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Virtually Inaccessible: Resolving ADA Title III Standing in Click-and-Mortar Cases

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VIRTUALLY INACCESSIBLE: RESOLVING ADA TITLE III STANDING IN CLICK-AND-MORTAR CASES

ABSTRACT

As the electronic age has taken hold of the global community, and digital devices have become the mainstay of human interaction, new accessibility barriers have emerged for people with disabilities. Although most courts now conclude virtual inaccessibility is an injury cognizable under Title III of the Americans with Disabilities Act, great ambiguity surrounds the injury-in-fact requirement of Article III standing in online accessibility cases. Despite pleading for elucidation and clarifying principles, federal district courts have been left to navigate the uncharted territory of the digital injury-in-fact inquiry with exiguous guidance from higher courts. The resultant confusion in the federal courts has manifested itself as diametrically contradictory injury-in-fact holdings in factually identical cases, both inter- and intra-circuit.

This Comment clarifies the digital injury-in-fact inquiry by identifying and dissecting four crucial issues dividing federal courts in ADA Title III online accessibility cases: (1) the location a plaintiff must intend to return; (2) the application of the geographic intent-to-return test factors in cyberspace; (3) the role of future injury; and (4) the scope of virtual standing.

First, this Comment argues the destination of a plaintiff's intent to return is preordained by the type of injury alleged by the plaintiff. If a plaintiff alleges a purely virtual website injury, federal courts must assess the plaintiff's intent to return to the inaccessible website. If a plaintiff alleges a hybrid website injury, federal courts must assess the plaintiff's intent to return to the inaccessible website and intent to avail themselves to the goods or services of the public accommodation's brick-and-mortar location.

Second, this Comment contends the geographic intent-to-return factors are not probative of a plaintiff's intent to return to a website. However, federal courts cannot merely remove the geographic factors from the intent-to-return test because the resulting analysis infringes on Supreme Court precedent. Rather, federal courts must substitute the intent-to-return test's geographic factors with factors appropriate in cyberspace.

Third, this Comment asserts the injury-in-fact inquiry cannot be satisfied by past injury alone. Instead, federal courts must assess the plaintiff's likelihood of future injury.

Finally, this Comment argues federal courts should not adopt a lenient approach to standing because a lenient approach is not necessitated by Supreme Court precedent, it is inconsistent with Supreme Court precedent, and it exacerbates the extant issue of serial litigation in online accessibility cases.

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INTRODUCTION

Deborah Laufer, a Florida resident, relies on a wheelchair or cane to ambulate.[1] Deborah requires various disability accommodations when staying in hotels, including an accessible parking space, sufficiently wide doorways, and lowered sinks.[2] In the span of one year, Deborah filed over 500 lawsuits against different hotels in over fifteen states.[3] In these nearly identical lawsuits,[4] Deborah alleged each hotel's reservation website violated the Americans with Disabilities Act by failing to provide information pertinent to booking a room that accommodates her disability.[5] Despite the indistinguishable nature of these lawsuits, federal courts across America were divided over one crucial issue—whether Deborah successfully established standing to sue.[6]

The Americans with Disabilities Act ("ADA") was signed into law on July 26, 1990, by President George H.W. Bush.[7] Deemed the "world's first comprehensive civil rights law for people with disabilities,"[8] the ADA prohibits discrimination on the basis of disability in "employment, transportation, public

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[1] Laufer v. Dove Hess Holdings, LLC, No. 5:20-cv-00379, 2020 U.S. Dist. LEXIS 246614, at *1, *3 (N.D.N.Y. Nov. 18, 2020).

[2] *See id.* at *3.

[3] *Id.* at *50.

[4] *Id.*

[5] *See, e.g.*, Laufer v. Patel, No. 1:20-CV-631-RP, 2021 U.S. Dist. LEXIS 38155, at *3 (W.D. Tex. Mar. 2, 2021) (alleging a violation under Title III of the ADA because a hotel website did not "provide sufficient information regarding whether the rooms or features at the hotel were accessible"); Laufer v. Naranda Hotels, LLC, No. SAG-20-2136, 2020 U.S. Dist. LEXIS 235894, at *3 (D. Md. Dec. 16, 2020) (same); *Dove Hess Holdings*, 2020 U.S. Dist. LEXIS 246614, at *4–5 (same). Title III of the ADA provides "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). The ADA's implementing regulations provide that a place of public accommodation, "with respect to reservations made by any means, including by telephone, in-person, or through a third party," must "[i]dentify and describe accessible features in the hotels and guest rooms offered through its reservations service in enough detail to reasonably permit individuals with disabilities to assess independently whether a given hotel or guest room meets his or her accessibility needs." 28 C.F.R. § 36.302(e)(1) (2021).

[6] *Compare Dove Hess Holdings*, 2020 U.S. Dist. LEXIS 246614, at *25, *29 (finding standing), *and* Laufer v. Lily Pond LLC C Series, No. 20-cv-617-wmc, 2020 U.S. Dist. LEXIS 244506, at *4 (W.D. Wis. Dec. 30, 2020) (same), *with Patel*, 2021 U.S. Dist. LEXIS 38155, at *13 (dismissing on standing grounds), *and Naranda Hotels*, 2020 U.S. Dist. LEXIS 235894, at *2 (same).

[7] *Introduction to the ADA*, ADA, https://www.ada.gov/ada_intro.htm (last visited Oct. 7, 2022). The Americans with Disabilities Act is an American civil rights law prohibiting discrimination against people with disabilities in employment, school, transportation, and private places that are open to the public. *An Overview of the Americans with Disabilities Act*, ADA NAT'L NETWORK, https://adata.org/factsheet/ADA-overview (last visited Nov. 7, 2021) [hereinafter *ADA Overview*]. The ADA contains five titles: employment; public services; public accommodations; telecommunications; and miscellaneous provisions. *Id.*

[8] *The Americans with Disabilities Act: The Development of the Law*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/americans-disabilities-act-development-law (last visited Oct. 18, 2022).

accommodations, communications and access to state and local government[] programs and services."[9] The stated purpose of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[10] Through this mandate, the ADA aims to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency for . . . individuals" with disabilities.[11]

Title III of the ADA provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."[12] In exchange for the comprehensive scope of Title III, "ADA proponents settled for limited remedies"[13]—a plaintiff may only seek injunctive relief under Title III, and damage awards are unavailable.[14]

Since the ADA's origin in 1990,[15] the role of the internet in American society has changed profoundly.[16] Following the first commercial website launch in

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[9] *Americans with Disabilities Act*, U.S. DEP'T LAB., https://www.dol.gov/general/topic/disability/ada#:~:text=The%20Americans%20with%20Disabilities%20Act,local%20government'%20programs%20and%20services (last visited Oct. 31, 2022).

[10] 42 U.S.C. § 12101(b)(1).

[11] *Id.* § 12101(a)(7); *see* PGA Tour, Inc. v. Martin, 532 U.S. 661, 674 (2001) ("Congress enacted the ADA in 1990 to remedy widespread discrimination against disabled individuals.").

[12] 42 U.S.C. § 12182(a).

[13] Elizabeth Keadle Markey, *The ADA's Last Stand?: Standing and the Americans with Disabilities Act*, 71 FORDHAM L. REV. 185, 189 (2002); *see also* Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377, 379 (2000) ("ADA proponents traded expanded coverage for limited relief.").

[14] The remedial provisions of Title III of the ADA are modeled after the Civil Rights Act of 1964. 42 U.S.C. § 12188(a) (providing that the remedies for ADA Title III violations mirror those stated in 42 U.S.C. § 2000a-3(a)); *id.* § 2000a-3(a) (allowing private actions for violations of Title II of the Civil Rights Act of 1964 to be remedied only by injunctive relief); Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 401–02 (1968) (per curiam) (noting Title II of the Civil Rights Act of 1964 allows injunctive relief only). *But see* 42 U.S.C. § 12188(b)(1)(B). The ADA authorizes the Attorney General to bring a suit for Title III violations if the Attorney General has reasonable cause to believe that "(i) any person or group of persons is engaged in a pattern or practice of discrimination under [ADA Title III]; or (ii) any person or group of persons has been discriminated against . . . and such discrimination raises an issue of general public importance." 42 U.S.C. § 12188(b)(1)(B). Monetary damages can be awarded in such suits; however, punitive damages are unavailable and the maximum award available for first-time violations is $50,000. *Id.* § 12188(b)(2), (4). Thus, unless the suit is brought by the Attorney General, monetary awards are not available in Title III inaccessibility claims and plaintiffs are limited to seeking injunctive relief and attorneys' fees. Markey, *supra* note 13, at 189–90.

[15] *ADA Overview*, *supra* note 7.

[16] Mike Murphy, *From Dial-up to 5G: A Complete Guide to Logging on to the Internet*, QUARTZ (Oct. 29, 2019), https://qz.com/1705375/a-complete-guide-to-the-evolution-of-the-internet/ ("[T]he internet has gone from a novel way for the US military to keep in touch to the always-connected heartbeat of the human race."); Statista Rsch. Dep't, *Internet Usage in the United States—Statistics & Facts*, STATISTA (July 6, 2022), https://www.statista.com/topics/2237/internet-usage-in-the-united-states/ ("The internet has become one of the most vital tools for communication, information, and entertainment in today's globalized world. . . . Among the

1993,[17] the internet quickly became a vital tool for communication, information, and entertainment.[18] In 2022, the United States ranked as the third-largest online market globally, with over 307 million internet users in the United States.[19] The expansive presence of the online world that has connected millions of Americans "has also created a 'digital divide' between the disabled and the nondisabled."[20] For many individuals with physical, visual, or auditory disabilities, the internet's expansion into vast areas of American life has resulted in new barriers to participation.[21]

Consequently, over the past decade, there has been a significant rise in lawsuits alleging that inaccessible websites violate Title III of the ADA.[22] Most case law and scholarship surrounding virtual accessibility have centered on the threshold issue: whether the protections of ADA Title III extend to website accessibility at all.[23] Although there is no unanimity over the matter, federal

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largest online markets in the world, the United States ranks third with over 307 million internet users nationwide.").

[17] Jeremy M. Norman, *Tim O'Reilly Launches the Global Network Navigator, the First Commercial Website with the First Online Advertising*, HISTORYOFINFORMATION.COM, https://www.historyofinformation.com/detail.php?entryid=1304 (last visited Oct. 3, 2021).

[18] Statista Rsch. Dep't, *supra* note 16.

[19] *Id.*

[20] Shani Else, *Courts Must Welcome the Reality of the Modern World: Cyberspace Is a Place Under Title III of the Americans with Disabilities Act*, 65 WASH. & LEE L. REV. 1121, 1127 (2008).

[21] *See* Deque Sys., *New Research Shows How "The Internet is Unavailable" to Blind Users*, DEQUE (Aug. 15, 2019), https://www.deque.com/blog/research-shows-internet-is-unavailable-to-blind-users/ (describing a study that assessed hundreds of websites and found 70% of websites had "'critical blockers' that rendered them inaccessible to visually impaired users").

[22] Minh Vu, Kristina Launey & John Egan, *The Law on Website and Mobile Accessibility Continues to Grow at a Glacial Pace Even as Lawsuit Numbers Reach All-Time Highs*, ABA (Jan. 1, 2022), https://www.americanbar.org/groups/law_practice/publications/law_practice_magazine/2022/jf22/vu-launey-egan/ (noting that between 2017 and 2020, there was an explosion of over 8,000 online accessibility suits filed or removed in federal courts and how this figure does not include "the substantial number of website . . . cases filed in state courts, demand letters that are resolved prior to the filing of any lawsuit, and DOJ enforcement actions that resolve before suit is filed"); H. Carlton Hilson & Gabriell Jeffreys, Burr & Forman, *ADA Title III Website Accessibility Lawsuits on the Rise*, JD SUPRA (Aug. 4, 2021), https://www.jdsupra.com/legalnews/ada-title-iii-website-accessibility-7564897/ (noting that online accessibility lawsuits have "increased over 200% since 2017" and the volume of online accessibility lawsuits "is expected to grow in 2021 and beyond").

[23] Ryan C. Brunner, *Websites as Facilities under ADA Title III*, 15 DUKE L. & TECH. REV. 171, 172 (2017); *see, e.g.*, Christopher Mullen, *Places of Public Accommodation: Americans with Disabilities and the Battle for Internet Accessibility*, 11 DREXEL L. REV. 745, 751 (2019) (arguing ADA Title III should apply to websites); Trevor Crowley, *Wheelchair Ramps in Cyberspace: Bringing the Americans with Disabilities Act into the 21st Century*, 2013 BYU L. REV. 651, 652 (2013) (same); Else, *supra* note 20, at 1125 (same); Carrie L. Kiedrowski, *The Applicability of the ADA to Private Internet Web Sites*, 49 CLEV. ST. L. REV. 719, 723 (2001) (same); Gil v. Winn-Dixie Stores, Inc., 993 F.3d 1266, 1276–77 (11th Cir. 2021) (determining whether a website constituted a place of public accommodation), *vacated as moot*, 21 F.4th 775 (11th Cir. 2021) (per curiam); Robles v. Domino's Pizza, LLC, 913 F.3d 898, 905 (9th Cir. 2019) (same); Haynes v. Dunkin' Donuts, LLC, 741 F. App'x 752, 754 (11th Cir. 2018) (per curiam) (same).

courts generally apply ADA Title III to websites as long as the website is linked to a brick-and-mortar public accommodation.[24] However, this judicial trek into the unfamiliar terrain of online accessibility cases has unearthed a myriad of novel questions that have confounded, conflicted, and divided courts.[25]

This Comment focuses its attention on an issue frequently overlooked by courts and academics alike: Article III standing in virtual accessibility cases. Specifically, this Comment centers around the most contested standing element in online accessibility cases—the injury-in-fact requirement.[26] The injury-in-fact inquiry is straightforward in brick-and-mortar accessibility cases but has perplexed and divided federal courts when they attempt to apply it to online accessibility cases.[27] Nationwide, federal courts have tried to "fit the square peg of an online injury into the round hole of traditional standing analysis"—an approach that has produced contradictory case outcomes between and within circuits.[28]

This Comment demystifies the virtual injury-in-fact assessment by identifying and then resolving the key issues that have generated splits in the federal courts. First, this Comment argues federal courts must assess a plaintiff's intent to return to the locale that corresponds with the type of injury alleged by the plaintiff. Second, this Comment contends federal courts must substitute the intent-to-return test's geographic factors with cyber-centric factors to discern a plaintiff's intent to return to a website. Third, this Comment asserts the injury-in-fact requirement cannot be satisfied by showing past injury alone. Finally, this Comment argues federal courts should not adopt an unfettered approach to standing in online accessibility cases.

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[24] Vu et al., *supra* note 22. There is no consensus amongst federal courts over whether ADA Title III applies to website-only businesses. *Id.* The Ninth and Eleventh Circuits decline to apply ADA Title III to websites without brick-and-mortar locations. *Id.* Although the Third and Sixth Circuits have yet to address the issue, they have held public accommodations must be physical places, which suggests ADA Title III does not extend to website-only businesses. *Id.* The First Circuit has held public accommodations under ADA Title III are not limited to physical locations. *Id.* The Seventh Circuit has suggested in dicta that ADA Title III could apply to website-only businesses. *Id.* The Second Circuit has yet to decide this issue. *Id.*

[25] *See id.*

[26] *See, e.g.*, Price v. Escalante-Black Diamond Golf Club LLC, No. 5:19-cv-22-Oc-30PRL, 2019 U.S. Dist. LEXIS 76288, at *15 (M.D. Fla. Apr. 29, 2019) (focusing on whether the plaintiff has met the injury-in-fact requirement of standing); Mahoney v. Waldameer Park, Inc., No. 20-3960, 2021 U.S. Dist. LEXIS 60477, at *10 (E.D. Pa. Mar. 30, 2021) (same); Kennedy v. Chet Enters., No. 4:19-CV-00170-JPB, 2020 U.S. Dist. LEXIS 257846, at *3–5 (N.D. Ga. Apr. 7, 2020) (same).

[27] *See* Vu et al., *supra* note 22.

[28] Laufer v. Galtesvar OM, LLC, No. 1:20-CV-00588-RP, 2020 U.S. Dist. LEXIS 240714, at *8–9 (W.D. Tex. Nov. 23, 2020) (quoting Kennedy v. Nisha, Inc., No. 8:20-CV-367-T-60CPT, 2020 U.S. Dist. LEXIS 170829, at *2 (M.D. Fla. Sept. 17, 2020)).

This Comment proceeds in four parts. Part I discusses the origin of the standing doctrine and the intricacies of the injury-in-fact requirement articulated through Supreme Court precedent. Next, this Part illustrates the injury-in-fact tests crafted by courts in brick-and-mortar ADA Title III cases.

Part II calls attention to the contradictory outcomes produced by federal courts' inconsistent virtual injury-in-fact approaches, both inter- and intra-circuit. This analysis demonstrates that district courts need guidance to navigate the injury-in-fact inquiry in online accessibility cases.

Part III identifies four critical injury-in-fact issues that have divided federal courts in online accessibility cases: (1) where the plaintiff must intend to return; (2) how the geographic intent-to-return test factors should be applied to online injuries; (3) the role of future injury; and (4) the scope of injury-in-fact analysis.

Finally, Part IV resolves the virtual injury-in-fact disputation by proposing a solution to each of the four central issues dividing federal courts. Section IV.A argues the location a plaintiff must intend to return in virtual accessibility cases is dictated by the type of injury alleged by the plaintiff. Section IV.B contends that to determine a plaintiff's intent to return to a website, federal courts must substitute the intent-to-return test's geographic factors with the following web-related factors: (1) the type of content that is inaccessible to the plaintiff; and (2) the relationship between the inaccessible content and the alleged injury. Section IV.C asserts the injury-in-fact requirement in online accessibility cases cannot be satisfied by past injury alone; instead, federal courts must assess a plaintiff's risk of future harm in online accessibility cases. Finally, Section IV.D posits it is untenable for federal courts to take a broad approach to standing in online accessibility cases.

I. THE STANDING DOCTRINE IN ADA TITLE III CLAIMS

A federal court's exercise of judicial power is legitimate only "as a necessity in the determination of real, earnest[,] and vital controversy."[29] To ensure judicial power is exercised within the confines of this limitation, federal courts apply the doctrine of standing.[30] This Part begins by illustrating the origin, purpose, and application of the standing doctrine, and then explores the injury-in-fact tests federal courts apply in ADA Title III cases.

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[29] Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 471 (1982) (quoting Chi. & Grand Trunk Ry. Co. v. Wellman, 143 U.S. 339, 345 (1892)).

[30] F. Andrew Hessick, *Understanding Standing*, 68 VAND. L. REV. EN BANC 195, 195 (2015).

A. Understanding Standing

Federal courts are not constitutionally permitted to hear all cases brought before them.[31] Rather, Article III of the United States Constitution endows judicial power to the federal courts which cannot extend beyond the bounds of "Cases" and "Controversies."[32] Although the Constitution does not expound the parameters of this case-or-controversy limitation, the Supreme Court has developed various doctrines to ensure federal courts do not exceed constitutional jurisdiction.[33] The "most important of these doctrines" is standing.[34]

Under the standing doctrine, federal courts determine if the party seeking relief is the "right person" to bring the claim.[35] In other words, the standing inquiry centers around whether the court is constitutionally permitted to "respond at the request of *this* plaintiff."[36] The province of federal courts is, "solely, to decide on the rights of individuals."[37] As such, the standing requirement requires a plaintiff to demonstrate that the challenged action "injures him in a concrete and personal way."[38]

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[31] U.S. CONST. art. III, §§ 1–2.

[32] *Id.* The case-or-controversy requirement is one of the most crucial limitations on federal courts' jurisdiction because "[i]t prevents the unelected judiciary from exercising executive or legislative powers, the exclusive province of the politically accountable branches of government." Martin H. Redish & Sopan Joshi, *Litigating Article III Standing: A Proposed Solution to the Serious (But Unrecognized) Separation of Powers Problem*, 162 U. PA. L. REV. 1373, 1375 (2014); Spokeo, Inc. v. Robins, 578 U.S. 330, 337 (2016) ("[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." (quoting Raines v. Byrd, 521 U.S. 811, 818 (1997))).

[33] F. Andrew Hessick, *The Separation-of-Powers Theory of Standing*, 95 N.C. L. REV. 673, 674 (2017). The justiciability doctrines include: (1) standing, (2) ripeness, (3) mootness, (4) political question, and (5) advisory opinions. Eugene Kontorovich, *What Standing Is Good For*, 93 VA. L. REV. 1663, 1670 (2007).

[34] Allen v. Wright, 468 U.S. 737, 750 (1984). The standing doctrine protects the separation of powers by "limiting Congress'[s] ability to delegate law enforcement authority to private plaintiffs and the courts." *Spokeo*, 578 U.S. at 347 (Thomas, J., concurring).

[35] Kontorovich, *supra* note 33, at 1670. Historically, common-law courts more readily heard suits "from private plaintiffs who alleged a violation of their own rights, in contrast to private plaintiffs who asserted claims vindicating public rights." *Spokeo*, 578 U.S. at 343 (Thomas, J., concurring). These limits subsist in the modern doctrine of standing. *Id.*

[36] Kontorovich, *supra* note 33, at 1670.

[37] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803). Contrariwise, "[v]indicating the *public* interest . . . is the function of Congress and the Chief Executive." Lujan v. Defs. of Wildlife, 504 U.S. 555, 576 (1992).

[38] *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring). The standing doctrine prevents Congress from authorizing "private plaintiffs to enforce *public* rights in their own names, absent some showing that the plaintiff has suffered a concrete harm particular to him." *Spokeo*, 578 U.S. at 348 (Thomas, J., concurring). The standing requirement is "not just an empty formality"; rather, "[i]t preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome." *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring).

The Supreme Court has articulated three requirements that must be met to establish standing.[39] First, a plaintiff must demonstrate they suffered an injury-in-fact.[40] Second, a plaintiff must show their injury is "fairly traceable" to the defendant's challenged conduct.[41] Third, the plaintiff must show their injury is "likely" to be "redressed by a favorable decision."[42] If a plaintiff fails to establish these standing requirements, a federal court would exceed its constitutional authority by adjudicating the case.[43]

The central component of Article III standing is the injury-in-fact requirement.[44] To satisfy the injury-in-fact requirement, a plaintiff must show they have "suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'"[45] The injury-in-fact requirement varies slightly for plaintiffs who seek injunctive relief.[46] Because injunctions control future conduct, a plaintiff who seeks injunctive relief must also demonstrate they face a "real and immediate" threat of *future* injury.[47] In other words, a plaintiff does not have standing to seek injunctive relief "unless he alleges facts giving rise to an inference that he will suffer future [injury] by the defendant."[48]

Despite the sweeping purpose and comprehensive mandate of Title III of the ADA, plaintiffs must still establish standing to sue in accessibility cases.[49] Moreover, ADA Title III plaintiffs must demonstrate an imminent threat of future harm to satisfy the injury-in-fact requirement because injunctive relief and attorneys' fees are the only relief available under the Act.[50]

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[39] *Lujan*, 504 U.S. at 560 (majority opinion).

[40] *Id.*

[41] *Id.* (quoting Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 41–42 (1976) (alterations omitted)).

[42] *Id.* (quoting *Simon*, 426 U.S. at 38, 43).

[43] *Spokeo*, 578 U.S. at 338.

[44] *Id.* (describing the injury-in-fact requirement as the "first and foremost" of standing's three elements (alterations omitted) (quoting Steel Co. v. Citizens for Better Environment, 523 U.S. 83, 103 (1998))); Kontorovich, *supra* note 33, at 1668.

[45] *Spokeo*, 578 U.S. at 339 (quoting *Lujan*, 504 U.S. at 560).

[46] City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983).

[47] O'Shea v. Littleton, 414 U.S. 488, 494 (1974) (quoting Golden v. Zwickler, 394 U.S. 103, 109–10 (1969)); *accord Lyons*, 461 U.S. at 111.

[48] Shotz v. Cates, 256 F.3d 1077, 1081 (11th Cir. 2001). "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *O'Shea*, 414 U.S. at 495–96.

[49] Chapman v. Pier 1 Imports (U.S.) Inc., 631 F.3d 939, 946 (9th Cir. 2011).

[50] *See supra* note 14 and accompanying text; Kelly Johnson, *Testers Standing up for the Title III of the ADA*, 59 CASE W. RSRV. L. REV. 683, 693, 695 (2009).

B. The Traditional Injury-in-Fact Tests

The most frequently contested standing issue in ADA Title III cases is whether a plaintiff has alleged an imminent threat of future injury.[51] To determine whether a plaintiff faces an imminent threat of future injury, federal courts have traditionally taken two approaches: (1) the intent-to-return test and (2) the deterrent effect test.[52]

Under the intent-to-return test, federal courts focus on the plaintiff's plan to return to the place of public accommodation to ascertain whether the plaintiff faces a threat of future injury.[53] To determine a plaintiff's intent to return to a public accommodation, federal courts balance the following factors: (1) the proximity between the public accommodation and the plaintiff's residence; (2) the plaintiff's past patronage of the public accommodation; (3) the definitiveness of the plaintiff's plan to return to the public accommodation; and (4) the plaintiff's frequency of travel near the public accommodation.[54] To illustrate, in *Houston v. Marod Supermarkets, Inc.*, a physically disabled plaintiff sued a supermarket under Title III of the ADA for its store's wheelchair inaccessibility.[55] The *Houston* court held the plaintiff was likely to be reinjured by the supermarket's wheelchair inaccessibility in the imminent future because the plaintiff lived near the supermarket, had previously visited the supermarket, professed intent to return to the supermarket, and frequently traveled near the supermarket.[56]

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[51] *See, e.g.*, Price v. Escalante-Black Diamond Golf Club LLC, No. 5:19-cv-22-Oc-30PRL, 2019 U.S. Dist. LEXIS 76288, at *9 (M.D. Fla. Apr. 29, 2019) (determining whether the plaintiff faced a threat of actual and immediate injury); Camacho v. Vanderbilt Univ., No. 10694, 2019 U.S. Dist. LEXIS 209202, at *25–26 (S.D.N.Y. Dec. 4, 2019) (same); Kennedy v. Chet Enters., No. 4:19-CV-00170-JPB, 2020 U.S. Dist. LEXIS 257846, at *5 (N.D. Ga. Apr. 7, 2020) (same).

[52] *See, e.g.*, Houston v. Marod Supermarkets, Inc., 733 F.3d 1323, 1337 (11th Cir. 2013) (applying the intent-to-return theory); *Chapman*, 631 F.3d at 950 (applying the deterrent effect doctrine).

[53] *Houston*, 733 F.3d at 1337.

[54] *Id.* at 1337 n.6. Some courts have adopted a variation of the intent-to-return test that considers whether (1) the plaintiff alleged a public accommodation violated ADA Title III; (2) it can be inferred from the plaintiff's allegations that the discriminatory conduct will continue; and (3) it can reasonably be inferred "based on past patronage, proximity of the place to the plaintiff's home, business, or personal connections to the area, that the plaintiff intends to return to the place in the future." Hollinger v. Reading Health Sys., No. 15-5249, 2017 U.S. Dist. LEXIS 12871, at *10 (E.D. Pa. Jan. 30, 2017). Under both variations of the intent-to-return test, federal courts consider a plaintiff's "intent to return to the place of accommodation, as well as his proximity and patronage to the place of accommodation." Mahoney v. Waldameer Park, Inc., No. 20-3960, 2021 U.S. Dist. LEXIS 60477, at *11 (E.D. Pa. Mar. 30, 2021) (quoting *Hollinger*, 2017 U.S. Dist. LEXIS 12871 at *4 n.3).

[55] *Houston*, 733 F.3d at 1325–26.

[56] *Id.* at 1337.

Alternatively, some courts have adopted the deterrent effect doctrine.[57] Under the deterrent effect doctrine, the plaintiff can show an imminent risk of future injury if (1) the plaintiff has "actual knowledge of the barriers preventing equal access"[58] and (2) there is a "reasonable likelihood that the plaintiff would use the facility if not for the barriers."[59] For example, in *Anderson v. Franklin Institution*, a plaintiff with a disability required a personal care attendant to help him utilize a museum's services, and the museum charged his care attendant an additional entrance fee.[60] The plaintiff in *Anderson* sued the museum under Title III of the ADA on the ground that charging his care attendant an additional fee was a barrier to his full and equal access to the museum.[61] The *Anderson* court held the plaintiff faced an imminent threat of future harm because he knew the museum's policy of charging his care attendant a fee was a barrier to his equal access to the museum, and he would likely patronize the museum but for the museum's access barrier.[62] Thus, even under the deterrent effect doctrine, "a plaintiff must still show that he or she has an intent to return to the place of alleged discrimination."[63]

In brick-and-mortar accessibility cases, the injury-in-fact tests have proven to be valuable tools for federal courts to ascertain a plaintiff's likelihood of future injury. The straightforward elements of the injury-in-fact tests have primarily produced consistent case holdings in brick-and-mortar accessibility cases across America, a result that is not replicated in digital accessibility cases.

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[57] Garner v. VIST Bank, No. 12-5258, 2013 U.S. Dist. LEXIS 179480, at *17 (E.D. Pa. Dec. 20, 2013). Courts have reasoned the deterrent effect doctrine is supported by the ADA because the ADA "expressly contemplates loss of opportunity as an actionable injury" and "Title III explicitly does not require 'a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization . . . does not intend to comply [with Title III of the ADA].'" *Id.* (first quoting Betancourt v. Federated Dep't Stores, 732 F. Supp. 2d 693, 707 (W.D. Tex. 2010); and then quoting *Betancourt*, 732 F. Supp. 2d at 701); Chapman v. Pier 1 Imports (U.S.), Inc., 631 F.3d 939, 950 (9th Cir. 2011) ("[A] plaintiff can demonstrate sufficient [risk of future] injury to pursue injunctive relief when discriminatory architectural barriers deter him from returning to a noncompliant accommodation.").

[58] Anderson v. Franklin Inst., 185 F. Supp. 3d 628, 641 (E.D. Pa. 2016) (quoting *Garner*, 2013 U.S. Dist. LEXIS 179480, at *16).

[59] *Id.* (quoting *Garner*, 2013 U.S. Dist. LEXIS 179480, at *16).

[60] *Id.* at 630.

[61] *Id.*

[62] *See id.*

[63] Hollinger v. Reading Health Sys., No. 15-5249, 2017 U.S. Dist. LEXIS 12871, at *10 (E.D. Pa. Jan. 30, 2017).

II. THE VIRTUAL INJURY-IN-FACT INQUIRY

Upon first exposure to online-based Title III ADA cases, federal courts approached standing with a one-size-fits-all standing approach, where the traditional injury-in-fact analysis was applied to website accessibility cases without alteration.[64] Over time, however, the rise of Title III website cases exposed the limitations of the conventional injury-in-fact analysis in digital accessibility cases, causing federal courts to venture into unfamiliar territory in search of resolution.[65]

The federal courts' injury-in-fact inquiries in virtual accessibility cases have produced perfectly incompatible holdings in factually similar cases, both within and betwixt circuits. The outcomes of Deborah Laufer's hotel website lawsuits are illustrative of this incongruency.[66] In each of the lawsuits, Laufer made identical allegations—that each hotel's reservation website violated the Title III of the ADA by failing to provide information pertinent to booking a room that accommodates her disability.[67] Even though federal courts were considering essentially the same facts and allegations, the outcomes of these duplicate lawsuits were split.[68] Federal courts in the First, Fourth, Fifth, and Tenth Circuits held Laufer did not suffer an injury-in-fact, whereas federal courts in the Seventh Circuit held that Laufer did suffer an injury-in-fact.[69]

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[64] *See, e.g.*, Nat'l Fed'n of the Blind v. Target Corp., 582 F. Supp. 2d 1185, 1194 (N.D. Cal. 2007) (applying traditional standing principles to an ADA Title III website accessibility case); Cox v. Patel, No. CV 13-00323-BRO, 2013 U.S. Dist. LEXIS 190031, at *6 (C.D. Cal. Dec. 23, 2013) (same).

[65] *See* Kennedy v. Nisha, Inc., No. 8:20-cv-367-T-60CPT, 2020 U.S. Dist. LEXIS 170829, at *6–7 (M.D. Fla. Sept. 17, 2020) (noting the traditional injury-in-facts tests are "difficult to apply in website cases" (quoting Parks v. Richard, No. 2:20-cv-227-FtM-38NPM, 2020 U.S. Dist. LEXIS 86790, at *3 (M.D. Fla. May 18, 2020)); Griffin v. Dep't of Lab. Fed. Credit Union, 912 F.3d 649, 653 (4th Cir. 2019) ("This case concerns the application of standing doctrine in an electronic age and it is important that we move narrowly in exploring this new territory.").

[66] *See supra* text accompanying notes 1–6.

[67] *See, e.g.*, Laufer v. Patel, No. 1:20-CV-631-RP, 2021 U.S. Dist. LEXIS 38155, at *3 (W.D. Tex. Mar. 2, 2021) (alleging a violation under Title III of the ADA because a hotel website "did not provide sufficient information regarding whether the rooms or features at the hotel were accessible"); Laufer v. Naranda Hotels, LLC, No. SAG-20-2136, 2020 U.S. Dist. LEXIS 235894, at *3 (D. Md. Dec. 16, 2020) (same); Laufer v. Dove Hess Holdings, LLC, No. 5:20-cv-00379, 2020 U.S. Dist. LEXIS 246614, at *4 (N.D.N.Y. Nov. 18, 2020) (same).

[68] *See Dove Hess Holdings*, 2020 U.S. Dist. LEXIS 246614, at *53 (describing the myriad of claims Laufer filed in numerous jurisdictions as "nearly identical" and Laufer's amendments to her original complains as "'cut-and-paste' allegations . . . with the only difference being the attractions she names").

[69] *Compare* Laufer v. Mar-Lyn In Me., LLC., No. 2:21-cv-00007-GZS, 2021 U.S. Dist. LEXIS 93704, at *15 (D. Me. May 18, 2021) (holding Laufer did not suffer an injury-in-fact), *and Naranda Hotels*, 2020 U.S. Dist. LEXIS 235894, at *27 (same), *and* Laufer v. Mann Hosp., LLC., 996 F.3d 269, 271 (5th Cir. 2021) (same), *and* Laufer v. Looper, No. 21-1031, 2022 U.S. App. LEXIS 288, at *22 (10th Cir. Jan. 5, 2022) (same), *with* Laufer v. Surf Hotel Invs., LLC, No. 20 C 5364, 2021 U.S. Dist. LEXIS 39780, at *5 (N.D. Ill. Mar. 3, 2021) (holding Laufer suffered an injury-in-fact), *and* Laufer. v. Lily Pond LLC C Series, No. 3:20-cv-617-wmc, 2020

The Laufer lawsuits also divided district courts within the federal circuits. In the Second Circuit, some district courts held Laufer had satisfied the injury-in-fact requirements, while others held the contrary.[70] Likewise, district courts in the Third and Eleventh circuits disagreed over whether Laufer established an injury-in-fact.[71] The federal court divide illustrated by the Laufer cases is characteristic of injury-in-fact holdings in ADA Title III website cases across America.[72] The increasing volume of online accessibility cases has accentuated and worsened federal courts' disunity.[73]

There is a pressing need for guidance surrounding the injury-in-fact analysis in online accessibility cases. Many district courts have articulated concern over the ambiguity of the injury-in-fact inquiry in online accessibility cases and the need to elucidate the matter; however, higher courts have been less than helpful

U.S. Dist. LEXIS 244506, at *5 (W.D. Wis. Dec. 30, 2020) (same), *and* Laufer v. Cap. Hosp. Grp., LLC, No. 20-cv-3200, 2021 U.S. Dist. LEXIS 180908, at *9 (C.D. Ill. Sept. 22, 2021) (same), *and* Laufer v. T & C Inn, LLC, No. 20-cv-3237, 2021 U.S. Dist. LEXIS 84692, at *8 (C.D. Ill. May 4, 2021) (same).

[70] *Compare* Laufer v. Jamestown Hotel LLC, No. 1:20-CV-0367-LJV-MJR, 2021 U.S. Dist. LEXIS 55471, at *14 (W.D.N.Y. Mar. 22, 2021) (holding Laufer suffered an injury-in-fact), *and* Laufer v. Drashti Batavia LLC, No. 1:20-CV-00407-LJV-MJR, 2021 U.S. Dist. LEXIS 55465, at *16 (W.D.N.Y. Mar. 22, 2021) (same), *with* Laufer v. Laxmi & Sons, No. 1:19-cv-01501, 2021 U.S. Dist. LEXIS 117554, at *26 (N.D.N.Y. June 14, 2021) (holding Laufer did not suffer an injury-in-fact), *and Dove Hess Holdings*, 2020 U.S. Dist. LEXIS 246614, at *48 (same).

[71] District courts within the Third Circuit are split on the issue. *Compare* Laufer v. Aark Hosp. Holding, LLC, No. 20-5648, 2021 U.S. Dist. LEXIS 244129, at *15 (D.N.J. Dec. 21, 2021) (holding Laufer has established injury-in-fact), *with* Laufer v. Buena Motel Corp., No. 1:20-cv-06438-NLH-KMW, 2021 U.S. Dist. LEXIS 125076, at *11 (D.N.J. July 6, 2021) (holding Laufer did not establish injury-in-fact). District courts within the Eleventh Circuit are split, as well. *Compare* Laufer v. Hjl Hosp., No. 1:20-CV-59, 2021 U.S. Dist. LEXIS 226737, at *7 (M.D. Ga. Mar. 10, 2021) (holding Laufer did not establish injury-in-fact), *and* Laufer v. Ershco, No. 1:19-cv-204-AW-GRJ, 2020 U.S. Dist. LEXIS 259827, at *4 (N.D. Fla. Oct. 15, 2020) (same), *with* Laufer v. Rudra Sai LLC, No. CV 120-185, 2021 U.S. Dist. LEXIS 14437, at *6 (S.D. Ga. Jan. 26, 2021) (holding Laufer had a right to injunctive relief), *and* Laufer v. Patel, No. CV 620-119, 2021 U.S. Dist. LEXIS 35558, at *6 (S.D. Ga. Feb. 25, 2021) (same).

[72] For example, an Eleventh Circuit district court in *Kennedy v. Floridian Hotel Inc.* held a plaintiff's "vague and conclusory plans" to revisit a hotel's website failed to sufficiently allege a future injury, No. 1:18-CV-20839-UU, 2018 U.S. Dist. LEXIS 235837, at *10 (S.D. Fla. May 15, 2018), whereas in the nearly identical case, *Honeywell v. Harihar*, an Eleventh Circuit district court held a plaintiff's alleged intent to revisit a hotel's website sufficiently alleged a future injury, No. 2:18-CV-618-FtM-29MRM, 2018 U.S. Dist. LEXIS 203740, at *8–10 (M.D. Fla. Dec. 3, 2018).

[73] As more courts attempt to navigate virtual accessibility cases, the gap between judicial interpretations of the injury-in-fact analysis has widened. Laufer v. Galtesvar OM, LLC, No. 1:20-CV-00588-RP, 2020 U.S. Dist. LEXIS 240714, at *9 (W.D. Tex. Nov. 23, 2020) (noting the "need for guidance" in ADA Title III website cases is highlighted by the "explosion of cases" and lack of authoritative guidance); *see* Kennedy v. Nisha, Inc., No. 8:20-cv-367-T-60CPT, 2020 U.S. Dist. LEXIS 170829, at *8 (M.D. Fla. Sept. 17, 2020) (describing the "explosion" of virtual accessibility cases (quoting Price v. City of Ocala, 375 F. Supp. 3d 1264, 1270 (M.D. Fla. 2019))).

in providing clarification.[74] The standing requirements in online-based ADA Title III cases is an area that has received very little attention from higher courts.[75] While some appellate courts have heard online accessibility claims, standing issues are rarely the central focus,[76] and, in many cases, standing is not mentioned at all.[77] Moreover, the Supreme Court has yet to hear an ADA Title III website case.[78] As such, federal district courts have been left to wrestle the complexities of the online injury-in-fact analysis with little guiding precedent—a position which has proved conducive to inconsistency.[79]

The judicial inconsistency born from the virtual injury-in-fact inquiry is injurious to both plaintiffs and defendants in online accessibility cases. Inconsistent injury-in-fact holdings in factually similar cases indicate judicial inaccuracy,[80] create legal uncertainty that makes predicting and planning for

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[74] *See, e.g.*, *Kennedy*, 2020 U.S. Dist. LEXIS 170829, at *8–9 (expressing the dire need for guidance in ADA Title website case injury-in-fact analysis); *Galtesvar OM*, 2020 U.S. Dist. LEXIS 240714, at *9 (same); Price v. Escalante-Black Diamond Golf Club LLC, No. 5:19-cv-22-Oc-30PRL, 2019 U.S. Dist. LEXIS 76288, at *15 (M.D. Fla. Apr. 29, 2019) (same).

[75] *See Escalante*, 2019 U.S. Dist. LEXIS 76288, at *11, *14. The *Prince* court noted that online accessibility cases, "which make up the majority of case law, do not address standing" because appellate courts have primarily focused on "whether a website is a 'place of public accommodation'" and "what a plaintiff must allege to establish a nexus between a website and 'place of public accommodation' such that a website claim is actionable." *Id.* (citing Price v. Everglades College, Inc., No. 6:18-CV-492-ORL-31GJK, 2018 U.S. Dist. LEXIS 117629, at *2 (M.D. Fla. July 16, 2018)).

[76] *Id.*; *see, e.g.*, Gil v. Winn-Dixie Stores, Inc., 993 F.3d 1266, 1274 (11th Cir. 2021) (addressing standing briefly while focusing the bulk of the opinion on whether a website constitutes a place of public accommodation under Title III), *vacated as moot*, 21 F.4th 775 (11th Cir. 2021) (per curiam). *But see* Griffin v. Dep't of Lab. Fed. Credit Union, 912 F.3d 649, 653 (4th Cir. 2019) (addressing online accessibility standing within the narrow scope of whether a "plaintiff *who is barred by law from making use of defendant's services* may sue under the ADA for an allegedly deficient website"); Brintley v. Aeroquip Credit Union (18-2326), 936 F.3d 489, 492 (6th Cir. 2019) (same); Carello v. Aurora Policemen Credit Union, 930 F.3d 830, 833 (7th Cir. 2019) (same).

[77] *See, e.g.*, Robles v. Domino's Pizza, LLC, 913 F.3d 898, 904 (9th Cir. 2019) (addressing only whether ADA Title III applies to websites); Haynes v. Dunkin' Donuts, LLC, 741 F. App'x 752 (11th Cir. 2018) (per curiam) (same).

[78] On October 7, 2019, the Supreme Court declined to review *Robles*, a Ninth Circuit online-based ADA Title III case. Joseph Lynett & Jackson Lewis P.C., *The SCOTUS Decides Not to Grant Certiorari in Robles v. Domino's Pizza*, JD SUPRA (Oct. 29, 2019), https://www.jdsupra.com/legalnews/the-scotus-decides-not-to-grant-52377/.

[79] *See, e.g.*, Laufer v. Patel, No. 1:20-CV-631-RP, 2021 U.S. Dist. LEXIS 38155, at *7–8 (W.D. Tex. Mar. 2, 2021) (noting there is "little authoritative guidance to help district courts" in ADA Title III website cases and so courts must "continue to attempt to navigate [the ADA Title III website case] terrain"); Kennedy v. Floridian Hotel, Inc., No. 1:18-cv-20839-UU, 2018 U.S. Dist. LEXIS 207984, at *32 (S.D. Fla. Dec. 7, 2018) (noting how the Eleventh Circuit has "yet to opine on the precise showing necessary to establish a 'real and immediate' threat of future injury resulting from a website's non-compliance with the ADA," and the overwhelming majority of courts that have addressed the injury-in-fact requirements have "done so in circumstances involving physical property").

[80] RYAN COPUS & RYAN HÜBERT, TARGETING INCONSISTENCY: THE WHY AND HOW OF STUDYING DISAGREEMENT IN ADJUDICATION 4 (2016). The fact that two district courts in the Second Circuit considered the same allegations in *Laufer v. Jamestown Hotel, LLC* and *Laufer v. Laxmi & Sons* and reached opposite

how the law will be applied impossible,[81] and provide "room for mischief" where the "biases or parochial interests" of judges can be undetectably advanced.[82] These conditions jeopardize the interests of plaintiffs and defendants in virtual accessibility cases.[83]

Accordingly, there is significant uncertainty amongst federal courts surrounding the injury-in-fact analysis in online accessibility cases. Because most higher courts have failed to elucidate this matter, district courts remain in need of guidance to navigate the injury-in-fact analysis in online-based ADA Title III cases.

III. THE QUESTIONS DIVIDING COURTS

The contradictory injury-in-fact holdings in virtual accessibility cases are a direct consequence of the myriad of inconsistent injury-in-fact approaches taken by federal courts. Four critical questions over which the courts have diverged include: (1) the location to which a plaintiff must intend to return; (2) the application of the intent-to-return test's geographic factors in cyberspace; (3) the

conclusions on the injury-in-fact question indicates that one of the holdings is erroneous. *See* Laufer v. Jamestown Hotel, LLC, No. 1:20-CV-0367-LJV-MJR, 2021 U.S. Dist. LEXIS 55471, at *14–15 (W.D.N.Y. Mar. 22, 2021); Laufer v. Laxmi & Sons, No. 1:19-cv-01501, 2021 U.S. Dist. LEXIS 117554, at *26 (N.D.N.Y. June 14, 2021). In other words, the plaintiff and defendant were done right by the legal system in one case, whereas in the other case, they were wronged.

[81] COPUS & HÜBERT, *supra* note 80. The unpredictable injury-in-fact holdings deprive plaintiffs and defendants of information needed to make crucial litigation decisions. The decisions to file and settle lawsuits can be mathematically expressed as a cost-benefit analysis. Keith N. Hylton, *Fee Shifting and Predictability of Law*, 71 CHI.-KENT L. REV. 427, 444, 447 (1995). A plaintiff will file suit if the expected benefit exceeds the expected cost. *Id.* at 444. In virtual accessibility cases, where plaintiffs are only awarded attorneys' fees if victorious, there are costs associated with defeat. As such, a plaintiff's estimate of the likelihood they will receive a favorable verdict is a crucial variable in the plaintiff's decision to file a lawsuit. *Id.* Likewise, a defendant's decision to litigate rather than settle a dispute depends on their perceived likelihood of winning at trial and the costs associated with litigation. *Id.* Because a plaintiff's case is dismissed if they fail to satisfy the injury-in-fact requirement, the expected injury-in-fact outcome is vital to plaintiffs' and defendants' perceived probabilities of success at trial. *See supra* Section I.A. However, parties cannot accurately assess a plaintiff's likelihood of satisfying the injury-in-fact requirement because the body of case law is riddled with contradiction. *See supra* notes 69–72. Accordingly, plaintiffs and defendants are unable to make informed litigation decisions because the inconsistent virtual injury-in-fact holdings interfere with the estimation of a plaintiff's probability of succeeding at trial. *See* Hylton, *supra*, at 444.

[82] COPUS & HÜBERT, *supra* note 80, at 3. In virtual accessibility cases, it is not uncommon for identical litigants, who file claims in the same district, to receive different injury-in-fact holdings solely because of the differing view of judges. *See* Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 811 (2012); *supra* notes 70–71. The unclarity and disunity surrounding the virtual injury-in-fact assessment makes it difficult to discern whether a "judge is deciding the case based on law and not personal preference." *See* Mead, *supra*, 813.

[83] *Supra* notes 80–82.

role a plaintiff's past injury plays in the injury-in-fact inquiry; and (4) whether a broad approach to standing is warranted.

A. Intent to Return Where?

To what location must a plaintiff intend to return? In brick-and-mortar accessibility cases, this question has a simple answer—the plaintiff must intend to return to the public accommodation's brick-and-mortar location.[84] In online accessibility cases, however, the answer is not particularly obvious.

In ADA Title III website cases, the inherent duality of a public accommodation's location has divided federal court injury-in-fact analysis over where a plaintiff must intend to return. Unlike in brick-and-mortar accessibility cases, federal courts adjudicating virtual accessibility cases are presented with two potential places a plaintiff can intend to return: the challenged website or its corresponding brick-and-mortar location.[85] Unsurprisingly, this choice between an online or physical location in digital accessibility cases has caused disagreement among federal courts over which location is the appropriate destination of the plaintiff's intent to return.[86]

Many federal courts have focused on the plaintiff's intent to return to a public accommodation's website in deciding whether the plaintiff faces a threat of imminent future injury.[87] For example, in *Camacho v. Vanderbilt Univiversity*, a visually impaired plaintiff visited a university's website to determine if the university met his needs.[88] The plaintiff in *Camacho* intended to visit its campus

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[84] In brick-and-mortar accessibility cases, a plaintiff is injured under Title III of the ADA when they experience an access barrier at a physical place of public accommodation. *See* Houston v. Marod Supermarkets, Inc., 733 F.3d 1323, 1337 (11th Cir. 2013). As such, a plaintiff can show a likelihood of future injury by showing an intent to return to the *physical* place of public accommodation. *See id.*

[85] In most jurisdictions, federal courts do not recognize a website itself as a public accommodation; rather, for an inaccessible website to violate Title III of the ADA, the website must be linked to a *physical* public accommodation. *See* Minh Vu et al., *supra* note 22. *But see* Nat'l Ass'n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 199 (D. Mass. 2012) (involving a virtual accessibility claim against a business that did not have a physical location); Nat'l Fed'n of the Blind v. Scribd Inc., 97 F. Supp. 3d 565, 567 (D. Vt. 2015) (same).

[86] *Compare* Camacho v. Vanderbilt Univ., No. 18 Civ. 10694, 2019 U.S. Dist. LEXIS 209202, at *27–29 (S.D.N.Y. Dec. 4, 2019) (focusing on a plaintiff's intent to return to a university's website), *with* Walker v. Sam's Oyster House, LLC, No. 18-193, 2018 U.S. Dist. LEXIS 158439, at *7–8 (E.D. Pa. Sept. 17, 2018) (focusing on the plaintiff's intent to return to a restaurant's physical location).

[87] *See, e.g.*, Parks v. Richard, No. 2:20-cv-227-FtM-38NPM, 2020 U.S. Dist. LEXIS 86790, at *4–8 (M.D. Fla. May 18, 2020) (focusing on a plaintiff's intent to return to the website); Laufer v. Lily Pond LLC C Series, No. 20-cv-617-wmc, 2020 U.S. Dist. LEXIS 244506, at *11–12 (W.D. Wis. Dec. 30, 2020) (same); Laufer v. Drashti Batavia LLC, No. 1:20-CV-00407-LJV-MJR, 2021 U.S. Dist. LEXIS 55465, at *10 (W.D.N.Y. Mar. 22, 2021) (same).

[88] *Camacho*, 2019 U.S. Dist. LEXIS 209202, at *4–5.

in the near future and apply for admission if the university met his needs; however, much of the website was not compatible with the plaintiff's screen-reading software.[89] The plaintiff sued the university under Title III of the ADA, alleging he suffered an injury when he could not access portions of the website's content because of his visual disability.[90] The *Camacho* court focused on the plaintiff's intent to return to the university's *website* to determine if he suffered an injury-in-fact because the plaintiff "claimed that he was denied access to the [w]ebsite, not [the university's] physical location itself."[91]

Conversely, other courts have focused on a plaintiff's intent to return to a public accommodation's brick-and-mortar location.[92] For example, in *Mahoney v. Waldameer Park, Inc.*, a visually impaired plaintiff visited an amusement park's website to access information about the park including its phone number, operating hours, directions, and information about its attractions.[93] Because much of the website's content was incompatible with the plaintiff's screen-reading software, the plaintiff in *Mahoney* sued the amusement park under ADA Title III on the grounds that its website's inaccessibility hindered his ability to access the website and the park.[94] To determine whether the plaintiff faced an imminent threat of future harm, the court in *Mahoney* focused on the plaintiff's intent to return to the amusement park's *brick-and-mortar* location because "websites are not by themselves public accommodations under the ADA."[95]

In other cases, federal courts have considered both the plaintiff's intent to return to public accommodation's website *and* brick-and-mortar location in its injury-in-fact analysis.[96] For example, in *Kennedy v. Chet Enterprises*, a plaintiff with a physical disability sued a hotel under Title III of the ADA for its website's

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89 *Id.*

90 *Id.* at *26.

91 *Id.* at *30.

92 *See, e.g.*, Langer v. Carvana, LLC, No. 8:21-cv-00303-JLS-JDE, 2021 U.S. Dist. LEXIS 188764, at *8 (C.D. Cal. Aug. 24, 2021) (focusing on a plaintiff's intent to return to the public accommodation's brick-and-mortar location); Gomez v. Knife Mgmt., LLC, No. 17-cv-23843-GAYLES, 2018 U.S. Dist. LEXIS 159178, at *5–6 (S.D. Fla. Sept. 14, 2018) (same); Mahoney v. Waldameer Park, Inc., No. 20-3960, 2021 U.S. Dist. LEXIS 60477, at *15 (E.D. Pa. Mar. 30, 2021) (same); Laufer v. Ft. Meade Hosp., LLC, No. 8:20-cv-1974-PX, 2020 U.S. Dist. LEXIS 210299, at *11 (D. Md. Nov. 10, 2020) (same); Langer v. HV Global Grp., Inc., No. 2:21-cv-00328-JAM-KJN, 2021 U.S. Dist. LEXIS 197769, at *6–7 (E.D. Cal. Oct. 12, 2021) (same).

93 *Mahoney*, 2021 U.S. Dist. LEXIS 60477, at *2.

94 *Id.*

95 *Id.* at *11.

96 Kennedy v. Chet Enters., No. 4:19-CV-00170-JPB, 2020 U.S. Dist. LEXIS 257846, at *2 (N.D. Ga. Apr. 7, 2020); Rosales v. Concentra Operating Corp., No. 5:16-CV-1070, 2017 U.S. Dist. LEXIS 222821, at *12 (W.D. Tex. Feb. 13, 2017) ("Under the 'intent to return' proximity standard, and the 'deterrent effect' doctrine Plaintiff has failed to establish standing because he has shown no plan to return to Defendant's *website* or to seek Defendant's *services*." (emphasis added)).

failure to provide information about accessible rooms.[97] To ascertain whether the plaintiff faced an imminent threat of future injury, the court in *Chet Enterprises* considered the distance between the plaintiff's residence and the hotel's brick-and-mortar location, the plaintiff's past patronage of both the hotel's website *and* brick-and-mortar location, and the frequency of the plaintiff's travel near the hotel's brick-and-mortar location to determine the likelihood of the plaintiff returning to the website.[98]

The location to which a plaintiff must intend to return is a central feature of the injury-in-fact analysis in virtual accessibility cases. Nonetheless, federal courts cannot agree over where exactly a plaintiff must intend to return—the website, the brick-and-mortar location, or both?

B. Geography in Cyberspace?

As previously discussed, federal courts crafted the intent-to-return test to help ascertain whether a plaintiff faced a personal threat of future injury.[99] Because the intent-to-return test was created to address claims involving *physical* barriers, two of its four factors are focused on geography: the plaintiff's proximity to and frequency of travel near a physical place of public accommodation.[100] Despite providing insight into a plaintiff's intent to return to a public accommodation's brick-and-mortar location, the geographic intent-to-return factors have created more questions than answers when applied to online accessibility cases. The imperfect correlation between physical and virtual locations has resulted in federal courts dividing over how to apply the geographic intent-to-return factors in cyberspace.

Some federal courts have opted to apply the traditional intent-to-return test in virtual accessibility cases—geographic factors and all.[101] For example, in *Strojnik v. Landry's Inc.*, a plaintiff with a physical impairment sued a hotel under ADA Title III on the grounds the hotel website's inaccessibility hindered his access to the hotel's services.[102] The *Strojnik* court considered each factor of

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97 *Chet Enters.*, 2020 U.S. Dist. LEXIS 257846, at *2.

98 *Id.* at *4–6.

99 *See supra* Section I.B.

100 Kennedy v. Sai Ram Hotels LLC, No. 8:19-cv-483-T-33JSS, 2019 U.S. Dist. LEXIS 80111, at *8 (M.D. Fla. May 13, 2019).

101 *See, e.g.*, *Chet Enters.*, 2020 U.S. Dist. LEXIS 257846, at *3–5 (applying the intent-to-return test, including its geographic factors, in a virtual accessibility case); Ariza v. Walters & Mason Retail, Inc., 516 F. Supp. 3d 1350, 1356 (S.D. Fla. 2021) (same); Strojnik v. Landry's Inc., No. 4:19-CV-01170, 2019 U.S. Dist. LEXIS 223873, at *11 (S.D. Tex. Dec. 9, 2019) (same).

102 *Strojnik*, 2019 U.S. Dist. LEXIS 223873, at *3.

the traditional intent-to-return test and held the plaintiff was unlikely to suffer future injury because he lived hundreds of miles from the hotel, had never visited the hotel before, did not allege plans to travel near the hotel, and did not profess intent to visit the hotel in the future.[103]

Some courts have circumvented the geographic factors in virtual accessibility cases by summarily removing the factors from the intent-to-return inquiry.[104] For example, in *Poschmann v. Fountain TN, LLC*, a plaintiff with a physical disability sued a hotel under Title III of the ADA for failing to provide information about the hotel's accessibility features on its website.[105] In applying the intent-to-return test, the court in *Poschmann* considered only one of the four intent-to-return factors to determine if the plaintiff established an injury-in-fact: the plaintiff's alleged intent to visit the hotel's website in the future to either book a hotel room or to test the website for compliance.[106]

Other courts have abandoned the intent-to-return test altogether in light of its geographic factors.[107] For example, in *Gniewkowski v. Lettuce Entertain You Enterprises*, two plaintiffs with visual impairments sued a gaming and entertainment company under Title III of the ADA because its website's inaccessibility impeded their access to the company's services.[108] The *Gniewkowski* court declined to apply the intent-to-return test, reasoning that its geographic factors were inapplicable because the "'proximity [of the company's website] to [the] [p]laintiffs' homes' [was] a nonissue."[109]

Federal courts have reached conflicting conclusions over how to tackle the intent-to-return test's geographic factors in online accessibility cases. Some

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[103] *Id.* at *11.

[104] *See, e.g.*, Sarwar v. Gopinathjee LLC, No. 1:20-cv-15724-NLH-KMW, 2021 U.S. Dist. LEXIS 139604, at *11–12 (D.N.J. July 27, 2021) (removing the intent-to-return test's geographic factors and considering only the plaintiff's professed intent to return); Poschmann v. Fountain TN, LLC, No. 2:19-cv-359-FtM-99NPM, 2019 U.S. Dist. LEXIS 159417, at *5–6 (M.D. Fla. Sept. 19, 2019) (same).

[105] *Poschmann*, 2019 U.S. Dist. LEXIS 159417, at *2.

[106] *Id.* at *6.

[107] *See, e.g.*, Gniewkowski v. Lettuce Entertain You Enters., 251 F. Supp. 3d 908, 919–20 (W.D. Pa. 2017); Gathers v. 1-800-Flowers.com, Inc., No. 17-cv-10273-IT, 2018 U.S. Dist. LEXIS 22230, at *9–10 (D. Mass. Feb. 12, 2018) (applying the injury-in-fact standard articulated in *Gniewkowski* instead of the intent-to-return test (citing *Gniewkowski*, 251 F. Supp. 3d at 913–14)).

[108] *Gniewkowski*, 251 F. Supp. 3d at 911.

[109] *Id.* at 920. The court in *Gniewkowski* declined to apply the intent-to-return test because:

> (1) all of the cases cited differ factually from the instant matter in that they involve physical barriers to a physical (brick-and-mortar) location; (2) the fourth requirement in the four-part test would not apply to a website case . . . because no travel is required; and (3) the test has not been adopted by the Court of Appeals.

Id. at 914 n.1.

courts apply the geographic intent-to-return factors, some remove them, and others discard the test altogether.

C. Past or Future Injury?

The traditional injury-in-fact tests were designed to ascertain a plaintiff's risk of *future* injury.[110] However, some courts in virtual accessibility cases have renounced the traditional injury-in-fact tests and conduct injury-in-fact inquiries that deviate considerably from the future injury focus.

Some courts have centered the injury-in-fact assessment entirely on the plaintiff's past injury.[111] For example, in *Erasmus v. Perry*, a plaintiff with an auditory impairment visited a clinic's website to gather information about its services.[112] The plaintiff in *Erasmus* could not understand the video content on the clinic's website because the videos lacked closed captioning and, accordingly, sued the clinic under Title III of the ADA.[113] Without considering the plaintiff's likelihood of suffering future injury from the website's inaccessibility, the court in *Erasmus* held the plaintiff suffered an injury-in-fact.[114] The *Erasmus* court reached its decision by reasoning that once a plaintiff has "encountered or become aware" of an ADA violation that deters him from patronizing or hinders his access to a public accommodation, "he has already suffered an injury in fact . . . [and] possesses standing under Article III to bring his claim for injunctive relief forward."[115]

Other courts have assessed a plaintiff's risk of future injury by focusing exclusively on the plaintiff's past injury.[116] For example, in *Gomez v. General Nutrition Corp.*, a visually impaired plaintiff sued a nutrition company under ADA Title III because its website was incompatible with his screen-reading software, which prevented him from adding items to his online cart, viewing the company's store locator, and accessing information about deals and

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[110] *See supra* Section I.B.

[111] *See, e.g.*, *Gathers*, 2018 U.S. Dist. LEXIS 22230, at *9 (holding a plaintiff suffered an injury-in-fact by focusing only on the plaintiff's prior online injury); Erasmus v. Perry, No. 2:21-cv-00915-WBS-KJN, 2021 U.S. Dist. LEXIS 184460, at *6–7 (E.D. Cal. Sept. 24, 2021) (same).

[112] *Erasmus*, 2021 U.S. Dist. LEXIS 184460, at *2.

[113] *Id.*

[114] *Id.* at *6–7.

[115] *Id.* at *6 (quoting Doran v. 7-Eleven, Inc., 524 F.3d 1034, 1042 n.5 (9th Cir. 2008)).

[116] *See, e.g.*, Gil v. Winn-Dixie Stores, Inc., 993 F.3d 1266, 1274 (11th Cir. 2021) (focusing exclusively on a plaintiff's past injury to determine he faced an imminent threat of future harm), *vacated as moot*, 21 F.4th 775 (11th Cir. 2021) (per curiam); Gomez v. Gen. Nutrition Corp., 323 F. Supp. 3d 1368, 1374 (S.D. Fla. 2018) (same); Laufer v. Lily Pond LLC C Series, No. 20-cv-617-wmc, 2020 U.S. Dist. LEXIS 244506, at *12 (W.D. Wis. Dec. 30, 2020) (similar).

promotions.[117] The court in *Gomez* held the plaintiff satisfied the injury-in-fact requirement because he suffered an injury by experiencing accessibility barriers to the nutrition company's website and, "if [the website was] not addressed, he could suffer that same injury in the future."[118]

Contrarily, some courts have expressly rejected the notion that plaintiffs can satisfy the injury-in-fact requirement by showing only past exposure to an online barrier.[119] For example, in *Rosales v. Concentra Operating Corp.*, a plaintiff with a physical disability visited a medical clinic's website to collect information about the goods and services of the clinic.[120] The plaintiff in *Rosales* sued the clinic under Title III of the ADA on the grounds that the clinic's website's inaccessibility prevented him from "navigating and utilizing" information about the clinic's goods and services.[121] In holding the plaintiff did not satisfy the injury-in-fact requirement, the *Rosales* court stressed that plaintiffs seeking injunctive relief must show "a significant possibility of *future* harm" and that it is "insufficient to demonstrate only past injury."[122]

In brief, federal courts in online accessibility cases are divided over the role a plaintiff's future injury plays in the injury-in-fact analysis. Some courts consider only the plaintiff's past injury, some look to the plaintiff's past injury to determine if they will suffer future injury, and others have held the injury-in-fact requirement cannot be satisfied by past injury alone.

D. Broad or Narrow Interpretation?

There are significant discrepancies in how broadly federal courts interpret the injury-in-fact requirement in online accessibility cases. Some courts approach the virtual injury-in-fact inquiry with unbounded leniency afforded to the plaintiff, while others expressly disavow such liberal interpretations. As such, federal courts have yet to reach a consensus on the proper scope of the injury-in-fact analysis in online accessibility cases.

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[117] *Gomez*, 323 F. Supp. 3d at 1372.

[118] *Id.* at 1374.

[119] *See, e.g.*, Strojnik v. Landry's Inc., No. 4:19-CV-01170, 2019 U.S. Dist. LEXIS 223873, at *10 (S.D. Tex. Dec. 9, 2019) ("[P]ast exposure to illegal conduct does not itself present a case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effect." (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983))); Laufer v. Buena Motel Corp, No. 1:20-cv-06438-NLH-KMW, 2021 U.S. Dist. LEXIS 125076, at *8 (D.N.J. July 6, 2021) ("Prior exposure to wrongful conduct is not sufficient for a claim for injunctive relief.").

[120] Rosales v. Concentra Operating Corp., No. 5:16-CV-1070, 2017 U.S. Dist. LEXIS 222821, at *1 (W.D. Tex. Feb. 13, 2017).

[121] *Id.*

[122] *Id.* at *9 (emphasis added).

Many federal courts have opted to take a broad approach to standing in online accessibility cases.[123] For example, in *Paguada v. YieldStreet Inc.*, a plaintiff with a visual impairment sued an investment company under ADA Title III because a virtual barrier on the investment company's website hindered his ability to enjoy the investment company's services.[124] The *Paguada* court held the plaintiff's attempts to access the website "on a couple of occasions" in the past, coupled with his professed intent to visit the website at some point in the future, satisfied the injury-in-fact requirement "in light of the 'broad view of constitutional standing' afforded under the ADA."[125] In practice, this broad approach to standing has amounted to federal courts giving plaintiffs in online accessibility cases "the benefit of any doubt" when determining if they have suffered an injury-in-fact.[126] Federal courts support this lenient stance toward standing by pointing to the remedial purpose of the Title III of the ADA and the fact that the statute is enforced primarily through private lawsuits.[127]

On the other hand, some federal courts have rejected a lenient approach to standing in online accessibility cases.[128] For example, in *Laufer v. Naranda Hotels, LLC*, a plaintiff sued a hotel under Title III of the ADA on the grounds that she was deprived of the hotel's goods and services as a result of its website's inaccessibility.[129] The court in *Naranda Hotels* stressed that the "undisputed importance of the ADA's general protections" does not require federal courts to

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[123] *See, e.g.*, Camacho v. Vanderbilt Univ., No. 18 Civ. 10694, 2019 U.S. Dist. LEXIS 209202, at *25 (S.D.N.Y. Dec. 4, 2019) ("In reviewing standing under the ADA, 'a broad view of constitutional standing is appropriate because private enforcement suits are the primary method of obtaining compliance with the Act.'" (quoting Feltzin v. Clocktower Plaza Props., Ltd., No. 2:16 Civ. 4329, 2018 U.S. Dist. LEXIS 32686, at *3 (E.D.N.Y. Mar. 8, 2018))); Paguada v. YieldStreet Inc., No. 20 Civ. 9254, 2021 U.S. Dist. LEXIS 202311, at *7 (S.D.N.Y. Oct. 20, 2021) (similar); Murphy v. Bob Cochran Motors, Inc., No. 1:19-cv-00239, 2020 U.S. Dist. LEXIS 139887, at *16 (W.D. Pa. Aug. 4, 2020) (similar).

[124] *Paguada*, 2021 U.S. Dist. LEXIS 202311, at *1–2.

[125] *Id.* at *7 (quoting Guglielmo v. Neb. Furniture Mart, Inc., No. 19 Civ. 11197, 2020. U.S. Dist. LEXIS 238707, at *3 (S.D.N.Y. Dec. 18, 2020)).

[126] *Murphy*, 2020 U.S. Dist. LEXIS 139887, at *16.

[127] *See, e.g.*, Erasmus v. Perry, No. 2:21-cv-00915-WBS-KJN, 2021 U.S. Dist. LEXIS 184460, at *7 (E.D. Cal. Sept. 24, 2021) ("[C]ourts must take 'a broad view of constitutional standing in civil rights cases, especially where, as under the ADA, private enforcement suits 'are the primary method of obtaining compliance with the Act . . . .'" (quoting Doran v. 7-Eleven, 524 F.3d 1034, 1039 (9th Cir. 2008))); *Camacho*, 2019 U.S. Dist. LEXIS 209202, at *25 (similar); Chavez v. 25 Jay Street LLC & N. Henry Partners, No. 20-CV-845, 2021 U.S. Dist. LEXIS 36831, at *9 (E.D.N.Y. Feb. 24, 2021) (similar); *Murphy*, 2020 U.S. Dist. LEXIS 139887, at *16 (noting plaintiffs should be "afforded the benefit of any doubt"); Marradi v. Galway House, Inc., 2014 U.S. Dist. LEXIS 51835, at *13 (D. Mass. Apr. 15, 2014) ("[G]iven the remedial purposes of Title III and the role assigned by Congress to private enforcement of its provisions, the benefit of the doubt as to standing should be accorded [to the plaintiff].").

[128] *See* Laufer v. Naranda Hotels, LLC, No. SAG-20-2136, 2020 U.S. Dist. LEXIS 235894, at *8–9 (D. Md. Dec. 16, 2020).

[129] *Id.* at *3–4.

"turn a blind eye" toward inconsistencies in the plaintiff's complaint or testimony.[130] The *Naranda Hotels* court held the plaintiff's alleged intent to visit the hotel at "an unspecified time in the future" was insufficient to establish an injury-in-fact because it would require an "interpretation of standing . . . that 'allow[s] any aggrieved person to challenge any allegedly deficient website belonging to anyone in the country'" which would "eviscerate Article III's standing limitations."[131]

As such, federal courts are split over whether standing in virtual accessibility cases should be viewed through a narrow or broad lens. This crucial issue, along with the other key issues illustrated in this Part, makes clear that elucidation of the injury-in-fact inquiry is needed to remedy the inconsistency, unpredictability, and incompatibility of virtual accessibility case holdings.

IV. SOLVING THE ONLINE INJURY-IN-FACT PUZZLE

As previously established, federal courts assessing the injury-in-fact requirement in online accessibility cases are divided over four crucial issues: (1) the locale to which a plaintiff must intend to return; (2) how to apply the intent-to-return test in light of its geographic factors; (3) the role of a plaintiff's future injury; and (4) the stringency of the standing inquiry. This Part provides the much-needed answers to each area of ambiguity in turn.[132]

A. Mapping the Location to Which a Plaintiff Must Intend to Return

Federal courts applying the injury-in-fact tests in virtual accessibility cases have reached conflicting conclusions over the location to which a plaintiff must intend to return.[133] This disagreement has generated three inconsistent options for the location of a plaintiff's intent to return: the inaccessible website, the brick-and-mortar location, or both the website and brick-and-mortar location.[134] This section proposes that the language of ADA Title III directs courts to harmonize these options into a single consistent principle. The relevant location to which a plaintiff must intend to return turns on whether the plaintiff suffered: (a) a purely virtual website injury or (b) a hybrid website injury.

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[130] *Id.* at *19.

[131] *Id.* at *12–13, *16 (quoting Griffin v. Dep't of Labor Fed. Credit Union, 912 F.3d 649, 657 (4th Cir. 2019)).

[132] *See supra* Part III.

[133] *See supra* Section III.A.

[134] *See supra* Section III.A.

In online accessibility cases, the destination of a plaintiff's intent to return is invariably preordained by the type of injury alleged by the plaintiff. Federal courts assess a plaintiff's intent to return to a public accommodation to determine if there is a reasonable likelihood the plaintiff will suffer the *same* injury in the imminent future.[135] Title III of the ADA prohibits discrimination on the basis of disability "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation."[136] Based on this language, a website's inaccessibility can only conceivably amount to an injury under ADA Title III if it falls into one of two categories: (1) the website's inaccessibility is a barrier to a public accommodation's virtual goods or services; or (2) the websites inaccessibility is a barrier to the physical place of public accommodation's goods or services.[137] Therefore, it is crucial for federal courts to identify which type of website injury is alleged by the plaintiff at the outset of the injury-in-fact analysis, because each injury type has distinct implications on the place a plaintiff must intend to return.

Under the first website injury category, a plaintiff is injured because a website's inaccessibility deprived them of the full and equal enjoyment of the public accommodation's virtual goods or services. A virtual good or service is one that can be enjoyed by users entirely online, such as online streaming, gaming, consulting, and shopping. If a plaintiff is deprived access to a public accommodation's virtual goods or services by virtue of the public accommodation's website's inaccessibility, the plaintiff has been injured by experiencing a *virtual* barrier to a *virtual* good or service.[138] For this "purely virtual" website injury, the locale of the plaintiff's initial injury is the public accommodation's website because the plaintiff experienced the accessibility barrier and was deprived of the public accommodation's goods or services from

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[135] The Supreme Court has made clear that plaintiffs seeking injunctive relief must show a sufficient likelihood they will suffer the *same* injury in the future. *See* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013). Both injury-in-fact tests—the intent-to-return and deterrent effect tests—require a plaintiff to show intent to return to the place of the alleged discrimination. *See supra* Section I.B. This is because a plaintiff's intent to return to the place of injury suggests the plaintiff will suffer the same injury imminently, whereas a plaintiff who does not intend to return to the initial locale of injury is unlikely to suffer the same injury imminently. *See* Houston v. Marod Supermarkets, Inc., 733 F.3d 1323, 1337 (11th Cir. 2013).

[136] 42 U.S.C. § 12182(a).

[137] *See id.* In most jurisdictions, federal courts do not recognize websites as public accommodations. *See* Minh Vu et al., *supra* note 22. However, if a court recognizes a website as a public accommodation, then the plaintiff's harm falls under the first category of website injury and the proceeding analysis that corresponds with the purely virtual website injury applies. *See infra* notes 144–146 and accompanying text.

[138] Purely virtual website injuries directly parallel injuries in brick-and-mortar cases, where a plaintiff is injured by a *physical* barrier to the goods or services of a public accommodation's *physical* location. *See Houston*, 733 F.3d at 1337. This is because both purely virtual website injuries and purely physical brick-and-mortar injuries are only linked to one location. *See id.*

that online location. Therefore, to determine if a public accommodation's website will interfere with a plaintiff's ability to access the public accommodation's virtual goods or services in the future, federal courts must assess a plaintiff's intent to return to the website.[139]

Under the second category of website injury, a plaintiff is injured because an inaccessible website interfered with their ability to enjoy the goods or services of a public accommodation's brick-and-mortar location. For this type of website injury, a plaintiff is harmed by experiencing a *virtual* barrier to a public accommodation's *physical* goods or services. Unlike the purely virtual website injury discussed previously, this "hybrid" website injury is inescapably linked to both a public accommodation's physical and cyber locations.[140] A plaintiff cannot experience a hybrid website injury without visiting the public accommodation's website because the plaintiff must face a virtual barrier on the website.[141] A plaintiff also cannot experience a hybrid website injury without having intent to visit or avail themselves to the goods or services of a public accommodation's brick-and-mortar location, because the website's virtual barrier must interfere with the plaintiff's access to a public accommodation's brick-and-mortar goods or services.[142] As such, federal courts must assess the plaintiff's intent to visit or avail themselves to the goods or services of the physical place of public accommodation *and* return to the public accommodation's website.[143]

Accordingly, federal courts performing the injury-in-fact tests in online accessibility cases should first categorize the type of injury alleged by the plaintiff as either a purely virtual website injury or a hybrid injury. If the plaintiff has alleged a purely virtual injury, federal courts must assess the plaintiff's intent to return to the inaccessible website. Alternatively, if the plaintiff has alleged a hybrid injury, federal courts must assess the plaintiff's intent to return to both

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[139] It would be clearly erroneous for courts in purely physical brick-and-mortar cases to consider a plaintiff's intent to return to the public accommodation's website because its website is entirely unrelated to the plaintiff's injury. *See id.* Likewise, it is incorrect for courts in purely virtual website cases to consider a plaintiff's intent to return to a public accommodation's brick-and-mortar location because the brick-and-mortar location is irrelevant to the injury at hand.

[140] The original hybrid website injury, by definition, includes the plaintiff being denied access to goods and services of the physical place of public accommodation. 42 U.S.C. § 12182(a). To experience a hybrid website injury, a plaintiff must: (1) face an online barrier on a public accommodation's website; *and* (2) the online barrier must interfere with the plaintiff's access to the public accommodation's brick-and-mortar offerings. *See id.*

[141] *See id.*

[142] *See id.* The website's inaccessibility alone does not constitute a hybrid injury. *See id.*

[143] *See id.*

the inaccessible website and intent to avail themselves to the goods or services of the brick-and-mortar location.

To illustrate this proposal, the aforementioned analysis will be applied to real online accessibility cases. In *National Federation of the Blind v. Scribd Inc.*, a plaintiff with a visual impairment sued a digital library subscription service under ADA Title III because its website was incompatible with her screen-reading software, which prevented her from enjoying its online service.[144] Because the plaintiff in *Scribd Inc.* experienced a virtual barrier to the digital library subscription service's virtual service, the plaintiff alleged a purely virtual injury.[145] Therefore, to determine if the plaintiff in *Scribd Inc.* is likely to experience the same injury in the future, a court must assess the plaintiff's intent to return to the digital library subscription service's website.[146]

In *Camacho v. Vanderbilt University*, the plaintiff alleged he was injured under Title III of the ADA because a university website deprived him of the necessary information required for him to determine whether he would like to apply and attend the university.[147] The injury alleged by the plaintiff in *Camacho* is properly categorized as a hybrid website injury because the plaintiff experienced a *virtual* barrier to the university's *brick-and-mortar* services.[148] The court in *Camacho* erred by focusing entirely on the plaintiff's intent to return to the university's website, because the inaccessibility of the university's website alone does not constitute a hybrid website injury that is cognizable under Title III of the ADA.[149] As such, the *Camacho* court concluded that the plaintiff's intent to return to the website—without an intent to visit or avail himself to the services of the university—could not demonstrate an immediate threat of future injury under Title III of the ADA.[150] Rather, the court in *Camacho* should have recognized the plaintiff suffered a hybrid website injury, which necessitates consideration of both the plaintiff's intent to return to the

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144 97 F. Supp. 3d 565, 567 (D. Vt. 2015). The digital library subscription service did not operate a brick-and-mortar location; rather, its services were offered to the public exclusively online. *See id.* The court in *Scribd Inc.* held the digital library subscription service's website constituted a place of public accommodation under Title III of the ADA. *Id.* at 576.

145 *Id.* at 567.

146 *Id.*

147 No. 18 Civ. 10694, 2019 U.S. Dist. LEXIS 209202, at *5 (S.D.N.Y. Dec. 4, 2019).

148 *See id.*

149 *See id.* at *30–31.

150 *Id.*

university's website *and* the plaintiff's intent to visit or avail himself to the brick-and-mortar university in its injury-in-fact analysis.[151]

Similarly, in *Mahoney*, the plaintiff alleged he was injured under Title III of the ADA because an amusement park website deprived him of the "information necessary to access and visit" the amusement park.[152] The injury alleged by the plaintiff constitutes a hybrid website injury because the plaintiff experienced a *virtual* barrier to the amusement park's *brick-and-mortar* services.[153] By focusing solely on the plaintiff's intent to avail themselves to the services of the brick-and-mortar amusement park and ignoring the plaintiff's intent to return to the website, the court in *Mahoney* misunderstood either the purpose of the intent-to-return test or the nature of the injury suffered by the plaintiff.[154] Intent to visit the brick-and-mortar amusement park without intent to return to its alleged virtual barrier does not constitute a hybrid website injury under Title III of the ADA and therefore cannot evince the likelihood of a plaintiff experiencing an imminent future injury.[155] Instead, the court in *Mahoney* should have identified that the plaintiff suffered a hybrid website injury and considered the plaintiff's intent to return to the amusement park's website *and* the plaintiff's intent to visit or avail himself to the brick-and-mortar amusement park while conducting its injury-in-fact analysis.[156]

In summary, federal courts conducting the injury-in-fact tests in online accessibility cases must first categorize the type of injury alleged by the plaintiff as either a purely virtual website injury or a hybrid injury. If the plaintiff has alleged a purely virtual injury, federal courts must assess the plaintiff's intent to return to the inaccessible website. Alternatively, if the plaintiff has alleged a hybrid injury, federal courts must assess the plaintiff's intent to return to both the inaccessible website and intent to avail themselves to the goods or services of the brick-and-mortar location.

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151 The plaintiff in *Camacho* alleged he intended to visit the university campus in the near future and apply for admission if the university met his needs; however, the court ignored these facts and focused solely on the plaintiff's intent to return to the university's website. *Id.*

152 Mahoney v. Waldameer Park, Inc., No. 20-3960, 2021 U.S. Dist. LEXIS 60477, at *2 (E.D. Pa. Mar. 30, 2021).

153 *See id.* at *11.

154 *See id.* at *2.

155 *See id.* at *2, *13.

156 The plaintiff in *Camacho* alleged he intended to visit the university campus in the near future and apply for admission if the university met his needs; however, the court ignored these facts and focused solely on the plaintiff's intent to return to the university's website. *Camacho*, 2019 U.S. Dist. LEXIS 209202, at *30–31.

B. Virtually Compatible Intent-to-Return Factors

The ubiquitous nature of cyberspace has made it difficult for courts to apply the traditional intent-to-return test in virtual accessibility cases.[157] Federal courts are bemused by the intent-to-return test's geographic factors and divided over how to ascertain a plaintiff's intent to return to the web in light of them.[158] This section assesses the current approaches taken by federal courts and asserts such approaches undermine Supreme Court precedent. It then proposes a novel intent-to-return test that is appropriately customized to the unique features of cyberspace.

The intent-to-return test's geographic factors offer no insight into a plaintiff's intent to return to a website.[159] As previously established, federal courts must assess a plaintiff's intent to return to an inaccessible website in every online accessibility case.[160] However, the traditional intent-to-return test entails two factors that are innately linked to the physical realm: the plaintiff's proximity to and frequency of travel near a public accommodation.[161] This begs the question: How does one assess a plaintiff's proximity to or frequency of travel near a website? Is the website located at the place of the plaintiff's computer? Cellphone? Internet router? Or even the website's server?

Cyberspace is "layered on top of, within, and between the fabric of traditional geographical space."[162] Unfixed to any perceivable physical location, websites can be accessed from various devices at any time and from nearly any location in the world.[163] However, even if a website's "location" could be discerned, it could not provide meaningful insight into whether a plaintiff will return to an inaccessible website. Federal courts in brick-and-mortar accessibility cases consider how close a plaintiff lives to a public

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157 *See supra* Section III.B.

158 *See supra* Section III.B .

159 *See* Parks v. Richard, No. 2:20-cv-227-FtM-38NPM, 2020 U.S. Dist. LEXIS 86790, at *6 (M.D. Fla. May 18, 2020) (noting how the intent-to-return test's geographic factors are not helpful in virtual accessibility cases because websites "present intangible barriers that can be felt far away from the property"); Kennedy v. Floridian Hotel, Inc., No. 1:18-cv-20839-UU, 2018 U.S. Dist. LEXIS 207984, at *32–33 (S.D. Fla. Dec. 7, 2018) (noting that in virtual accessibility cases, "some of the considerations that are relevant in discussing the threat of future injury from physical property may take on outsized importance when analyzing websites").

160 Both the purely virtual website injury and hybrid website injury cognizable under Title III of the ADA necessitate a showing of a plaintiff's intent to return to a website. *See supra* Section IV.A.

161 *See* Houston v. Marod Supermarkets, Inc., 733 F.3d 1323, 1337 n.6 (11th Cir. 2013).

162 Michael Batty, *The Geography of Cyberspace*, 20 ENV'T & PLAN. B: PLAN. & DESIGN 615, 616 (1993).

163 Voyeur Dorm, L.C. v. City of Tampa, 265 F.3d 1232, 1237 n.3 (11th Cir. 2001) (explaining the internet is "a unique medium . . . located in no particular geographical location but available to anyone, anywhere in the world, with access to the [i]nternet" (quoting Reno v. ACLU, 521 U.S. 844, 851 (1997))).

accommodation and how frequently they travel near that public accommodation, because factors like convenience, time, and expense undoubtedly influence a person's decision to return to a public accommodation. However, these factors are entirely absent in online accessibility cases.[164] Because websites can be accessed instantly from practically any location on planet Earth, the geographic intent-to-return factors have no probative value in determining if a plaintiff will return to a website. As such, federal courts in virtual accessibility cases should not consider geographic factors to ascertain a plaintiff's intent to return to the web.

Despite the inapplicability of geography in cyberspace, federal courts cannot merely remove the intent-to-return test's geographic factors from their inquiry because casting these factors aside loses sight of the purpose of the intent-to-return test. In the landmark standing case, *Lujan v. Defenders of Wildlife*, the Supreme Court made this purpose clear, establishing a plaintiff's professed intent to return, "without any description of concrete plans, or indeed even any speculation of *when* the some day will be," cannot satisfy the injury in fact requirement for plaintiffs seeking injunctive relief.[165] Such "some day" intent, the *Lujan* Court cautioned, "is simply not enough."[166] In online accessibility cases, the intent-to-return test functions to prove plaintiffs possess more than just the someday intentions that the Supreme Court in *Lujan* warned against.[167]

Federal courts avoid infringing on the *Lujan* holding by considering a plaintiff's proximity to, past patronage of, and frequency of travel near a place of public accommodation, in addition to a plaintiff's professed intent to return to a public accommodation under the intent-to-return test.[168] However,

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[164] *See Kennedy*, 2018 U.S. Dist. LEXIS 207984, at *33 (noting websites are "easily and instantly accessible 'from the comfort of . . . home and at no cost'").

[165] 504 U.S. 555, 564 (1992). In *Lujan*, a wildlife organization sought injunctive relief to rescind amendments to the Endangered Species Act ("ESA"). *Id.* at 559. Originally, the ESA required federal agencies to consult with the Secretary of the Interior to ensure federally funded projects did not jeopardize endangered or threatened species worldwide; however, amendments to the ESA limited its scope to projects in the United States or on the high seas. *Id.* at 558–59. To determine whether the wildlife organization established an injury-in-fact, the *Lujan* Court looked to the allegations of two of its members. *Id.* at 563. One member alleged she previously visited the Nile, where she observed "the endangered nile crocodile and she intend[ed] to do so again." *Id.* The other member alleged that—although she had never observed the endangered Asian elephant—she had previously visited Sri Lanka where she observed its habitat, and "she intend[ed] to return to Sri Lanka in the future." *Id.* When asked about her plans to return to Sri Lanka, this member stated "I don't know [when]. There is a civil war going on right now. I don't know. Not next year, I will say. In the future." *Id.* at 564. Even though there were American funded projects at the sites described in the member's affidavits, the *Lujan* Court held these allegations could not demonstrate an imminent threat of future harm. *Id.*

[166] *Id.*

[167] *See id.*

[168] *See id.*; Houston v. Marod Supermarkets, Inc., 733 F.3d 1323, 1337 n.6 (11th Cir. 2013).

eliminating the geographic intent-to-return factors frequently leaves federal courts with only one factor remaining: the plaintiff's professed intent to return.[169] Of all the intent-to-return factors, the plaintiff's alleged intent to return is the most susceptible to vagueness, least falsifiable, and most likely to infringe on the Supreme Court's holding in *Lujan*.[170] By eliminating the geographic factors of the intent-to-return test, federal courts in virtual accessibility cases have given undue weight to the one intent-to-return factor most likely to produce results inconsistent with Supreme Court precedent.[171] Consequently, it is erroneous for federal courts to merely remove the inapplicable geographic factors from the intent-to-return test in online accessibility cases.[172]

Therefore, because half of the traditional intent-to-return factors are unsuitable in cyberspace and merely eliminating the inapplicable factors is untenable, federal courts must take a novel approach to determine if a plaintiff faces an imminent threat of future injury online. In virtual accessibility cases, federal courts should replace the geographic intent-to-return factors with the following website-centric factors: (1) the type of website content that is inaccessible to the plaintiff; and (2) the relation between the inaccessible content and the plaintiff's alleged harm.[173]

First, federal courts should consider the type of content that is inaccessible to the plaintiff to determine whether a plaintiff is likely to experience imminent online injury. Federal courts hear cases covering a wide range of inaccessible online content, including product descriptions, virtual check-outs, video testimonials, and calculators, to name a few.[174] Despite the vast array of inaccessible online content, federal courts conducting the intent-to-return test treat all inaccessible content the same.[175] But is a plaintiff just as likely to return

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[169] *See, e.g.*, Poschmann v. Fountain TN, LLC, No. 2:19-cv-359-FtM-99NPM, 2019 U.S. Dist. LEXIS 159417, at *6 (M.D. Fla. Sept. 19, 2019).

[170] *See Lujan*, 504 U.S. at 564.

[171] *See Poschmann*, 2019 U.S. Dist. LEXIS 159417, at *6.

[172] *See Lujan*, 504 U.S. at 564.

[173] These additional factors were first considered in *Price v. City of Ocala*, an online-based ADA Title II claim. 375 F. Supp. 3d 1264, 1275 (M.D. Fla. 2019).

[174] *See, e.g.*, Gomez v. Gen. Nutrition Corp., 323 F. Supp. 3d 1368, 1372 (S.D. Fla. 2018) (alleging a website's virtual shopping cart was inaccessible); Erasmus v. Perry, No. 2:21-cv-00915-WBS-KJN, 2021 U.S. Dist. LEXIS 184460, at *13 (E.D. Cal. Sept. 24, 2021) (alleging a website's testimonial videos were inaccessible); Camacho v. Vanderbilt Univ., No. 18 Civ. 10694, 2019 U.S. Dist. LEXIS 209202, at *5 (S.D.N.Y. Dec. 4, 2019) (alleging an online net price calculator was inaccessible).

[175] There are no factors in the intent-to-return test that focus on or differentiate between the type of online content that is inaccessible to plaintiffs. *See* Gomez v. Dadeland Dodge, Inc., No. 19-23682-Civ, 2020 U.S. Dist. LEXIS 73701, at *8–9 (S.D. Fla. Apr. 24, 2020).

to a website's antiquated blog post as they are to return to its contact information page?

Both common sense and empirical studies indicate that people are unlikely to revisit irrelevant or inapplicable website content.[176] The Fourth and Sixth Circuits have also supported this notion.[177] In *Griffin v. Department of Labor Federal Credit Union* and *Brintley v. Aeroquip Credit Union*, plaintiffs with visual disabilities sued credit unions under Title III of the ADA for inaccessible website content.[178] In each case, the plaintiff was barred by state law from becoming a member of and utilizing the credit union's services.[179] The courts in *Griffin* and *Brintley* held the plaintiffs did not face an imminent threat of future injury because it was objectively improbable a plaintiff would revisit a website to obtain information about a service they could never use.[180]

The inverse relationship between the irrelevancy of online content and the likelihood a plaintiff will revisit it in the future identified by the *Griffin* and *Brintley* courts is applicable in all online accessibility cases.[181] There are countless ways online content can be unusable by or inapplicable to plaintiffs. For example, some online content becomes irrelevant to all website users as time elapses. It is doubtful a plaintiff would revisit outdated information, antiquated calendars, newsletters or schedules, expired coupons, discontinued product or service pages, or other obsolete content in the future because the usability of

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176 *See* Natalie Vila & Ines Kuster, *Consumer Feelings and Behaviours Towards Well Designed Websites*, 48 INFO. & MGMT. 166, 168 (2011) (noting improving the quality of a website's information and useability is "likely to increase customer satisfaction to the point of making the user return to the website"). *See generally* Blanca Hernández, Julio Jiménez & M. José Martín, *Key Website Factors in E-business Strategy*, 29 INT'L J. INFO. MGMT. 362 (2009) (noting that the accuracy, up-to-dateness, and relevancy of a website's information to the customer, are critical for the success of a website); F.O. Isinkayea, Y.O. Foljima & B.A. Ojokoh, *Recommendation Systems: Principles, Methods and Evaluation*, 16 EGYPTIAN INFORMATICS J. 261 (2015).

177 *See* Griffin v. Dep't of Lab. Fed. Credit Union, 912 F.3d 649, 655 (4th Cir. 2019); Brintley v. Aeroquip Credit Union (18-2326), 936 F.3d 489, 492 (6th Cir. 2019).

178 *Griffin*, 912 F.3d at 655; *Brintley*, 936 F.3d at 492.

179 *Griffin*, 912 F.3d at 655 ("The Federal Credit Union Act of 1934 positively forbids Griffin from taking advantage of any of the Credit Union's products or services because he does not share the 'common bond' of those who may become its members." (quoting 12 U.S.C. § 1759(b))); *Brintley*, 936 F.3d at 492 ("[D]omestic credit unions may assist only those falling within a narrow 'field of membership' based on one or more 'common bonds.' . . . [The plaintiff] isn't within any of these fields of membership . . . ." (quoting MICH. COMP. LAWS § 490.352 (2004))).

180 *Griffin*, 912 F.3d at 656 (noting the facts suggested it was "objectively implausible" the plaintiff intended to return to the credit union's website because "why would an individual with no hope of ever making use of the Credit Union's services want to visit a website describing those services?"); *Brintley*, 936 F.3d at 493 (dismissing the "possibility [the plaintiff] wants to access the [credit unions'] websites in full to determine whether to become a member of either credit union" because the plaintiff "had not conveyed any intent to join either credit union").

181 *See Griffin*, 912 F.3d at 656; *Brintley*, 936 F.3d at 493.

such content has eroded with the passage of time.[182] Moreover, some virtual content is only accessible to, or usable by, members of a limited group, such as employees, students, or patients, making it unlikely a non-member plaintiff will visit it in the future.[183]

Numerous other barriers, such as paywalls, passwords, or language, render online content irrelevant to, or unusable by, plaintiffs, irrespective of their disabilities. Akin to geographical distance, the inapplicability or irrelevancy of inaccessible content makes it less likely a plaintiff will visit the content in the future.[184] As such, federal courts should consider the type of content that is inaccessible to the plaintiff as an intent-to-return factor in online accessibility cases because it is probative of whether the plaintiff will revisit such content at a future date.

The second novel factor federal courts should consider is the relationship between the inaccessible content and the harm alleged by the plaintiff. As previously established, a plaintiff suffers an injury cognizable under Title III of the ADA when inaccessible website content interferes with the plaintiff's full and equal enjoyment of a public accommodation's goods or services.[185] Therefore, in online accessibility cases, the threat of future harm is not the inaccessibility of the content; rather, it is the deleterious effect the inaccessible content has on the plaintiff's ability to enjoy a public accommodation's goods and services.[186]

As such, the relationship between the inaccessible content and the plaintiff's alleged injury is crucial to determining whether a plaintiff faces an immediate threat of future harm. If a plaintiff does not allege a specific way the inaccessible content hindered his enjoyment of a public accommodation's goods or services, "it is akin to an allegation that [the plaintiff] was harmed by the inaccessibility

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[182] This type of content is irrelevant because it serves no functional purpose. For example, in *Price v. Escalante-Black Diamond Golf Club LLC*, a plaintiff sued a golf course under Title III of the ADA because he could not access a one-and-a-half-year-old member newsletter on its website. No. 5:19-cv-22-Oc-30PRL, 2019 U.S. Dist. LEXIS 76288, at *17 (M.D. Fla. Apr. 29, 2019). It is unlikely the plaintiff in *Escalante* would revisit an archived member newsletter containing outdated information in the future because the newsletter's content was only temporally relevant, which made it irrelevant to the plaintiff at the time he accessed it and even less relevant as time elapsed. *See id.* Granted, there might be subjective reasons for a plaintiff to visit outdated or antiquated information—such as for research purposes or general interest. In those instances, federal courts should consider the plaintiff's professed reason for visiting such content.

[183] For example, a plaintiff is unlikely to return to a university's online student portal or a company's online staff portal in the future if they are not a university student or company employee, because the portal, and what lies beyond it, are not relevant to the plaintiff.

[184] *See* Price v. City of Ocala, 375 F. Supp. 3d 1264, 1275 (M.D. Fla. 2019).

[185] *See supra* Section IV.A.

[186] *See supra* Section IV.A; *Price*, 375 F. Supp. 3d at 1275.

of the [content] itself," which weighs against the plaintiff having an imminent threat of future injury.[187] Similarly, if the harm alleged by the plaintiff is too attenuated from the inaccessible content, a plaintiff's access to such content in the future is unlikely to result in an injury cognizable under ADA Title III.[188] Thus, federal courts should consider the relationship between the inaccessible content and alleged harm in online accessibility cases, because a plaintiff cannot show an imminent threat of future *injury* by presenting evidence of future *inaccessibility* alone.

Accordingly, the geographic intent-to-return factors are not probative of a plaintiff's intent to return to an inaccessible website. However, federal courts cannot merely remove the geographic factors from the intent-to-return test because the remaining factors are prone to violate Supreme Court precedent. Instead, federal courts should replace the problematic geographic factors of the intent-to-return test with two factors relevant to websites—the type of inaccessible content and the relationship between the inaccessible content and harm alleged by the plaintiff—because both novel factors are probative of whether a plaintiff faces an imminent threat of future online injury.

C. Preserving the Role of Future Online Injury

Federal courts in online accessibility cases are divided over the role a plaintiff's future injury plays in the injury-in-fact analysis.[189] Some courts center the entire injury-in-fact analysis on the plaintiff's past injury; some assess a plaintiff's risk of future injury by looking solely at the plaintiff's past injury; others have stressed that a plaintiff's showing of past injury is insufficient.[190] This section demonstrates that it is erroneous for federal courts to focus the injury-in-fact analysis exclusively on a plaintiff's past injury because it violates longstanding Supreme Court precedent. As such, federal courts must assess a plaintiff's risk of *future* harm to satisfy the injury-in-fact requirement.

A plaintiff's risk of future injury is indispensable from the virtual injury-in-fact analysis. In *City of Los Angeles v. Lyons*, a plaintiff was unjustifiably placed in a chokehold by city police officers during a traffic stop, which damaged his larynx.[191] The plaintiff in *Lyons* sought an injunction against the police department to prohibit the use of chokeholds, except where the victim of the

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187 *Price*, 375 F. Supp. 3d at 1277.
188 *See id.*
189 *See supra* Section III.C.
190 *See supra* Section III.C.
191 461 U.S. 95, 97–98 (1983).

chokehold threatened the immediate use of deadly force.[192] The Supreme Court held the plaintiff did not have standing to seek an injunction because the plaintiff did not establish he was "likely to suffer *future* injury."[193] Even though the plaintiff in *Lyons* was illegally choked by the police in the past, his past injury did not "establish a real and immediate threat" that he would be stopped by the police again and placed in an illegal chokehold without provoking or resisting the police.[194] The Court in *Lyons* made it clear that if a plaintiff cannot demonstrate a "sufficient likelihood" they will be wronged again in a similar way, they have not met the requirements for seeking an injunction in a federal court.[195] The Court has reaffirmed this future injury requirement for plaintiffs seeking injunctive relief numerous times in subsequent cases.[196]

It is erroneous for federal courts in virtual accessibility cases to ignore the future injury requirement. Because every ADA Title III plaintiff seeks injunctive relief, federal courts in online accessibility cases are bound by the future injury requirement articulated by the Supreme Court.[197] As such, a plaintiff in a virtual accessibility case must establish they are likely to experience re-injury in the future. Yet, federal courts often toss this requirement aside. For example, in *Erasmus v. Perry*, the court held that a plaintiff had "already suffered an injury in fact" and had standing because he had previously encountered a virtual barrier

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[192] *Id.* at 98. The plaintiff sought this injunction on the grounds the plaintiff and those similarly situated to him face the risk of irreparable injury and the plaintiff feared any contact he had with the police might "result in him being choked and strangled to death without provocation, justification or other legal excuse." *Id.*

[193] *Id.* at 105 (emphasis added).

[194] *Id.* To establish a threat of future injury, the plaintiff in *Lyons* would have needed to show he would encounter the police again and "make the incredible assertion either (1) that *all* police officers in [the city] *always* choke any citizen with whom they happen to have an encounter, . . . or (2) that the City ordered or authorized police officers" to do so. *Id.* at 105–06.

[195] *Id.* at 111. A showing of immediate threat of future injury is required "[b]ecause injunctions regulate future conduct." Wooden v. Bd. of Regents of Univ. Sys. of Ga., 247 F.3d 1262, 1284 (11th Cir. 2001).

[196] *See, e.g.*, TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2210 (2021) ("[A] person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring . . . so long as the risk of harm is sufficiently imminent and substantial."); Clapper v. Amnesty Int'l USA, 568 U.S. 398, 401 (holding the plaintiff's theory of future injury "is too speculative to satisfy the well-established requirement that threatened injury must be 'certainly impending'" (quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990))); Lujan v. Def. of Wildlife, 504 U. S. 555, 564 (1992) ("'[S]ome day' intentions . . . do not support a finding of the 'actual or imminent' injury that our cases require."); *Whitmore*, 495 U.S. at 158 ("Allegations of possible future injury do not satisfy the requirements of Art. III. A threatened injury must be 'certainly impending' to constitute injury in fact." (quoting Babbitt v. Farm Workers, 442 U.S. 289, 298 (1979))).

[197] *See Wooden*, 247 F.3d at 1284–85 (noting injunctive relief is the only remedy for a plaintiff suing under ADA Title III); Citizens United v. FEC, 558 U.S. 310, 362 (2010) ("[Supreme Court] precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error."). The Supreme Court has not indicated Title III of the ADA is excluded from the future injury requirement. *See* PGA Tour, Inc. v. Martin, 532 U.S. 661, 690 (2001).

that hindered his access to a public accommodation.[198] The *Erasmus* court's holding is a gross deviation from Supreme Court precedent.[199] The Supreme Court has explicitly held that past injury, "if unaccompanied by any continuing, present adverse effects," cannot satisfy the injury-in-fact requirement for injunctive relief because a plaintiff must demonstrate a risk of *future* injury.[200] Therefore, the *Erasmus* court's contention that plaintiffs can establish standing for injunctive relief by pointing solely to the plaintiff's past injury is insupportable.[201]

Similarly, in *Gomez v. General Nutrition Corp.*, the court held that a plaintiff had met the injury-in-fact requirement because he had faced a virtual access barrier and "if [the website was] not addressed, he *could* suffer that same injury in the future."[202] Even though the *Gomez* court expressed a general awareness of future injury requirement articulated by the Supreme Court, both the court's reasoning and holding evinced a categorical misapprehension of the principle.[203] The Supreme Court has explicitly held a plaintiff cannot establish an injury-in-fact for injunctive relief by merely showing they "*could*" suffer the same injury in the future.[204] Instead, a plaintiff must show there is a "*sufficient likelihood*" the plaintiff will be injured in the imminent future.[205] Had the court in *Gomez* considered any facts other than the plaintiff's past injury—such as the fact that the plaintiff had not visited the company's website in over one year, or the fact that the plaintiff did not express any intent to return to the website again—it would have been unable to conscionably reach the conclusion that it was sufficiently likely the plaintiff would be injured in the imminent future.[206] Thus, the *Gomez* court violated the Supreme Court's future injury requirement by looking solely at the plaintiff's past injury under the guise of future injury analysis.[207]

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198 No. 2:21-cv-00915-WBS-KJN, 2021 U.S. Dist. LEXIS 184460, at *6 (E.D. Cal. Sept. 24, 2021) (quoting Doran v. 7-Eleven, Inc., 524 F.3d 1034, 1042 n.5 (9th Cir. 2008)).

199 *See id.*; *Lyons*, 461 U.S. at 111.

200 *Lujan*, 504 U.S. at 564 (quoting *Lyons*, 461 U.S. at 102).

201 *See Erasmus*, 2021 U.S. Dist. LEXIS 184460, at *6.

202 Gomez v. Gen. Nutrition Corp., 323 F. Supp. 3d 1368, 1374 (S.D. Fla. 2018) (emphasis added).

203 *See id.* ("In an injunctive suit, a plaintiff must additionally show there is 'a sufficient likelihood that he will be [injured] by [such conduct] in the future.'" (quoting Gaylor v. N. Springs Assocs., LLLP, 648 F. App'x 807, 811 (11th Cir. 2016))).

204 *Id.* (emphasis added); Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013) ("[W]e have repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient." (quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990))).

205 City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983) (emphasis added).

206 *See Gomez*, 323 F. Supp. 3d at 1374.

207 *See id.*

Accordingly, federal courts in virtual accessibility cases are conducting injury-in-fact analysis that is untethered from Supreme Court precedent. Many federal courts have adopted injury-in-fact approaches that erroneously focus entirely on the plaintiff's past injury. This Comment, therefore, asserts that to remain consistent with the Supreme Court precedent, federal courts must assess whether a plaintiff is likely to suffer an injury in the imminent *future*.

D. The Constitutionally Sound Scope of Cyber Standing

In online accessibility cases, federal courts have reached conflicting conclusions regarding the degree of leniency that should be afforded to plaintiffs throughout the injury-in-fact analysis.[208] This section argues federal courts should not take a broad approach to standing in ADA Title III website cases because (1) standing leniency based on *Trafficante v. Metropolitan Life Insurance* misapplies Supreme Court precedent;[209] (2) standing leniency based on the private enforcement of the ADA violates the Supreme Court's holding in *TransUnion LLC v. Ramirez*;[210] and (3) the extant issue of serial litigation under Title III of the ADA is exacerbated by lenient standing requirements.

1. Standing Leniency Based on Trafficante Misapplies Supreme Court Precedent

Federal courts frequently contend a broad view of standing in virtual accessibility cases is necessary because Title III of the ADA is primarily enforced by private lawsuits—a notion which can be traced to the Supreme Court's holding in *Trafficante v. Metropolitan Life Insurance.*[211]

In *Trafficante*, two tenants—one black and one white—who lived in an apartment rental complex sued an apartment rental company under the Fair Housing Act for discriminating against "nonwhites on the basis of race in the rental of apartments."[212] The plaintiffs in *Trafficante* alleged they were injured by the apartment rental company's discrimination against non-whites, because

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[208] *See supra* Section III.D.

[209] *See* 409 U.S. 205, 212 (1972).

[210] 141 S. Ct. 2190, 2200 (2021).

[211] *See supra* Section III.D; *supra* note 127; *Trafficante*, 409 U.S. at 212. Courts frequently cite to the holding in *Chapman v. Pier 1 Imports (U.S.), Inc.*, to support taking a lenient approach to standing in online accessibility cases. 631 F.3d 939, 952 (9th Cir. 2011). The *Chapman* court adopted its broad standing notion from the holding in *Doran v. 7-Eleven, Inc*. *See Chapman*, 631 F.3d at 952; Doran v. 7-Eleven, Inc., 524 F.3d 1034, 1043 (9th Cir. 2008). The *Doran* court adopted its broad standing notion from Supreme Court's holding in *Trafficante. See Doran*, 524 F.3d at 1043; *Trafficante*, 409 U.S. at 209.

[212] *Trafficante*, 409 U.S. at 206–07.

it caused them to lose out on the social and business advantages that come with living in an integrated community and suffer "embarrassment and economic damage in social, business, and professional activities from being 'stigmatized' as residents of a 'white ghetto.'"[213] Both the district court and court of appeals held the plaintiffs did not fall within the class of people entitled to sue under the Fair Housing Act because they were not personally subjected to discriminatory housing practices.[214]

The Supreme Court in *Trafficante* held the plaintiffs were protected by the Fair Housing Act, despite not being personally discriminated against.[215] The Court reasoned that the definition of a "person aggrieved" in the Fair Housing Act was broadly defined as "[a]ny person who claims to have been injured by a discriminatory housing practice," which evinced "congressional intent[] to define standing as broadly as is permitted by Article III of the Constitution."[216]

Decades later, federal courts in online accessibility cases incorrectly interpret the Supreme Court's holding in *Trafficante* as necessitating a broad view of standing in ADA Title III cases.[217] In its opinion, the *Trafficante* Court focused primarily on whether the injuries alleged by the plaintiffs were protected by the Fair Housing Act.[218] Despite referring to Congress's intent for broad standing under the Fair Housing Act, the Supreme Court's holding in *Trafficante* did not expand the standing doctrine in the way federal courts in online accessibility cases contend.[219] The *Trafficante* holding only "broadened" standing to the extent that it recognized the Fair Housing Act affords all tenants the right to live in an unsegregated community.[220] The Supreme Court in *Trafficante* held the plaintiffs had standing because they had experienced injuries cognizable under the Fair Housing Act *and* satisfied the injury-in-fact requirement.[221] The *Trafficante* Court did not take a broad approach to the injury-in-fact requirement, let alone instruct federal courts to view the injury-in-fact requirement through a lenient lens.[222]

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213 *Id.* at 208.

214 *Id.*

215 *See id.*

216 *Id.* at 208–09.

217 *See* Erasmus v. Perry, No. 2:21-cv-00915-WBS-KJN, 2021 U.S. Dist. LEXIS 184460, at *7 (E.D. Cal. Sept. 24, 2021); Chavez v. 25 Jay St. LLC & N. Henry, No. 20-CV-845, 2021 U.S. Dist. LEXIS 36831, at *9 (E.D.N.Y. Feb. 24, 2021).

218 Rosalee Chiara, Trafficante v. Metropolitan Life Ins. Co.*: White Ghetto Tenants—Standing to Protest Landlord's Rental Discrimination*, 22 CLEV. ST. L. REV. 359, 364 (1973).

219 *Id.*

220 *Id.* at 366.

221 *Trafficante*, 409 U.S. at 209.

222 *Id.* at 211.

It is an even further stretch for federal courts to conclude *Trafficante* requires a broad approach to standing in online accessibility cases because Title III of the ADA does not contain similar language to the Fair Housing Act, which the Supreme Court in *Trafficante* relied on.[223] The sweeping language of the Fair Housing Act that warranted the supposed "broad" application of standing in *Trafficante* is notably absent in the ADA.[224] The Fair Housing Act defines the category of people eligible to bring housing discrimination claims as "[*a*]*ny person* who claims to have been injured by a discriminatory housing practice."[225] In contrast, ADA Title III claims cannot be brought by "any person" who claims to be harmed by a public accommodation's discriminatory practices; rather, Title III of the ADA requires a person to have a disability within the meaning of the statute before the ADA Title III's protections are triggered.[226] As such, the *Trafficante* case and its holding are not applicable in online accessibility cases because Title III of the ADA does not contain language similar to the language of the Fair Housing Act that the Supreme Court's *Trafficante* decision relied on.[227]

Accordingly, contrary to the interpretations touted by lower courts, the Supreme Court's holding in *Trafficante* does not require federal courts in online accessibility to take an expansive approach to standing in online accessibility cases.[228]

2. Standing Leniency Based on Private Enforcement Contravenes Supreme Court Precedent

Not only is a broad approach to standing in online accessibility cases not required, but it is also not permitted.[229] This section argues standing leniency in virtual accessibility cases cannot be supported on the grounds that ADA Title III

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223 *See id.* at 206 n.1; 42 U.S.C. § 12102(1)(A)–(C).

224 *See Trafficante*, 409 U.S. at 206 n.1.

225 *Id.* (emphasis added).

226 *See* 42 U.S.C. § 12102(1)(A)–(C) (defining disability, with respect to an individual, as "a physical or mental impairment that substantially limits one or more major life activities of such individual; . . . a record of such an impairment; or . . . being regarded as having such an impairment"); *id.* § 12102(2)(A) (defining major life activities as including, but not being limited to "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working"); *id.* § 12102(2)(B) ("[A] major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.").

227 *See Trafficante*, 409 U.S. at 206 n.1.

228 *See id.* at 205.

229 *See supra* Section III.D; *supra* note 127.

is principally enforced through private suits because it is inconsistent with the Supreme Court's holding in *TransUnion*.[230]

In *TransUnion*, a credit reporting agency used software to flag an individual's credit report if their name matched the name of a person listed by the Department's Office of Foreign Assets Control as a national threat.[231] The third-party software in *TransUnion* produced many false positive matches, which resulted in the credit reporting agency generating credit reports with inaccurate information.[232] Over 8,000 plaintiffs sued the credit reporting agency under the Fair Credit Reporting Act for failing to use reasonable measures to ensure the accuracy of their credit files.[233] However, only 1,853 of the plaintiffs had their credit reports containing false information disseminated by the credit reporting company.[234] The Supreme Court in *TransUnion* held the plaintiffs who did not have inaccurate credit reports sent to third-party businesses did not have standing because they did not suffer an injury under the Fair Credit Reporting Act.[235] The *TransUnion* Court reasoned that uninjured plaintiffs sought to sue only to "ensure a defendant's 'compliance with regulatory law' (and of course, to obtain some money via the statutory damages)," which are not sufficient harms to satisfy the standing requirement.[236]

It is improper for federal courts to take a lenient approach to standing in virtual accessibility cases on the grounds that ADA Title III compliance is primarily enforced by private parties, because it is incompatible with the Supreme Court's holding in *TransUnion*.[237] The *TransUnion* Court made clear plaintiffs are unaccountable to the public and "not charged with pursuing the public interest in enforcing a defendant's general compliance with regulatory law."[238] In *TransUnion*, the fact that the plaintiffs sought to enforce the defendant's compliance with the Fair Credit Reporting Act had no bearing on whether the plaintiffs had standing to sue.[239] Therefore, the fact that plaintiffs in online accessibility cases are the primary enforcers of ADA compliance should not weigh in favor of a plaintiff having standing.[240]

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230 *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021).
231 *Id.* at 2201.
232 *Id.*
233 *Id.* at 2200.
234 *Id.*
235 *Id.*
236 *Id.* at 2206 (quoting Spokeo, Inc. v. Robins, 578 U.S. 330, 345 (2016)).
237 *See id.* at 2200.
238 *Id.* at 2207.
239 *See id.* at 2200.
240 *See id.*

Moreover, the Supreme Court in *TransUnion* expressly cautioned against an overly broad interpretation of standing because it "would flout constitutional text, history, and precedent," which further indicates the federal courts' deviation from the traditional scope of standing in online accessibility cases is misguided.[241] As such, it is incorrect for federal courts to broaden the scope of standing in online accessibility cases on the grounds that private lawsuits are the primary method of obtaining compliance with ADA Title III because it contradicts the Supreme Court's holding in *TransUnion.*[242]

Accordingly, the holding in *TransUnion* tells us that even though ADA Title III is primarily enforced by private lawsuits, it should have no bearing on the leniency of a federal court's application of the standing doctrine.[243] In addition, the Court cautioning against the impropriety of unduly broad standing in *TransUnion* further detracts from the notion that federal courts ought to take a lenient approach to standing in website accessibility cases.[244]

3. Standing Leniency Exacerbates Serial Litigation

Over the past decade, online accessibility lawsuits have grown exponentially, progressively inundating the federal courts.[245] Contributing greatly to this flurry of online accessibility cases is the phenomenon of serial litigation that some have coined "surf-by" lawsuits.[246] Surf-by lawsuits are brought by claimants who visit a public accommodation's website "for the sole purpose of discovering potential accessibility violations."[247] Because a sole claimant can visit countless websites with relative ease, online accessibility lawsuits are commonly filed on behalf of the same plaintiff, typically by the same law firm, and alleging nearly the same facts against a multitude of

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241 *Id.* at 2206.

242 *See id.*

243 *See id.*

244 *See id.*

245 Minh Vu et al., *supra* note 22.

246 Vincent Adams & Steve Miller, *Surfin' USA: Website Accessibility Lawsuits are Alive and Well Under the ADA*, JD SUPRA (Feb. 4, 2021), https://www.jdsupra.com/legalnews/surfin-usa-website-accessibility-9470297/.

247 *Id.*

businesses.[248] Consequently, it is not uncommon for hundreds of online accessibility lawsuits to be brought by the same plaintiff.[249]

But what is driving this serial litigation in online accessibility cases? The answer is simple: profit.[250] Online accessibility litigation has created "a lucrative business for plaintiff's attorneys."[251] The increasing number of ADA Title III cases are frequently filed by a small collective of lawyers and plaintiffs who collaborate to "create a profitable 'cottage industry' of fee-driven lawsuits."[252] Plaintiffs who prevail in ADA Title III claims are awarded attorneys' fees, which incentivizes litigation and settlement.[253] Serial litigation under ADA Title III is "essentially driven by economics—that is, the economics of attorneys' fees."[254]

The broad approach to standing adopted by many federal courts in online accessibility cases facilitates serial litigation. By taking a lenient approach to standing, federal courts in online accessibility cases, in essence, "rubber-stamp standing for injunctive relief in every claim against a non-compliant website in

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[248] *Id.*; Helia Garrido Hull, *Vexatious Litigants and the ADA: Strategies to Fairly Address the Need to Improve Access for Individuals with Disabilities*, 26 CORNELL J.L. & PUB. POL'Y 71, 91 (2016) ("Given the number of web-based businesses, and the fact that individuals could identify a Title III violation with a click of the computer mouse without leaving the comfort of their own homes, the potential for increased litigation in this area appears very high.").

[249] Adams & Miller, *supra* note 246.

[250] Carri Becker, *Private Enforcement of the Americans with Disabilities Act via Serial Litigation: Abusive or Commendable*, 17 HASTINGS WOMEN'S L.J. 93, 97 n.31 (2006) (describing the serial plaintiff scheme as entailing the following three steps: (1) "an unscrupulous law firm sends a disabled individual to as many businesses as possible . . . to have him aggressively seek out any and all violations of the ADA"; (2) instead of trying to remedy inaccessibility through "conciliation and voluntary compliance," the plaintiff files a lawsuit; and (3) "[f]aced with the specter of costly litigation and a potentially fatal judgment against them, most businesses quickly settle the matter" (first quoting Rodriguez v. Investco, L.L.C., 305 F. Supp. 2d 1278, 1280–81 (M.D. Fla. 2004); and then citing Molski v. Mandarin Touch, 347 F. Supp. 2d 860, 863 (C.D. Cal. 2004))); Hull, *supra* note 248, at 81 ("[T]he primary motivation to bring a lawsuit shifts from a desire to eliminate a violation to a desire to obtain plaintiff's attorney fees, costs and expenses.").

[251] EUNICE NAKAMURA, JONATHAN E. PERLMANN & R. HENRY PFUTZENREUTER, HOW TO BEST AVOID OR DEFEND AN ADA DRIVE-BY LAWSUIT 3 (2019); *see* 42 U.S.C. § 12205.

[252] Hull, *supra* note 248, at 73 (quoting *Rodriguez*, 305 F. Supp. 2d at 1280–82); Jason Taylor, *A Record-Breaking Year for ADA Digital Accessibility Lawsuits*, USABLENET (Dec. 21, 2020), https://blog.usablenet.com/a-record-breaking-year-for-ada-digital-accessibility-lawsuits (noting how the same firms represent 70% of all ADA-based website accessibility suits).

[253] Mark Pulliam, *The ADA Litigation Monster*, CITY J. (Spring 2017), https://www.city-journal.org/html/ada-litigation-monster-15128.html.

[254] *Rodriguez*, 305 F. Supp. at 1282. California, Florida, and New York have enacted laws that piggyback on the ADA and also allow plaintiffs to recover money damages for ADA Title III violations in addition to attorneys' fees. Pulliam, *supra* note 253. The greatest number of ADA Title III cases are unsurprisingly brought in these states. *ADA Title III & Public Access*, SEYFARTH, https://www.seyfarth.com/services/practices/advisory/ada-title-iii-and-public-access.html (last visited Jan. 29, 2022).

which the plaintiff alleges a vague intention to return to the website."[255] This approach "encourages massive litigation" in online accessibility cases, which "undermines both the spirit and purpose of the ADA."[256]

Online accessibility serial litigation has deleterious implications for businesses—small businesses in particular.[257] ADA Title III suits often target small businesses because they "tend to be unsophisticated, averse to litigation, and unable to afford a lawyer," making them more likely to pay a settlement to avoid a lawsuit.[258] If a business does not settle, it can face exorbitant costs in the litigation process, including the business's own legal fees, frequently the plaintiff's legal and expert fees, and the costs associated with reputational damage.[259] Moreover, some states, including California, Florida, and New York, have enacted laws that allow plaintiffs in ADA Title III claims to recover money damages, which increases both the cost to small businesses and the incentive for plaintiffs to bring suit in those states.[260]

The harm that online accessibility serial litigation has caused small businesses has captured the attention of Congress.[261] In 2021, Representatives introduced the "Online Accessibility Act" into Congress.[262] Among other things,

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[255] Kennedy v. Floridian Hotel, Inc., No. 1:18-cv-20839-UU, 2018 U.S. Dist. LEXIS 207984, at *34 (S.D. Fla. Dec. 7, 2018).

[256] *Id.* (citing Steven Bro. v. Tiger Partner, 331 F. Supp. 2d 1368, 1375 (M.D. Fla. 2004)).

[257] Pulliam, *supra* note 253 (noting Title III of the ADA does not have a fifteen-employee coverage threshold, so businesses with fewer than fifteen employees can be subjected to claims).

[258] *Id.*; Abigail Sterling & Allen Martin, *Serial Plaintiff Turns California ADA Lawsuits into a Lucrative Cottage Industry*, KPIX 5 (Aug. 2, 2021), https://sanfrancisco.cbslocal.com/2021/08/02/serial-plaintiff-turns-california-ada-lawsuits-into-lucrative-cottage-industry/ ("[Serial plaintiffs] are exploiting and extorting small businesses, not to vindicate the critical rights or inclusion of the disabled, but rather to shake down and extort [them] . . . ."); Evelyn Clark, *Enforcement of the Americans with Disabilities Act: Remedying "Abusive" Litigation While Strengthening Disability Rights*, 26 WASH. & LEE J. CIV. RIGHTS & SOC. JUST. 689, 708 (2020) ("Abusive plaintiffs use the threat of lawsuits and money damages as an effective inducement to settle quickly."); Houston v. Marod Supermarkets, Inc., 733 F.3d 1323, 1341 (11th Cir. 2013) (Bowen, J., dissenting) ("Seeking injunctions, costs in every variety, and monetary grist for the mills of his attorneys' offices (the wheels of which surely grind exceeding expensive), this [ADA Title III] plaintiff is doubtless a force with which many a small business will reckon.").

[259] Sheri Byrne-Harber, *ADA Lawsuit Costs Are Way More than Just the Settlement*, MEDIUM (Aug. 30, 2019), https://sheribyrnehaber.medium.com/ada-lawsuit-costs-are-way-more-than-just-the-settlement-7f2aaccfe1e7; Clark, *supra* note 258, at 710 ("Plaintiffs in California lawsuits have been awarded upwards of $155,000 in attorney's fees and costs, which does not account for the attorney's fees and litigation costs incurred by the business owner's counsel.").

[260] Pulliam, *supra* note 253; Clark, *supra* note 258, at 702; *see supra* note 81.

[261] *See* Online Accessibility Act of 2021, H.R. 1100, 117th Cong. (2021); Online Accessibility Act of 2020, H.R. 8478, 116th Cong. (2020).

[262] Online Accessibility Act of 2021, H.R. 1100. The Online Accessibility Act was previously introduced to Congress in 2020. *See* Online Accessibility Act of 2020, H.R. 8478, 116th Cong. (2020). The Online

the Online Accessibility Act would have codified the applicability of ADA Title III to websites,[263] established the Web Content Accessibility Guidelines as the standard for compliance for online accessibility,[264] and introduced a requirement for claimants to exhaust various administrative remedies before filing a complaint against an operator of an inaccessible website.[265] Representative Hudson stated the purpose of the Online Accessibility Act was to "improve web access for individuals with disabilities, as well as support small businesses.[266] To achieve this purpose, the Representative stressed that "we must curtail frivolous and abusive litigation while continuing to push for web accessibility for everyone."[267] As such, federal courts should not embrace an unbridled approach to standing in virtual accessibility cases because of the inimical effect it has on small American businesses.

Virtual accessibility serial litigation is also harmful to the administration of the judiciary. The sheer volume of online accessibility claims filed by serial plaintiffs is extraordinarily burdensome to the judiciary and generates significant costs and delays.[268] The interests of justice are not served by spending significant amounts of federal court resources on cases where a plaintiff "lacks standing,

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Accessibility act was reintroduced into Congress in 2021, after the Online Accessibility Act of 2020 failed to pass. *See* Online Accessibility Act of 2021, H.R. 1100.

[263] Online Accessibility Act of 2021, H.R. 1100, § 601(a) ("No individual, by reason of a disability, shall be excluded from participation in or be denied the full and equal benefits of the services of a consumer facing website . . . or be subjected to discrimination by any private owner or operator of a consumer facing website . . . .").

[264] *Id.* § 601(b) ("A consumer facing website . . . shall be considered compliant under the requirements of this section if such website or mobile application is in substantial compliance with the Web Content Accessibility Guidelines . . . .").

[265] *Id.* § 602(a) ("No individual may bring an action before a civil court to enforce the provisions of this title until all administrative remedies under this section have been exhausted."). The administrative remedies under the Online Accessibility Act would require a plaintiff to: (1) give a website operator notice of the ADA violation and 90 days to cure the violation before filing a complaint with the Department of Justice ("DOJ"); and (2) wait 180 days for the DOJ to determine if a violation exists. *Id.* § 602(b)(1), (c)(2). The plaintiff would be able to file a civil action against the website operator only after they had exhausted all administrative remedies. *Id.* § 603(a).

[266] Kristina Launey, Seyfarth Shaw LLP, *Renewed Attempt at ADA Web Accessibility Legislation*, JD SUPRA (April 1, 2021), https://www.jdsupra.com/legalnews/renewed-attempt-at-ada-web-3373818/.

[267] *Id.*

[268] Laufer v. Dove Hess Holdings, LLC, No. 5:20-cv-00379, 2020 U.S. Dist. LEXIS 246614, at *54–55 (N.D.N.Y. Nov. 18, 2020) (noting how a "relatively deferential [standing] standard at the pleading stage" results in "administrative inefficiency" and burdens both the courts and defendants, "only for the plaintiff's claims to be dismissed for lack of standing . . . after significant time, resources and money has been expended," and calling for any doubt surrounding "the sincerity of a serial ADA Plaintiff's standing allegations" to be resolved immediately); Laufer v. Naranda Hotels, LLC, No. SAG-20-2136, 2020 U.S. Dist. LEXIS 235894, at *28 (D. Md. Dec. 16, 2020) (noting how broad approaches to standing "clog[] the dockets of the federal courts"); Pulliam, *supra* note 253 ("The well-intentioned Americans with Disabilities Act has produced endless litigation, at astronomical cost.").

lacks credibility, and is not operating in good faith."[269] The standing requirements in online accessibility cases "aim[] to prevent the federal judiciary from becoming a vehicle for the vindication of the value interests of concerned bystanders" and play a crucial role in limiting serial litigation.[270] Therefore, federal courts should not adopt an unfettered approach to standing in virtual accessibility cases because of its pernicious impact on the judiciary.

Finally, serial litigation does not fulfill the purpose of the ADA. Congress did not intend for Title III of the ADA to spawn "litigation factories [for] attorneys to reap fees from hundreds of lawsuits."[271] The purpose of the ADA is to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency for . . . individuals [with disabilities]."[272] While one can imagine serial litigation helps fulfill this goal, in practice, it has had the opposite results.[273] Because such a large percentage of plaintiffs settle before a federal court issues an injunction ordering the website to be brought in compliance with Title III of the ADA, the ADA's purpose is not furthered by serial litigation.[274] When an ADA Title III lawsuit results in a settlement, "monetary awards are paid directly to the plaintiffs and their attorneys, and not expended on removing barriers to access."[275] Even if the plaintiff is successful in litigation and an injunction is ordered, there is no mechanism that ensures online accessibility violations are cured, which "often leads to an odd result that rewards an attorney for successfully 'enforcing' the ADA even though the underlying violation persists."[276] If the goal of serial litigation was to ensure compliance with Title III of the ADA, serial litigants "would give notice to businesses of their noncompliance before filing suit, in the hopes that the businesses achieve compliance out of court."[277] As such, serial litigation brought

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269 *Naranda Hotels*, 2020 U.S. Dist. LEXIS 235894, at *27–28.

270 Laufer v. Galtesvar OM, LLC, No. 1:20-CV-00588-RP, 2020 U.S. Dist. LEXIS 240714, at *17 (W.D. Tex. Nov. 23, 2020) (quoting United States v. Students Challenging Regul. Agency Procs. (SCRAP), 412 U.S. 669, 687 (1973) (internal quotation marks omitted)).

271 *Naranda Hotels*, 2020 U.S. Dist. LEXIS 235894, at *28.

272 42 U.S. Code § 12101(a)(7).

273 *See* Clark, *supra* note 258, at 708; Leslie Lee, *Giving Disabled Testers Access to the Federal Courts: Why Standing Doctrine Is Not the Right Solution to Abusive ADA Litigation*, 19 VA. J. SOC. POL'Y & L. 320, 343 (2012).

274 *See* Lee, *supra* note 273, at 343.

275 *Id.* (footnote omitted).

276 Hull, *supra* note 248, at 81–82; *see also* Sarwar v. Gopinathjee LLC, No. 1:20-cv-15724-NLH-KMW, 2021 U.S. Dist. LEXIS 139604, at *15 (D.N.J. July 27, 2021) (noting how serial plaintiff cases "all follow a predictable pattern: a case is filed and shortly thereafter settled, leaving the Court uncertain whether each defendant's purported ADA violation was remedied" or if the plaintiff ever returned to each accessibility barrier).

277 Lee, *supra* note 273, at 343; Clark, *supra* note 258, at 713 ("[N]otifying businesses of their non-compliance and achieving voluntary compliance may be a more rational solution for [a] good-faith plaintiff.").

under Title III of the ADA frequently "accomplishes nothing except the enrichment of a small number of opportunist plaintiffs' lawyers and their serial clients."[278] Thus, the federal courts' unbounded approach to standing in online accessibility cases is even further untenable because it does not fulfill the purpose of Title III of the ADA.

Accordingly, federal courts should not take a broad approach to standing in virtual accessibility cases because it exacerbates the extant issue of serial litigation under Title III of the ADA—an issue with deleterious implications for small businesses and the judiciary, all while failing to fulfill the purpose of the ADA.

This Part has illustrated the consequences of the four issues confounding the injury-in-fact inquiry into a puzzle of missing pieces, infringements of the Supreme Court's standing precedent, and results that vary not just among circuits but within circuits. However, this puzzle can be solved if courts heed this Comment's proposed solutions and base the injury-in-fact inquiry on the location corresponding to the plaintiff's injury, adopt virtually compatible intent-to-return factors, redirect their focus to future injury, and adopt a constitutionally sound scope of standing.

CONCLUSION

Federal courts across America are divided over the application of the traditional injury-in-fact tests in digital accessibility cases. Notwithstanding the calls of many district courts for elucidative precedent over the virtual injury-in-fact inquiry, higher courts have been largely unresponsive. Without a guiding light to assist in wayfinding, federal courts' assessments of injury-in-fact in ADA Title III website cases have produced fundamentally incompatible holdings, both inter- and intra-circuit.

Despite the inherent differences between brick-and-mortar and virtual accessibility cases, federal courts need not stray too far from the precedential path while conducting the online injury-in-fact inquiry. Indeed, the answers to the key questions dividing federal courts can often be discerned from the purpose of the injury-in-fact inquiry, Supreme Court precedent, and common sense.

As an ever-growing number of online accessibility cases reach federal courts' dockets, it becomes increasingly important for courts to abandon erroneous reasoning and reach a consensus on the virtual injury-in-fact inquiry.

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[278] Pulliam, *supra* note 253.

Otherwise, the holdings in virtual accessibility cases will divagate further from precedent, reason, and the spirit of Title III of the ADA.

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