third Circuit found support for this decision in the plain meaning of the ADA and the purposes of the DOJ's requirements; because the meaning was so plain to the court, it found "no need to analyze the ADA's legislative history."<sup>103</sup>

In 2010, the Third Circuit declined a plaintiff's request to "clarify or reconsider" the *Ford* holding when it determined the use of a defendant's credit card services "in no way relate[d] to the equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations on physical property that [the defendant] . . . owns, leases, or operates."<sup>104</sup> Despite the Third Circuit's adherence to its *Ford* precedent, some of its district courts have moved away from the circuit's narrow interpretation of "public accommodation" in recent motions to dismiss website accessibility claims.<sup>105</sup>

---

93. See *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1008 (6th Cir. 1997).

94. 121 F.3d 1006 (6th Cir. 1997).

95. *Parker*, 121 F.3d at 1010.

96. *Id.* at 1010–11.

97. 59 F.3d 580 (6th Cir. 1995).

98. *Parker*, 121 F.3d at 1011 (quoting *Stoutenborough*, 59 F.3d at 583).

99. *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 613–14 (3d Cir. 1998).

100. 145 F.3d 601 (3d Cir. 1998).

101. *Ford*, 145 F.3d at 603.

102. *Id.* at 614.

103. *Id.* at 613.

104. *Peoples v. Discover Fin. Servs., Inc.*, 387 F. App'x 179, 183–84 (3d Cir. 2010).

105. See, e.g., *West v. DocuSign, Inc.*, No. 19cv0501, 2019 WL 3843054, at \*4 (W.D. Pa. Aug. 15, 2019) ("Plaintiff's allegations support a theory that she was rendered unable to access property (*i.e.*, the website) owned, operated, and controlled by [the] Defendant."); *Tawam v. APCI Fed. Credit Union*, No. 5:18-cv-00122, 2018 WL 3723367, at \*8 (E.D. Pa. Aug. 6, 2018) ("At this stage of the litigation, [plaintiff] has sufficiently

### C. *The Move Away from Brick-and-Mortar Locations*

Online retailers like Amazon are continuing to grow their market shares despite a relative lack of brick-and-mortar locations.<sup>106</sup> Like other subscription services, Prime Wardrobe, Stitch Fix, and Trunk Club use only websites and apps to cater to their consumers, who receive their clothing options in the mail rather than in brick-and-mortar stores.<sup>107</sup> Beyond clothing, everyday household goods like shaving supplies,<sup>108</sup> beauty and fitness products,<sup>109</sup> and bathroom necessities<sup>110</sup> are accessed through subscription boxes and have created a massive, billion-dollar retail industry—with no physical locations for consumers to access.<sup>111</sup> Companies that “disrupt” traditional retail shopping sales in physical stores tend to offer options not found in one’s local retail establishments,

---

alleged that the accessibility barriers on the website prevent him from finding and visiting the [defendant] location or learning about services offered at [defendant’s] locations. Thus, [plaintiff] has asserted that the website services have a sufficient physical nexus to [defendant’s] physical location.”); *Gniewkowski v. Lettuce Entertain You Enters., Inc.*, 251 F. Supp. 3d 908, 918 (W.D. Pa. 2017) (finding that the “alleged discrimination—Plaintiffs’ inability to access financial services information—took place at property that [defendant] owns, operates, and controls.”).

106. See Kate Rooney, *Online Shopping Overtakes a Major Part of Retail for the First Time Ever*, CNBC (Apr. 3, 2019, 2:34 PM), <http://www.cnbc.com/2019/04/02/online-shopping-officially-overtakes-brick-and-mortar-retail-for-the-first-time-ever.html> [https://perma.cc/MLB7-WSNS] (“Online shopping led by Amazon hit a new milestone in February. The total market share of ‘non-store,’ or online U.S. retail sales was higher than general merchandise sales for the first time in history.”). Amazon is expanding its presence in the brick-and-mortar retail space, with grocery, book, and general merchandise stores around the country. See Lauren Thomas, *Amazon Is Opening Its First Full-Size, Cashierless Grocery Store. Here’s a First Look Inside*, CNBC (Feb. 25, 2020, 9:46 PM), <http://www.cnbc.com/2020/02/24/amazon-opens-its-first-full-size-cashierless-grocery-store-in-seattle.html> [https://perma.cc/P98Q-VWLS].

107. E.g., *Prime Wardrobe*, AMAZON, <http://www.amazon.com/learn-more-prime-wardrobe/b?ie=UTF8&node=16122413011> [https://perma.cc/79MZ-9LL6] (last visited Apr. 1, 2021); *What Is Stitch Fix and How Does It Work?*, STITCH FIX, <http://support.stitchfix.com/hc/en-us/articles/204222994-FAQ#general> [https://perma.cc/75SN-Q6J6] (last visited Apr. 1, 2021); *How It Works*, TRUNK CLUB, <http://www.trunkclub.com/faq#how-does-trunk-club-work> [https://perma.cc/82TR-8B99] (last visited Apr. 1, 2021).

108. See, e.g., Mark Ellwood, *The Best Shaving Clubs for Men*, MEN’S J., <http://www.mensjournal.com/style/best-shaving-subscription-boxes/> [https://perma.cc/Y3LH-283A] (last visited Apr. 1, 2021) (“It shouldn’t come as a surprise, then, that to meet this soaring dude demand, a slew of new subscription-based services . . . have emerged to cut that pharmacy trip out of your life altogether.”).

109. See, e.g., Victoria Xiao, Chelsea Burns & Yasmine Maggio, *The 20 Best Beauty Subscription Boxes To Satisfy Any Beauty Junkie*, WOMEN’S HEALTH (Oct. 1, 2020), <http://www.womenshealthmag.com/beauty/g28339728/beauty-subscription-boxes/> [https://perma.cc/U5AY-BH8X] (“Self-care straight to your door.”); Leah Stodart, *11 of the Best Fitness Subscription Boxes for Any Type of Wellness Junkie*, MASHABLE (Mar. 6, 2019), <http://mashable.com/roundup/fitness-workout-subscription-boxes/> [https://perma.cc/3EPG-JDVD] (“Because let’s be honest: Navigating a Lululemon sale or a Whole Foods at rush hour isn’t exactly fun.”).

110. See, e.g., Dan Nosowitz, *Disruption Has Come for Toilet Paper*, VOX (Jul. 17, 2019, 7:00 AM), <http://www.vox.com/the-goods/2019/7/17/20688093/toilet-paper-no-2-tushy-who-gives-a-crap-charmin> [https://perma.cc/5A27-TV7K] (“Toilet paper is sold the same way as millennial-focused makeup, reusable straws, and foam mattresses.”).

111. See Elizabeth Segran, *Inside the \$2.6 Billion Subscription Box Wars*, FAST CO. (Oct. 17, 2018), <http://www.fastcompany.com/90248232/inside-the-2-6-billion-subscription-box-wars> [https://perma.cc/KT55-N6YD].

like entirely organic tampons in a customizable period kit,<sup>112</sup> seasonal clothing chosen specifically based on the consumer's preferences,<sup>113</sup> or samplings of paleo treats.<sup>114</sup>

According to the *Netflix* categorization method, these sellers would easily qualify as public accommodations under the "shopping center" category of the ADA<sup>115</sup>—thus making them subject to accessibility suits by consumers with disabilities in the First and Seventh Circuits.<sup>116</sup> However, for consumers in the remaining circuits, no claim could be made under the ADA about the accessibility of these retailers' apps and websites—which are the entirety of their services—because they do not have physical stores or locations.<sup>117</sup>

Beyond the shopping realm, more technological disruption has occurred in the "service" category of the ADA's list of public accommodations.<sup>118</sup> In the financial services industry, online-only services allow consumers to prepare and file annual taxes at home, with no option to visit a physical office.<sup>119</sup> In 2018, TurboTax—a home tax service with a live chat feature and on-demand video communication option<sup>120</sup>—contributed to the more than \$1.6 billion generated by the consumer division of Intuit, its parent company.<sup>121</sup> Quicken Loans, which has no physical, consumer-accessible offices, has removed what its CEO called the "intimidating and cumbersome aspects of the traditional mortgage process" by offering the entire mortgage application process via website or mobile app.<sup>122</sup> In 2019, Quicken ranked as the number one mortgage lender by volume in the first quarter of the year and earned \$32 billion in mortgage originations in the second quarter.<sup>123</sup> Other financial technology services (referred to as "Fintech") are "smashing old business models" as well. For example,

112. *E.g.*, *Meet LOLA*, LOLA, <http://www.mylola.com/pages/about> [https://perma.cc/63L6-5ALF] (last visited Apr. 1, 2021).

113. *E.g.*, *Step Up Your Everyday Style*, CURATEUR, <http://www.curateur.com/pages/membership> [https://perma.cc/DJJ6-7LJ2] (last visited Apr. 1, 2021).

114. *E.g.*, Rick, *7 Paleo Snack Subscription Boxes To Keep You Satisfied and On Track*, FOOD FOR NET (Dec. 25, 2018), <http://foodfor.net/paleo-snack-subscription-boxes/> [https://perma.cc/4BGE-23M5].

115. *See* 42 U.S.C. § 12181(7)(E) (2018).

116. *See supra* Parts II.B.1.

117. *See supra* Parts II.B.2, II.B.3.

118. *See* 42 U.S.C. § 12181(7)(F).

119. *See, e.g.*, Tina Orem, *TurboTax Review 2021*, NERDWALLET (Mar. 4, 2021), <http://www.nerdwallet.com/blog/taxes/turbotax-review/> [https://perma.cc/Q8YK-B3SC] ("Like many other providers, TurboTax lets you access and work on your return across devices: on your computer via the website or on your phone or tablet via an app . . . TurboTax's interface is like a chat with a tax preparer . . .").

120. *Id.*

121. Justin Elliott & Lucas Waldron, *Here's How TurboTax Just Tricked You Into Paying To File Your Taxes*, PROPUBLICA (Apr. 22, 2019, 5:00 AM), <http://www.propublica.org/article/turbotax-just-tricked-you-into-paying-to-file-your-taxes> [https://perma.cc/7BHV-CFX8].

122. Ben Lane, *Here's How Much Rocket Mortgage Helped Quicken Loans in 2016*, HOUSINGWIRE (Mar. 7, 2017, 1:40 PM), <http://www.housingwire.com/articles/39505-heres-how-much-rocket-mortgage-helped-quicken-loans-in-2016/> [https://perma.cc/WZY7-VFSL].

123. JC Reindl, *Quicken Loans Says It Just Had the Best Quarter in Its History*, DETROIT FREE PRESS (July 16, 2019, 6:48 PM), <http://www.freep.com/story/money/business/2019/07/16/quicken-loans-jobs-mortgages/1743783001/> [https://perma.cc/8J8X-QMFE].

financial advisors and student and business loan providers offer services without physical locations, which increase opportunities for consumers.<sup>124</sup>

Specific service industries listed in the ADA’s “public accommodations” definition, like travel agencies, have also moved away from physical spaces.<sup>125</sup> The number of physical retail travel agencies with employees dropped by fifty-nine percent between 1997 and 2013.<sup>126</sup> While various factors have affected the reduction in brick-and-mortar travel agencies,<sup>127</sup> the “online travel revolution” that allows direct booking on websites and apps has massively affected the way Americans schedule and execute travel, including securing flights, transportation to and from the airport, and lodging.<sup>128</sup> Instead of physical agencies, travel experts “look quite different” and have found niches that allow them to thrive, such as providing luxury travel opportunities and customized vacations through their “sleek websites.”<sup>129</sup> Just below half of U.S. smartphone users were found to be comfortable “researching, booking, and planning” entire vacations to a new place using only their mobile devices.<sup>130</sup> In fact, eighty-two percent of bookings were completed through a website or app in 2018—with no human interaction at all.<sup>131</sup>

Emerging technologies in the entertainment and recreation industries also continue to move away from physical gathering spaces, like movie theaters, concert halls, and recreation centers.<sup>132</sup> While in-home streaming services have a solid grip on disrupting the way Americans purchase and consume entertainment,<sup>133</sup> virtual reality (VR) and

---

124. See *How Fintech Is Revolutionizing Financial Services*, KNOWLEDGE @ WHARTON (Apr. 9, 2019), <http://knowledge.wharton.upenn.edu/article/fintech-revolutionizing-financial-services/> [https://perma.cc/N35C-GA5Y] (“[The lending firm] also has lower operating costs by not having any physical stores, unlike banks. ‘We don’t have bricks-and-mortar locations and we underwrite so that has allowed us to lower the rate of interest for students going to school or refinancing . . . .’”).

125. See, e.g., Greg Oates, *Travel Agent Industry Executives Argue That Agents Are Coming Back*, SKIFT (Feb. 3, 2015, 7:30 AM), <http://skift.com/2015/02/03/travel-agent-industry-executives-argue-that-agents-are-coming-back/> [https://perma.cc/MMR6-52KB].

126. *Id.*

127. See *id.*

128. Suzanne Bearne, *How Technology Has Transformed the Travel Industry*, GUARDIAN (Feb. 29, 2016, 12:11 PM), <http://www.theguardian.com/media-network/2016/feb/29/technology-internet-transformed-travel-industry-airbnb> [https://perma.cc/G2QF-YWGW] (“For travel agents, the rise of digital has severely disrupted the industry. ‘Traditional travel distribution in which high street travel agencies played a dominant role was revolutionised [sic] with online travel agencies and direct distribution through airlines and hotels’ websites acquiring a key role . . . .”).

129. See Aditi Shrikant, *How Travel Agencies Avoided Extinction and Became a Luxury Service*, VOX (Sep. 21, 2018, 6:30 AM), <http://www.vox.com/the-goods/2018/9/21/17879864/travel-agency-millennials-transformative/> [https://perma.cc/F7UA-HR6Z].

130. ALONA MITTIGA, NICOLE KOW, BARBRA SILVA, STEPHANIE KUTSCHERA & FRANZISKA WERNET, TREKKSOFT, TRAVEL TRENDS REPORT 2019, at 20 (2019).

131. *Id.* at 17.

132. See Andrew Liptak, *The MPAA Says Streaming Video Has Surpassed Cable Subscriptions Worldwide*, VERGE (Mar. 21, 2019, 11:13 AM), <http://www.theverge.com/2019/3/21/18275670/mpaa-report-streaming-video-cable-subscription-worldwide> [https://perma.cc/5SGA-AAKP]; Bernard Marr, *5 Important Augmented and Virtual Reality Trends for 2019 Everyone Should Read*, FORBES (Jan. 14, 2019, 12:25 AM), <http://www.forbes.com/sites/bernardmarr/2019/01/14/5-important-augmented-and-virtual-reality-trends-for-2019-everyone-should-read/#29e2601622e7> [https://perma.cc/J5J8-CQHG].

133. Liptak, *supra* note 132 (“[I]t’s pretty clear that increasingly, more people around the world prefer to buy their entertainment from the internet, rather than buying a physical disc.”).

augmented reality (AR) technologies are becoming more realistic, accurate, and immersive for those looking for recreation and entertainment via simulations and games.<sup>134</sup>

According to a 2019 survey of VR and AR developers, fifty-nine percent of respondents' projects were in the "gaming space."<sup>135</sup> VR and AR are predicted to grow into a massive \$95 billion market by 2025, with high demand from "industries in the creative economy" like live events and video entertainment.<sup>136</sup> Virtual reality concerts—in which participants "attend" while wearing VR headsets that track their eye movements and allow them to see a musical performance in real time, next to real people, while remaining in their own homes—have already occurred.<sup>137</sup> While the musician performing is in a tangible, physical location, no attendees actually have access to that physical space; the entertainment can only be accessed through the technology.<sup>138</sup>

Given the circuit split about the need for a physical location to assert an actionable claim, consumers with disabilities in some parts of the country cannot advocate for more accessibility in online-only industries and businesses.<sup>139</sup> If inaccessibility is present on these apps and websites, these consumers are left to rely on physical business locations that may not provide the personalization, efficiency, and ease that online services do.

#### D. *The Crucial Wayfair Decision: Physical Presence in State Sales Tax*

With the continuing evolution of modern technology and its effects on Americans' daily lives, private entities look to the Supreme Court for guidance on how to apply other statutes and regulations to these new developments.<sup>140</sup> In 2018, the Court acknowledged the effects of technological advances in the context of state sales tax in *South Dakota v. Wayfair*.<sup>141</sup> South Dakota has a law requiring out-of-state sellers to collect and remit sales tax as if the seller had a physical presence in the State.<sup>142</sup> None of the respondent businesses collected or remitted South Dakota sales tax as part of their massive net

134. See Marr, *supra* note 132.

135. Peter Rubin, *Want To Know the Real Future of AR/VR? Ask Their Devs*, WIRED (Aug. 5, 2019, 12:38 PM), <http://www.wired.com/story/future-ar-vr-survey/> [https://perma.cc/4GA7-EGPX]. Beyond the traditional game-related space for these technologies, the survey demonstrated huge growth in the use of VR and AR for education and training. *Id.*

136. Stefan Hall & Ryo Takahashi, *Augmented and Virtual Reality: The Promise and Peril of Immersive Technologies*, MCKINSEY & COMPANY (Oct. 3, 2017), <http://www.mckinsey.com/industries/technology-media-and-telecommunications/our-insights/augmented-and-virtual-reality-the-promise-and-peril-of-immersive-technologies> [https://perma.cc/CN3Y-7BBF] ("This could be game-changing: users will no longer view content but will be placed inside ever-expanding virtual worlds and find themselves at the center, hence the 'immersive' nature of the technology.").

137. See Sol Rogers, *Are VR and AR the Future of Live Events?*, FORBES (Nov. 26, 2018, 9:26 AM), <http://www.forbes.com/sites/solrogers/2018/11/26/are-vr-and-ar-the-future-of-live-events/#703c5e924243> [https://perma.cc/Y46D-CJVJ].

138. Shannon Connellan, *Facebook's Oculus Venues Streams Its First VR Concert. Was It Any Good?*, MASHABLE (May 31, 2018), <http://mashable.com/2018/05/31/oculus-venues-vr-concert-vance-joy/?europe=true#Q9U8Lxpy.kqc> [https://perma.cc/GB47-HMC4].

139. See *supra* Section II.B.

140. See Rusie, *supra* note 9.

141. 138 S. Ct. 2080, 2088–89 (2018).

142. *Id.*

revenues each year.<sup>143</sup> The law was enacted to combat the state’s loss of between \$48 and \$58 million annually because online retailers that are physically located *outside* of the state were not required to pay sales tax, and consumers did not voluntarily remit the payments to the state.<sup>144</sup>

Resolution of *Wayfair* heavily relied on consideration of the Court’s 1992 decision in *Quill v. North Dakota*,<sup>145</sup> which established the framework for state sales tax burdens on interstate commerce.<sup>146</sup> In *Quill*, a mail-order corporation challenged North Dakota’s law that required any retailer—defined to include “every person who engages in regular or systemic solicitation of a consumer market in th[e] state”—to collect and remit state sales tax, despite a lack of property or personnel in the state.<sup>147</sup>

The *Quill* Court analyzed the North Dakota law by examining the restrictions of the Due Process and Commerce Clauses on state tax laws.<sup>148</sup> In terms of due process, *Quill* established that if a foreign corporation “purposefully avails itself of the benefits of an economic market in the forum State, it may subject itself to the State’s *in personam* jurisdiction even if it has no physical presence in the State.”<sup>149</sup> The Court discussed “modern commercial life” in the early 1990s, when the use of a “deluge” of mail-order catalogs and materials to North Dakota residents was deemed “more than sufficient” for establishing minimum contacts for due process purposes.<sup>150</sup> Thus, in *Quill*, the Supreme Court overruled its due process precedent and rejected the requirement for physical presence in the state in order to be taxed by the state.<sup>151</sup>

However, *Quill* ultimately relied upon the Due Process and Commerce Clauses to restrict state taxation of outside entities, noting that the requirements of the Due Process and Commerce Clauses were not identical.<sup>152</sup> The Commerce Clause explicitly grants power to Congress to regulate interstate commerce;<sup>153</sup> it has also been used by the Supreme Court to impose limitations on the states *without* congressional action.<sup>154</sup> These limitations exist under the dormant Commerce Clause, which mandates that states “may

---

143. *Id.* at 2089 (quoting S. 106, 2016 Leg. Assemb., 91st Sess. § 1 (S.D. 2016)).

144. *Id.* at 2088.

145. 504 U.S. 298 (1992).

146. *Quill*, 504 U.S. at 314–19.

147. *Id.* at 302–03 (alteration in original).

148. *Id.* at 305.

149. *Id.* at 307.

150. *Id.* at 307–08.

151. *Id.* at 308.

152. *Id.* at 312–13.

153. U.S. CONST. art. I, § 8, cl. 3.

154. *See, e.g.,* S. Pac. Co. v. Arizona, 325 U.S. 761, 770 (1945) (“[I]n general Congress has left it to the courts to formulate the rules thus interpreting the commerce clause in its application . . . and has been aware that in their application state laws will not be invalidated without the support of relevant factual material which will ‘afford a sure basis’ for an informed judgment . . . There has thus been left to the states wide scope for the regulation of matters of local state concern, even though it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern.” (citations omitted)); *see also* South Dakota v. Wayfair, 138 S. Ct. 2080, 2089 (2018).

not discriminate against interstate commerce” or “impose undue burdens on interstate commerce.”<sup>155</sup>

The *Quill* Court emphasized the differences between the Due Process Clause’s “minimum contacts” test and the Commerce Clause’s “substantial nexus” test, recognizing that the latter was not about fairness to a defendant, but instead about “structural concerns about the effects of state regulation on the national economy.”<sup>156</sup> The *Quill* Court thus chose not to overrule its Commerce Clause precedent, which still relied on finding a “substantial nexus” of physical presence in the state by examining property, people, and payroll present there and which allowed courts to complete a case-by-case factual analysis of a state law’s burden on interstate commerce.<sup>157</sup> The North Dakota law was found to violate Commerce Clause restrictions by placing an unconstitutional burden on interstate commerce.<sup>158</sup>

The *Quill* Court relied on stare decisis in overturning the Due Process Clause’s physical presence requirement and in sustaining the Commerce Clause’s physical presence requirement.<sup>159</sup> A departure from stare decisis would have been an extraordinary occurrence, given that the Court rarely overturns its previous decisions.<sup>160</sup> The *Quill* Court recognized the predictability stare decisis provides to the industry it affects, stating that its precedent had “engendered substantial reliance.”<sup>161</sup> In his concurrence, Justice Scalia noted the ability of Congress to change Commerce Clause jurisprudence by “simply saying so.”<sup>162</sup> When courts provide a particular interpretation of a statute, as the Supreme Court did in its *Quill* precedents, and Congress does *not* choose to act, it has been assumed that Congress implicitly supports the interpretation and stare decisis is the appropriate choice.<sup>163</sup>

155. *Wayfair*, 138 S. Ct. at 2090–91.

156. *Quill*, 504 U.S. at 312.

157. See Rick Najjar & Ted Kontopoulos, *Understanding Wayfair: A User-Friendly Guide to the Biggest State Tax Case in 30 Years*, J. MULTISTATE TAX’N & INCENTIVES, Oct. 2019, at 6, 13; Eric C. Miller, Comment, *Answering the Call: South Dakota v. Wayfair, Inc. and a Challenge to the Physical Presence Rule*, 64 S.D. L. REV. 94, 106 (2019) (“Justice Stevens differentiated between Due Process and Commerce Clause concerns. . . . A seller might meet the ‘minimum contacts’ of Due Process; however, the seller might still fail to meet the ‘substantial nexus’ requirement of the Commerce Clause. This difference was why the two nexus analyses deviated from each other.” (footnotes omitted)).

158. *Quill*, 504 U.S. at 318–19.

159. Miller, *supra* note 157, at 107–08 (“[A] ‘special justification’ beyond the simple belief the precedent is wrong is necessary in order to adequately provide a sound basis to overturn it.”); see John A. Swain, *State Income Tax Jurisdiction: A Jurisprudential and Policy Perspective*, 45 WM. & MARY L. REV. 319, 331–32 (2003) (“For many commentators, stare decisis is the crux of the *Quill* decision. They caution that the Court’s other rationales should not ‘be taken very seriously.’ Indeed, the three concurring justices seem to take us aside and whisper this sentiment.” (footnotes omitted)).

160. F.E. Guerra-Pujol, *Bitcoin, the Commerce Clause, and Bayesian Stare Decisis*, 22 CHAP. L. REV. 143, 147–48 (2019).

161. *Quill*, 504 U.S. at 317; see also Najjar & Kontopoulos, *supra* note 157, at 12 (“As tax professionals are aware, predictability in the tax law is quite important.”).

162. *Quill*, 504 U.S. at 320 (Scalia, J., concurring).

163. Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, 97 TEX. L. REV. 1125, 1138 (2019). But see *Johnson v. Transp. Agency, Santa Clara Cty., Cal.*, 480 U.S. 616, 671 (1987) (Scalia, J., dissenting) (“This assumption, which frequently haunts our opinions, should be put to



Like *Quill*, resolution of the issue in *Wayfair* relied both on Due Process and Commerce Clause jurisprudence.<sup>164</sup> Respondents challenged South Dakota's role in taxing its online retail businesses by citing *Quill* and stated that "[i]t is only Congress, and not the [s]tates or the courts, that has the institutional expertise to weigh the national implications of expanded state taxing authority and to craft legislation that will ensure state tax obligations do not unduly burden interstate commerce."<sup>165</sup> The *Wayfair* Court was also left to resolve the application of the Due Process Clause minimum contacts test in the context of "the [i]nternet revolution"—which no longer involved the physical deluge of catalogues to consumers' homes.<sup>166</sup>

Justice Kennedy set the groundwork for his majority *Wayfair* opinion in *Direct Marketing Ass'n v. Brohl*,<sup>167</sup> in which his concurrence criticized *Quill* for its Commerce Clause holding, stating that it "inflict[ed] extreme harm and unfairness on the [s]tates."<sup>168</sup> His concurrence outlined the effects of this unfairness, including states' loss of tax revenue, and emphasized—as his *Wayfair* opinion would—the way the internet has changed the notion of physical presence.<sup>169</sup> He also explicitly called for an appropriate case for the Court to address the limitations of *Quill*.<sup>170</sup> Although *Brohl* did not give Justice Kennedy the opportunity to overrule *Quill*,<sup>171</sup> *Wayfair* did.

In *Wayfair*'s majority opinion, holding the South Dakota state tax law constitutional, Justice Kennedy wrote that *Quill*'s Commerce Clause substantial nexus rule had become "further removed from economic reality" each year and did not align with modern e-commerce.<sup>172</sup> Justice Kennedy stated that "[t]he 'dramatic technological and social changes' of our 'increasingly interconnected economy' mean that buyers are 'closer to most major retailers' than ever before—'regardless of how close or far the nearest storefront.'"<sup>173</sup> Relying upon a precursor to *Quill*, *Complete Auto Transit, Inc. v. Brady*,<sup>174</sup> the Court held that a state tax on interstate commerce is allowable so long as the tax "(1) applies to an activity with a substantial nexus with the taxing [s]tate, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services the [s]tate provides."<sup>175</sup> Justice Kennedy disagreed with the *Quill* Court's holding that a substantial nexus requires physical presence, finding that this

---

rest. It is based, to begin with, on the patently false premise that the correctness of statutory construction is to be measured by what the current Congress desires, rather than by what the law as enacted meant.").

164. See *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2091 (2018).

165. Brief for Respondents at 60, *Wayfair*, 138 S. Ct. 2080 (No. 17-494).

166. *Wayfair*, 138 S. Ct. at 2097.

167. 575 U.S. 1 (2015).

168. *Brohl*, 575 U.S. at 17 (Kennedy, J., concurring). For an analysis of the effects of e-commerce on state and local economies post-*Quill*, see Donald Bruce, William F. Fox & LeAnn Luna, *State and Local Government Sales Tax Revenue Losses from Electronic Commerce*, 52 ST. TAX NOTES 537 (2009).

169. See *Brohl*, 575 U.S. at 18 (Kennedy, J., concurring) ("Today[,] buyers have almost instant access to most retailers via cell phones, tablets, and laptops. As a result, a business may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term.").

170. *Id.* at 17–19.

171. See *id.*

172. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2092–95 (2018).

173. *Id.* at 2095 (quoting *Brohl*, 575 U.S. at 18 (Kennedy, J., concurring)).

174. 430 U.S. 274 (1977).

175. *Wayfair*, 138 S. Ct. at 2091 (citing *Complete Auto Transit*, 430 U.S. at 279).

requirement “allows remote sellers to escape an obligation to remit a lawful state tax,” which is “unfair and unjust.”<sup>176</sup>

Justice Kennedy found the bright-line physical presence rule to be unworkable in the cyber age; he noted the nature of the cyber age itself—with smarter, more efficient software being constantly developed—would make the post-*Wayfair* transition easier for online retailers facing a wide variety of tax laws.<sup>177</sup> In overruling *Quill*, Justice Kennedy assured opponents that the Commerce Clause doctrine can still protect against the feared undue burdens on interstate commerce, but that the possibility of these instances did not justify retaining an “artificial, anachronistic rule.”<sup>178</sup> He retired from the Court forty days later.<sup>179</sup>

Chief Justice Roberts contributed a lengthy dissent.<sup>180</sup> He acknowledged the role of e-commerce in the national economy as “significant and vibrant” but stated that altering established tax rules should be left to Congress.<sup>181</sup> Further, he criticized the urgency of the majority’s decision, given evidence that the monetary harm to states had been receding as online retailers voluntarily collected and remitted state sales tax.<sup>182</sup> Chief Justice Roberts emphasized the effect of the ruling on small businesses that have been able to thrive via the connections and exposure the internet offers, stating, “[p]eople starting a business selling their embroidered pillowcases or carved decoys can offer their wares throughout the country—but probably not if they have to figure out the tax due on every sale.”<sup>183</sup> Instead of fixing a past error, he asserted that the Court had compounded it “by trying to fix it in a totally different era.”<sup>184</sup>

Similar to the *Quill* Court, Chief Justice Roberts’s dissent also placed an emphasis on the doctrine of stare decisis.<sup>185</sup> He emphasized the exceptional nature of the Court overturning precedent, especially where Congress can pass legislation contrary to the Court’s decision.<sup>186</sup> He echoed Justice Scalia’s *Quill* concurrence, noting that stare decisis is particularly important in the Commerce Clause context because of the nature of interstate commerce and Congress’ role in regulating it.<sup>187</sup> Chief Justice Roberts, a known conservative,<sup>188</sup> was joined in his dissent by three justices usually in ideological

---

176. *Id.* at 2093–95.

177. *Id.* at 2097–98.

178. *Id.* at 2099.

179. *See Justices 1789 to Present*, SUPREME COURT U.S., [http://www.supremecourt.gov/about/members\\_text.aspx](http://www.supremecourt.gov/about/members_text.aspx) [https://perma.cc/5GNA-ZVN7] (last visited Apr. 1, 2021).

180. *See Wayfair*, 138 S. Ct. at 2101–05. (Roberts, J., dissenting).

181. *Id.* at 2101.

182. *Id.* at 2103.

183. *Id.* at 2104.

184. *Id.*

185. *See id.* at 2101.

186. *Id.* at 2101–02 (“We have applied this heightened form of *stare decisis* in the dormant Commerce Clause context. . . . But because Congress ‘has plenary power to regulate commerce among the States,’ it may at any time replace such judicial rules with legislation of its own.” (citations omitted)).

187. *Id.* at 2102.

188. Benjamin Pomerance, *Inside a House Divided: Recent Alliances on the United States Supreme Court*, 81 ALB. L. REV. 361, 431 (2018).

opposition to him—Kagan, Sotomayor, and Breyer.<sup>189</sup> These justices were not persuaded by Justice Kennedy’s recognition of the need for this precedent to change with the evolving world; instead, while acknowledging that *Quill*’s precedent was incorrectly decided and agreeing with the majority on that notion, the dissent favored stability over massive economic and social change.<sup>190</sup>

The Due Process and Commerce Clause questions regarding state taxation of online retailers implicated the tension of state power versus federal power and planted strong state economic interests in opposition to federal interests of economic and internet growth.<sup>191</sup> In holding the online retailers politically accountable to state power, the *Wayfair* Court relied on the economic aspect of state revenue loss in the midst of a changing national economy.<sup>192</sup>

The Supreme Court has consistently distinguished between the protection of a state’s right to “shelter its people from menaces to their health or safety and from fraud” from a state’s ability to “burden or constrict the flow of such commerce for [its] economic advantage.”<sup>193</sup> In 1935, Justice Cardozo rejected an argument that the economic welfare brought by New York’s Milk Control Act would lead to better health for its citizens—and thus make the Act constitutionally sound—by writing:

To give entrance to that excuse would be to invite a speedy end of our national solidarity . . . . [The Constitution] was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.<sup>194</sup>

---

189. See *Wayfair*, 138 S. Ct. at 2101 (Roberts, J., dissenting); see also Pomerance, *supra* note 188, at 433 (discussing Chief Justice Roberts’s tendency to agree with his politically liberal counterparts during the October 2016 Term). The *Wayfair* majority was also diverse in its ideology, with traditionally textualist Justices Alito, Gorsuch, and Thomas joining more progressive Justices Ginsburg and Kennedy. See *Wayfair*, 138 S. Ct. at 2087 (majority opinion); see also *The Political Leanings of the Supreme Court Justices*, AXIOS (June 1, 2019), <http://www.axios.com/supreme-court-justices-ideology-52ed3cad-fc467-a336-8bec2e6e36d4.html> [<https://perma.cc/V8RV-5LB3>].

190. See *Wayfair*, 138 S. Ct. at 2101–05 (Roberts, J., dissenting); see also Guerra-Pujol, *supra* note 160, at 149–50.

191. See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd. 14986, 14987–88 (2005) (including in its policymaking goals the effort to “foster creation, adoption and use of Internet broadband content, applications, services and attachments, and to ensure consumers benefit from the innovation that comes from competition”); Anupam Chander, *How Law Made Silicon Valley*, 63 EMORY L.J. 639, 647–50 (2014) (“[Congressional] statutes helped undergird a legal framework that proved conducive to the development of Internet-based services. While the titles of these statutes often professed consumer-oriented goals—a remarkable list including decency, tax freedom, privacy, and consumer protection—commercial concerns were never far from the table.”); Lynn C. Percival, IV, *Public Policy Favoritism in the Online World: Contract Voidability Meets the Communications Decency Act*, 17 TEX. WESLEYAN L. REV. 165, 186 (2011) (noting that allowing an online service provider to gather damages from content providers after illegal conduct “furthers” Section 230 values by preserving free market principles and encouraging the continued development of the internet).

192. See *Wayfair*, 138 S. Ct. at 2097 (“The Internet’s prevalence and power have changed the dynamics of the national economy. . . . This expansion has . . . increased the revenue shortfall faced by States seeking to collect their sales and use taxes . . . . The South Dakota Legislature has declared an emergency . . . which again demonstrates urgency of overturning the physical presence rule.”).

193. See *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949) (reaffirming its earlier decision in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935)).

194. *Seelig*, 294 U.S. at 523.

The interpretation and development of the dormant Commerce Clause was a direct result of the economic competition and “Balkanization” that had occurred among the colonies and states before the Constitutional Convention.<sup>195</sup> This threat to the new nation’s interests as a whole led to the ability of Congress to regulate commerce but failed to provide any guidance as to what states can do without congressional action.<sup>196</sup>

As noted, the *Wayfair* Court’s decision took place in an entirely different national economy, where state boundaries were rarely a barrier to the access of goods and services.<sup>197</sup> The state interest in recouping its economic losses outweighed the dissent’s interest in national stability in tax law<sup>198</sup> and the national interest in corporations’ rights.<sup>199</sup> The traditionally federalist perspective won, giving states the right to enforce each of their own regulatory taxation schemes.<sup>200</sup> Justice Kennedy even explicitly stated that *Quill* did harm to both federalism and free markets by preventing states “from competing on an even playing field.”<sup>201</sup>

Chief Justice Roberts’s dire predictions about the consequences of the majority’s decision on businesses were echoed by the tax law and business communities both before and after the decision.<sup>202</sup> As if emboldened by Justice Kennedy’s statement on

195. *Hughes v. Oklahoma*, 441 U.S. 322, 325–26 (1979).

196. *H.P. Hood & Sons*, 336 U.S. at 534–35.

197. See *supra* Part II.C for a discussion of the internet-based industries affecting the national economy and the daily lives of consumers.

198. See *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2101 (2018) (Roberts, J., dissenting).

199. See Angelo Guisado, *When Harry Met Sallie Mae: Marriage, Corporate Personhood, and Hyperbole in an Evolving Landscape*, 49 U.S.F. L. REV. 123, 131–32 (2015) (“Long gone were the days of the colonial-era paternalistic State—substituted was a lasting era of free incorporation. . . . Corporations were no longer defined by the aggregate behavior of their constituents, but rather were judged by courts to be responsible for the consequences of their own actions. With this recognition came both responsibilities and entitlements.” (footnotes omitted)); Matthew Lambert, Comment, *Beyond Corporate Speech: Corporate Powers in a Federalist System*, 37 RUTGERS L. REC. 20, 20 (2010) (“[T]he sovereign grants corporate privileges to the extent it favors the public. . . . Through organic devolution of power, the States reserve corporate chartering powers, whereas the federal government has constitutionally vested control over interstate commerce and the power to make all laws necessary and proper to execute constitutional powers. This federal authority has evolved to engender the regulatory authority to reach highly localized economic activity.” (footnotes omitted)); Peter S. Goodman, *Too Big To Fail?*, N.Y. TIMES (July 20, 2008), <http://www.nytimes.com/2008/07/20/weekinreview/20goodman.html> [<https://perma.cc/CZ3F-M36S>] (discussing government bailouts of companies considered “too big to fail”).

200. See Brief for Colony Brands, Inc. as *Amicus Curiae* in Support of Respondents at 19–21, *Wayfair*, 138 S. Ct. 2080 (No. 17-494) (noting that online businesses would have to contend with “varying rules” of all fifty states, a result not “contemplated by the federal system of government”); Kyle Sammin, *Why the Supreme Court’s Ruling About Online Taxes Is Sensible and Fair*, FEDERALIST (June 26, 2018), <http://thefederalist.com/2018/06/26/supreme-courts-ruling-online-taxes-sensible-fair/> [<https://perma.cc/VW3J-QG6T>]. But see *Wayfair*, 138 U.S. at 2099–100 (noting that South Dakota is one of twenty states with a standardized tax system and sales tax administration software paid for by the state).

201. *Wayfair*, 138 S. Ct. at 2096.

202. See, e.g., Brief of Amicus Curiae America’s Collectibles Network, Inc., d/b/a Jewelry Television in Support of Respondents at 5, *Wayfair*, 138 S. Ct. 2080 (No. 17-494) (“If any new taxing nexus standard that lacked a ‘physical-presence requirement’ and relied solely on the existence of an economic transaction were adopted by the Court, considerable controversy and new legal questions would arise by giving States and their political subdivisions . . . the latitude to exert national taxing authority with disparate rates, tax bases, exemptions, exclusions, holidays, and terms and conditions of collection. The resulting further proliferation of rules and regulations would create a truly chaotic taxing regime and would place an undue burden on interstate

federalism, numerous states acted quickly following *Wayfair*, enacting “economic nexus policies” similar to South Dakota’s that require a seller with economic and virtual contacts within the state, but not a physical presence in the state, to pay state sales tax.<sup>203</sup> Although six bills were proposed in Congress after the decision in an effort to address the issue from a legislative perspective, as Chief Roberts demanded, none of them were passed into law.<sup>204</sup> In 2021, three years after the decision, the reality of the ruling’s consequences remain unclear; forty-three states have enacted “economic nexus” laws

---

commerce that would clearly be Constitutionally unsound.”); Brief of *Amici Curiae* eBay Inc., et al., in Support of Respondents at 3–4, *Wayfair*, 138 S. Ct. 2080 (No. 17-494) (“Imposition of these burdens would have destructive effects on the innumerable independent small sellers now operating online. . . . [T]hat [imposition] would have profoundly destructive effects on the national economy: Small online companies provide unique business opportunities for women, minorities, and people with disabilities, while fostering growth and employment in areas of the country that otherwise have suffered from economic stagnation.”); Brief for *Amici Curiae* National Taxpayers Union Foundation, et al., at 4, *Wayfair*, 138 S. Ct. 2080 (No. 17-494) (“[W]hile a state certainly has the power to impose taxes on its in-state residents, its power to force out-of-state retailers with no voice in the state’s political process to serve as the state’s private tax collector is another matter entirely. The physical presence rule that this Court established in [its precedents] continues to serve as a vital limit on that power.”); see also Steven M. Hogan & Alan J. LaCerra, *South Dakota v. Wayfair: The Case That Changes Everything*, FLA. B.J., Mar./Apr. 2019, at 22, 26 (“For the first time, small retailers may face compliance costs and audit risks in all 50 states. . . . Tax professionals are openly discussing the possibility of some states taking the position that *Wayfair* applies retroactively. This would mean that state governments could assess taxes against remote sellers that failed to collect and remit sales and use taxes because of *Quill*.” (footnotes omitted)); Jessica Melugin, *Supreme Court’s Wayfair Decision Will Hurt Online Shopping*, N.Y. TIMES (June 21, 2018), <http://www.nytimes.com/2018/06/21/opinion/supreme-court-wayfair-south-dakota-online-shopping.html> [<https://perma.cc/75HR-7Q3H>] (“The internet has presented enormous opportunities to people who dreamed of starting their own business, and American consumers have reaped the reward. . . . Congress should get to work protecting this progress for the sake of all consumers and online entrepreneurs.”); Tom Wheelwright, *How Will the ‘Wayfair’ Supreme Court Decision Affect Retailers? 5 Ways.*, ENTREPRENEUR (July 17, 2018), <http://www.entrepreneur.com/article/316805> [<https://perma.cc/YL43-XCSM>] (“Small businesses that sell products on Amazon, eBay, and Etsy may see their profits drop dramatically, or even see no profit, as states start charging this sales tax. As a result, these online retailers will need to review their profit and loss numbers closely and may need to make some tough decisions.”).

203. Checkpoint Editorial Team, *How States Responded to South Dakota v. Wayfair in 2018*, THOMSON REUTERS (Dec. 21, 2018), <http://tax.thomsonreuters.com/blog/how-states-responded-to-south-dakota-v-wayfair-in-2018/> [<https://perma.cc/L83U-RQX6>] (“Less than six months after the U.S. Supreme Court overturned the physical presence rule for sales and use tax nexus with its ruling in [*Wayfair*], the vast majority of states have enacted . . . economic nexus policies, and the trend continues into the end of the year.”); Ryan Prete, *Eleven States Roll Out New Sales Tax Laws Oct. 1*, BLOOMBERG TAX (Oct. 1, 2019, 4:45 AM), <http://news.bloombergtax.com/daily-tax-report-state/eleven-states-roll-out-new-sales-tax-laws-oct-1> [<https://perma.cc/947B-5M7S>].

204. See Protecting Businesses from Burdensome Compliance Cost Act of 2019, H.R. 379, 116th Cong. (2019); Stop Taxing Our Potential Act of 2019, S. 128, 116th Cong. (2019); Protecting Businesses from Burdensome Compliance Cost Act of 2018, H.R. 6724, 115th Cong. (2018); Online Sales Simplicity and Small Business Relief Act of 2018, H.R. 6824, 115th Cong. (2018); No Retroactive Online Taxation Act of 2018, H.R. 7184, 115th Cong. (2018); Online Sales Simplicity and Small Business Relief Act of 2018, S. 3725, 115th Cong. (2018). The political hurdles in passing a law of this kind include the risk that increased state sales tax revenue post-*Wayfair* could have triggered decreased personal income taxes (depending on each state’s tax laws). If Congress restricts state sales tax collection from out-of-state retailers, personal income tax could rise and Congress could be blamed. Joe Crosby, Kendall L. Houghton, Stephen P. Kranz & Diann L. Smith, *Sales Taxes in A Post-Wayfair, Post-Kennedy World*, 89 ST. TAX NOTES 241, 244 (2018).

requiring outside entities to remit sales taxes, which may be the key for states to stay afloat in the midst of the brick-and-mortar retail losses of the 2020 recession.<sup>205</sup>

### III. DISCUSSION

In the post-*Wayfair* world, two major instabilities exist regarding the way internet business is done: (1) constitutionally, the applicability of state sales tax to internet sites<sup>206</sup> and (2) statutorily, the ADA's applicability to nontraditional "public accommodations" in the form of websites and mobile apps. As demonstrated by the recent, rapid rise in claims made under the ADA regarding accessibility to apps and other technologies and the DOJ's failure to publish regulations on the subject, consumers with disabilities will continue to be forced to turn to lower courts to resolve their claims.<sup>207</sup> Depending on where they live, these consumers *may* have a claim under the statute designed to protect their access to goods and services—or they may be left behind to contend with the inaccessibility on their own. Even more often, their suits may be settled out of court, leaving no standards on which other consumers with disabilities in the same jurisdiction can rely and no evolution of accessibility law in modern contexts.<sup>208</sup>

As it did in *Wayfair* in the taxation context, the Court should modernize the idea of physical presence to cover non-traditional, intangible "public accommodations" under the ADA because of the evolution of physicality in the modern economy; continued litigation, settlements, and lack of action from Congress and the DOJ; and consumers with disabilities' need for equal access to modern commerce. This Section proceeds in two parts. Part III.A analyzes how *Wayfair* provides guidance for the Court to extend the interpretation of "public accommodations" to comply with the First and Seventh Circuits interpretations of the term. Part III.B discusses why the Court is the proper entity to resolve the circuit split, instead of unlikely resolution by Congress or the executive branch.

#### A. *The Importance of Wayfair and the Changing Interpretation of Physical Presence*

The *Wayfair* Court established that online retailers could be held responsible for state sales tax remission even if their "storefronts" did not exist within the state's borders.<sup>209</sup> The departure from requiring a business to have a physical presence within the state for that activity to be subject to state sales tax offers an opportunity for the Court to apply this same thinking to interpreting "public accommodations" under the ADA.

205. Jackson Brainerd, *In Retrospect, Speedy Implementation of the Wayfair Decision Was Crucial*, NAT'L CONF. ST. LEGISLATURES (June 22, 2020), <http://www.ncsl.org/blog/2020/06/22/in-retrospect-speedy-implementation-of-wayfair-decision-was-crucial.aspx> [<https://perma.cc/2288-HH48>].

206. This issue is outside the scope of this Comment and will not be addressed. For further exploration of this topic, see Adam B. Thimmesch, *The Unified Dormant Commerce Clause*, 92 TEMP. L. REV. 331 (2020).

207. See *supra* Part II.A for a discussion of the rise of ADA litigation and the DOJ's current policy regarding the statute.

208. Cannady, *supra* note 29 ("Many cases settle after receipt of the demand letter without suit being filed. However, in some cases where no settlement is reached, plaintiffs have proceeded to court. . . . [B]anks and other companies have typically quickly settled to avoid further litigation costs as attempts to dismiss the suit are often, if not always, denied."); see also Behnken, *supra* note 26.

209. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2095 (2018) (quoting *Direct Mktg. As'sn v. Brohl*, 575 U.S. 1, 17 (2015) (Kennedy, J., concurring)).

Justice Kennedy's majority opinion in *Wayfair* emphasized the nation's "increasingly interconnected economy" and the decreasing importance of where physical storefronts are located,<sup>210</sup> which echoes the central issue of physical presence in the ADA website accessibility circuit split. Like Justice Kennedy wrote, remote sellers—apart from their tangible, physical locations—should be held to a rule that is workable in the cyber age rather than escape statutory compliance merely by existing in cyberspace.<sup>211</sup> The First and Seventh Circuits similarly enforce regulations on online businesses in this way, despite the lack of tangible, physical locations.<sup>212</sup>

The state sales tax issue in *Wayfair* was resolved constitutionally, by overturning the *Quill* dormant Commerce Clause holding,<sup>213</sup> but an extension of the ADA's "public accommodations" categories would stem from the Court's statutory interpretation of a congressionally-backed Act.<sup>214</sup> Regardless, *Wayfair*'s sentiment regarding physicality in the modern economy is essential in approaching the modernization of accessibility law for ever-evolving, widespread e-commerce.

The interpretation of "public accommodations" should not include mention of "physical boundaries or physical entry."<sup>215</sup> In examining the statute itself, the listing of categories that qualify as "public accommodations" includes only the modifier that the public accommodations' operations "affect commerce," not that they are "at" or "in" a physical location.<sup>216</sup> Interpretations that require a physical presence do not account for activities that have no tangible location or access point.<sup>217</sup> The Third and Sixth Circuits provided the narrowest precedential interpretations of "public accommodation" in 1998<sup>218</sup> and 1997,<sup>219</sup> respectively—when the internet was not widely available or used by consumers, smartphones did not exist, and in-home entertainment systems largely included a VCR and a speaker system. A cursory summary of the everyday activities of an average American in 2021 would demonstrate the drastic differences between those

---

210. *Id.* (quoting *Brohl*, 575 U.S. at 17 (Kennedy, J., concurring)).

211. *See id.* at 2097–98.

212. *See supra* Part II.B.1 for a discussion of the Seventh and First Circuits interpretation of the ADA as applied to "public accommodations" online.

213. *See Wayfair*, 138 S. Ct. at 2092–96.

214. Arguably, extending the ADA would be easier because it does not involve overturning precedent. *See infra* notes 224–25 and accompanying text for a discussion regarding the lack of a stare decisis obstacle.

215. *Carparts Distribution Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 20 (1st Cir. 1994).

216. 42 U.S.C. § 12181(7) (2018); *see also Carparts*, 37 F.3d at 19 ("The plain meaning of the terms do not require 'public accommodations' to have physical structures for persons to enter. Even if the meaning of 'public accommodation' is not plain, it is, at worst, ambiguous."); *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 896 F. Supp. 2d 196, 201 (D. Mass. 2012) ("The ADA covers the services 'of' a public accommodation, not services 'at' or 'in' a public accommodation. This distinction is crucial.").

217. *See, e.g., Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612–14 (3d Cir. 1998); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010 (6th Cir. 1997).

218. *See Ford*, 145 F.3d at 612–14.

219. *See Parker*, 121 F.3d at 1010.

interpretations and today's world,<sup>220</sup> especially in light of the increase in use of online services and time spent on screens during the COVID-19 pandemic.<sup>221</sup>

Further, the narrow interpretations of "public accommodation" occurred within the context of insurance policies,<sup>222</sup> not internet-based commerce, services, or entertainment in the modern era. These dated opinions regarding physical location and the ADA were considering only one type of commodity—insurance—and not the wide scope of ways in which consumers use and access intangible goods today. Despite these circuits' adherence to their narrow interpretations, the shift in district court opinions across the country—including those in the Third Circuit<sup>223</sup>—demonstrates the need for the Court to update the interpretation of "public accommodation" to account for modern commerce.

The *Wayfair* Court opened the door for the current Court to account for the technological advancements of the economy and the effects these advancements have on the way companies operate businesses online. While the majority's notions about modern commerce and physical presence apply to the ADA website accessibility split, the dissent's focus on preserving stare decisis and the importance of predictability in tax law does not.<sup>224</sup> Chief Justice Roberts and the other *Wayfair* dissenters remain on the post-Kennedy Court and stare decisis would not apply if they were to address the ADA accessibility circuit split because no Supreme Court decision exists about how the ADA applies to intangible services.<sup>225</sup> The inapplicability of precedent regarding this issue leaves the justices with nothing to hide behind except their own ignorance of—or willful blindness to—the reality of individuals with disabilities' lives today.

#### *B. The Legislative and Executive Branches Will Not Take the Appropriate Steps To Solve the Current Circuit Split*

The Supreme Court is the appropriate entity to resolve the circuit split, as continuing, repetitive litigation regarding website accessibility exponentially grows in lower courts.<sup>226</sup> With frequent settlements and thus only rare opinions released on the

---

220. See *supra* Part II.C for a discussion of modern technologies and consumerism in the United States.

221. See Michael J. Wolf, *How Covid-19 Has Transformed the Amount of Time We Spend Online*, WALL STREET J. (Aug. 7, 2020, 12:47 PM), <http://www.wsj.com/articles/how-covid-19-has-transformed-the-amount-of-time-we-spend-online-01596818846> [<https://perma.cc/KRQ5-3S35>].

222. See *supra* Part II.B.3.

223. See, e.g., *West v. DocuSign, Inc.*, No. 19cv0501, 2019 WL 3843054, at \*4 (W.D. Pa. Aug. 15, 2019) ("Plaintiff's allegations support a theory that she was rendered unable to access property (*i.e.*, the website) owned, operated, and controlled by [the] Defendant."); *Tawam v. APCI Fed. Credit Union*, No. 5:18-cv-00122, 2018 WL 3723367, at \*8 (E.D. Pa. Aug. 6, 2018) ("At this stage of the litigation, [plaintiff] has sufficiently alleged that the accessibility barriers on the website prevent him from finding and visiting the [defendant's] location or learning about services offered at [the defendant's] locations. Thus, [plaintiff] has asserted that the website services have a sufficient physical nexus to [defendant's] physical location."); *Gniewkowski v. Lettuce Entertain You Enters., Inc.*, 251 F. Supp. 3d 908, 916–18 (W.D. Pa. 2017) (finding that the "alleged discrimination—Plaintiff's inability to access financial services information—took place at property that [defendant] owns, operates, and controls.");

224. See *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2101–02 (2018) (Roberts, J., dissenting).

225. See *supra* Part II.

226. See *Martin*, *supra* note 26.



matter,<sup>227</sup> accessibility law in this arena is at a standstill, leaving consumers with disabilities without resolution and businesses left vulnerable to continuing suits.<sup>228</sup> The Court must accept the opportunity to resolve the split and create a guideline for the interpretation of “public accommodation” that aligns with the realities of modern commerce and day-to-day life. While Congress has not yet acted to clarify the issue, a Court interpretation may force the legislature’s hand to either implicitly support the interpretation or act upon it and use its power to alter the Act.<sup>229</sup>

Further, the Trump DOJ’s 2017 withdrawal of the 2010 Advanced Notice of Proposed Rulemaking<sup>230</sup> significantly delayed any progress from the executive branch in updating accessibility law to account for emerging technologies. Even without going so far as to clarify website accessibility under the ADA, the Trump DOJ has also declined to file briefs regarding private website accessibility claims, as the Obama administration had done.<sup>231</sup> The DOJ’s movement away from website accessibility, which has affected Congress’ ability to act on the issue,<sup>232</sup> leaves the Court to provide the ultimate resolution for modernizing “public accommodations” under the ADA.

#### IV. CONCLUSION

While the ADA has been revolutionary for Americans with disabilities, the Act is limited by the circumstances in which it was enacted. The circuit split, lack of clarification from the DOJ, and the increased litigation surrounding website and mobile app accessibility claims demonstrate the need for the Supreme Court to explicitly modernize the Act. The Court’s opinion in *Wayfair* provides a framework for this modernization, which will remove the need for a connection to a physical location to make an accessibility claim under the ADA. By expanding the ADA to cover intangible spaces, the Court will allow consumers with disabilities to equally access the conveniences, conversations, and connections available online.

---

227. See Cannady, *supra* note 29 (“Many cases settle after receipt of the demand letter without suit being filed. However, in some cases where no settlement is reached, plaintiffs have proceeded to court. . . . [B]anks and other companies have typically quickly settled to avoid further litigation costs as attempts to dismiss the suit are often, if not always, denied.”); see also Behnken, *supra* note 26.

228. See Randazzo, *supra* note 30 (“[Twenty percent] of the website lawsuits filed in 2018 were against companies that had already been sued.”).

229. See Kozel, *supra* note 163, at 1138. The last major congressional effort to amend the ADA occurred in 2018, when the ADA Education and Reform Act was passed in the House. The bill would have required individuals with disabilities to notify the noncompliant business of its ADA violation. The business would then have 120 days to “make substantial progress” toward compliance. ADA Education and Reform Act of 2017, H.R. 620, 115th Cong. § 3(B) (2017); see also Robyn Powell, *Sen. Tammy Duckworth Saves the Americans with Disabilities Act—For Now*, REWIRE.NEWS GRP. (Apr. 3, 2018, 12:19 PM), <http://rewire.news/article/2018/04/03/sen-tammy-duckworth-saves-americans-disabilities-act-now/> [https://perma.cc/7KEJ-GRYP]. No legislation has been proposed in Congress to update the ADA on the issue of websites and mobile app accessibility.

230. Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions, 82 Fed. Reg. 60932 (Dec. 26, 2017).

231. Launey, *supra* note 25.

232. See *id.*