

**INVISIBLE WAITING ROOMS: ACCESSIBLE TELEHEALTH AND A  
COMPARISON OF THE AMERICANS WITH DISABILITIES ACT AND  
THE ACCESSIBILITY FOR ONTARIANS WITH DISABILITIES ACT**

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## I. INTRODUCTION

From murder hornets<sup>1</sup> to record-breaking wildfires,<sup>2</sup> it is safe to say that 2020 was one heck of a year. There was one word, however, that will make 2020 go down in history: COVID-19. COVID-19, or coronavirus as it is commonly called, is a pandemic that caused worldwide lockdowns and a global death toll of at least three million people.<sup>3</sup> These lockdowns and the new "social distancing" protocols caused most people to spend many months stuck in their homes, only venturing out for essential purposes.<sup>4</sup> With most of the world stuck in lockdowns, people turned to the internet in record numbers to pass the time and work.<sup>5</sup> In fact, internet services saw an increase in usage from 40% before the lockdowns to 100% after the lockdowns.<sup>6</sup> Despite this increase in usage, the Internet is not created equally. There is at least one group of individuals for whom the Internet may not be accessible: individuals with disabilities.

There are approximately 61 million adults living with a disability in the U.S. and more than 6 million individuals fifteen and older living with a disability

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<sup>1</sup> See Associated Press, *First Murder Hornet Nest Found to Have 200 Queens Capable of Spawning New Nests*, THE GUARDIAN (Nov. 10, 2020), <https://www.theguardian.com/environment/2020/nov/10/murder-hornet-nest-queens-washington>.

<sup>2</sup> See *2020 North American Wildfire Season*, CENTER FOR DISASTER PHILANTHROPY (Dec. 7, 2022), <https://disasterphilanthropy.org/disaster/2020-california-wildfires/>; see also *2019-2020 Australian Bushfires*, CENTER FOR DISASTER PHILANTHROPY (Sep. 9, 2019), <https://disasterphilanthropy.org/disaster/2019-australian-wildfires/>; see also *Fires Raged in the Amazon Again in 2020*, EARTH OBSERVATORY (2020), <https://earthobservatory.nasa.gov/images/147946/fires-raged-in-the-amazon-again-in-2020>.

<sup>3</sup> *COVID-19 Pandemic Timeline Fast Facts*, CNN HEALTH (last updated Jan. 5, 2022), <https://www.cnn.com/2021/08/09/health/covid-19-pandemic-timeline-fast-facts/index.html>; see also *The True Death Toll of COVID-19*, WHO (last visited Jan. 9, 2022), <https://www.who.int/data/stories/the-true-death-toll-of-covid-19-estimating-global-excess-mortality>.

<sup>4</sup> *Human Rights Dimensions of COVID-19 Response*, HUMAN RIGHTS WATCH (Mar. 19, 2020), <https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response>.

<sup>5</sup> See Rahul De', Neena Pandey & Abhipsa Palc, *Impact of Digital Surge During COVID-19 Pandemic: A Viewpoint on Research and Practice*, 55 INT'L J. INFO. MGMT. 1 (Dec. 2020), <https://www.sciencedirect.com/science/article/pii/S0268401220309622?via%3Dihub>.

<sup>6</sup> *Id.* at 1.

in Canada,<sup>7</sup> 2.6 million of those disabled Canadians live in the province of Ontario.<sup>8</sup> Disability is defined as “a physical, mental, cognitive, or developmental condition that impairs, interferes with, or limits a person’s ability to engage in certain tasks or actions or participate in typical daily activities and interactions.”<sup>9</sup> For individuals with disabilities, using the Internet may be difficult due to web inaccessibility.<sup>10</sup> Web inaccessibility stems from the fact that many websites are not compatible with the assistive technologies that allow individuals with disabilities to access and interact with them.<sup>11</sup> Because of this inaccessibility, many disabled individuals are cut off from the economic, cultural, and social benefits the Internet provides.<sup>12</sup>

Both the U.S. and Ontario have enacted legislation aimed at ensuring equal access for individuals with disabilities. However, when it comes to web accessibility, they take separate paths. The U.S.’s Americans with Disabilities Act (ADA) does not mandate that websites need to be accessible, but instead relies on litigation to remedy the web inaccessibility issue.<sup>13</sup> Ontario’s Accessibility for Ontarians with Disabilities Act (AODA), on the other hand, mandates web accessibility and relies on compulsory compliance to achieve this goal.<sup>14</sup> While the ADA is the U.S.’s premier disability rights act, its lack of a mandate for web accessibility causes web users with disabilities and website owners to be unsure of how to approach web accessibility. This apprehension exacerbates the U.S. web inaccessibility issue as it can leave individuals with disabilities unable to interact with the virtual world. Comparing these two laws can provide guidance on

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<sup>7</sup> *Disability Impacts All of Us*, CENTERS FOR DISEASE CONTROL (last updated September 16, 2020), <https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html>; *Making an Accessible Canada for Persons with Disabilities*, GOV. OF CANADA (last updated Feb. 4, 2022), <https://www.canada.ca/en/employment-social-development/programs/accessible-canada.html>.

<sup>8</sup> *Accessibility for Ontarians with Disabilities Act Annual Report 2019*, ONTARIO (last updated Sep. 13, 2021), <https://www.ontario.ca/page/accessibility-ontarians-disabilities-act-annual-report-2019#ref-1>.

<sup>9</sup> *Definition of Disability*, MERRIAM-WEBSTER (last updated Feb. 4, 2022), <https://www.merriam-webster.com/dictionary/disability>.

<sup>10</sup> Meredith Mays Espino, *Website Accessibility for Persons with Disabilities: The Why & How*, AM. BAR ASS’N (Dec. 16, 2016), [https://www.americanbar.org/groups/business\\_law/publications/blt/2016/12/07\\_espino/](https://www.americanbar.org/groups/business_law/publications/blt/2016/12/07_espino/).

<sup>11</sup> Blake E. Reid, *Internet Architecture and Disability*, 95 IND. L. J. 591, 592 (Feb. 17, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3338589](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3338589).

<sup>12</sup> *Id.*

<sup>13</sup> See Thiru M. Annaswamy, Monica Verduzco-Gutierrez & Lex Frieden, *Telemedicine Barriers and Challenges for Persons with Disabilities: COVID-19 and Beyond*, 13 DISABILITY HEALTH J. 1 (July 9, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7346769/>; Ravi Malhotra & Megan A. Rusciano, *Using Provincial Laws to Drive a National Agenda: Connecting Human Rights and Disability Rights Laws*, in DISABILITY, HUMAN RIGHTS, AND INFORMATION TECHNOLOGY, Ch. 6, at 88-89 (Jonathan Lazar ed., 2017), <https://www.degruyter.com/document/doi/10.9783/9780812294095-008/html>.

<sup>14</sup> Malhotra & Rusciano, *supra* note 13.

implementing an ADA mandate for web accessibility, which would also help alleviate confusion and reduce the U.S.'s reliance on web accessibility-based litigation.

The increased dependence on the Internet during COVID-19 also impacted the healthcare field as seen by an unprecedented uptake in telehealth usage.<sup>15</sup> Given this rise of telehealth usage and the health crisis caused by the pandemic, this Note discusses web accessibility through the lens of telehealth. While there are many barriers to telehealth, including regulatory and infrastructural barriers, this Note will focus on what Thiru Annaswamy calls the technological and legislative barriers.<sup>16</sup> Section two introduces the concept of telehealth, as well as describes its benefits and the technological barriers that prevent accessibility. Sections three and four will focus on the legislative barriers by discussing the ADA and the AODA. Section five will compare these two acts to determine their strengths and weaknesses. Lastly, section six discusses the implications of implementing an AODA-like mandate under the ADA. It is important to keep in mind while reading this Note that, although it focuses on telehealth, the principles presented here are applicable to the web as a whole.

## II. TELEHEALTH

Telehealth is defined as “the use of electronic information and telecommunications technologies to support long-distance clinical healthcare.”<sup>17</sup> It is usually conducted over the Internet on a computer, tablet, or smart phone, and includes videoconferencing or streaming media.<sup>18</sup> Once a telehealth user is connected to their online healthcare provider, they can take advantage of the myriad of healthcare services that are available via telehealth such as online counseling, prescription management, and post-surgical follow-up visits.<sup>19</sup>

The coronavirus pandemic has caused healthcare providers, patients, telehealth companies, and legislators to increase the use of telehealth. For example, in 2019 before the pandemic, 43% of U.S. healthcare providers were set up to provide telehealth services;<sup>20</sup> however, during the pandemic, 93% of U.S.

<sup>15</sup> See *infra* notes 19-21, 24-25 and accompanying text.

<sup>16</sup> Annaswamy et al., *supra* note 13.

<sup>17</sup> *What is Telehealth? How is Telehealth Different from Telemedicine*, HEALTHIT (last revised Oct. 17, 2019), <https://www.healthit.gov/faq/what-telehealth-how-telehealth-different-telemedicine>.

<sup>18</sup> *Id.*; *What is Telehealth?*, HHS.GOV (last updated August 16, 2021), [https://telehealth.hhs.gov/patients/understanding-telehealth/?gclid=CjwKCAjwyIKJBhBPEiwAu7zllxndlphSDxNyk\\_dNhoTJpcHZLnCkteGWetxnwW3Apk3Gnifqc7CMehocIu8QAvD\\_BwE](https://telehealth.hhs.gov/patients/understanding-telehealth/?gclid=CjwKCAjwyIKJBhBPEiwAu7zllxndlphSDxNyk_dNhoTJpcHZLnCkteGWetxnwW3Apk3Gnifqc7CMehocIu8QAvD_BwE).

<sup>19</sup> *What is Telehealth?*, *supra* note 17.

<sup>20</sup> Hanna B. Demeke et al., *Trends in Use of Telehealth among Healthcare Centers during the Covid-19 Pandemic — United States, June 26 – November 6, 2020*, CTR. FOR DISEASE CONTROL & PREVENTION (Feb. 19, 2021), <https://www.cdc.gov/mmwr/volumes/70/wr/mm7007a3.htm>.

healthcare providers were capable of providing telehealth.<sup>21</sup> This sharp increase might be explained by the fact that 82% of those Americans that currently use telehealth began doing so during the pandemic.<sup>22</sup> Due to the rise in telehealth usage, the Office for Civil Rights (OCR) relaxed the Health Insurance Portability and Accountability Act (HIPAA) enforcement requirements on healthcare providers to allow them to use previously prohibited applications such as Skype and Google Hangouts for their telehealth visits.<sup>23</sup> However, the availability of these new applications were only limited to nonpublic facing video programs; therefore, programs like Facebook Live, Twitch, and TikTok that are public facing were prohibited.<sup>24</sup>

In Ontario, the Ontario Telemedicine Network (OTN), which primarily focuses on video-based communication, saw a 36% increase in the use of virtual visits between 2019 and 2021.<sup>25</sup> There was also a 79.1% decline of in-office visits while the emerging virtual visits took their place by making up 71.1% of primary care visits.<sup>26</sup> In order to meet the influx of new virtual visits, the province of Ontario partnered with Telehealth Ontario in early 2020 to immediately expand telehealth resources so it could “significantly reduce the time it takes for Ontarians to receive the information they need to stay safe and healthy.”<sup>27</sup> Like the U.S., the Ontario Minister of Health issued a temporary change to Ontario’s health insurance billing code on March 14, 2020, to allow healthcare providers greater flexibility in using video-based telehealth services and alternative video-based conferencing programs like Skype and Zoom.<sup>28</sup>

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<sup>21</sup> *Id.*

<sup>22</sup> *New Nationwide Poll Shows an Increase in Popularity for Telehealth Services*, AM. PSYCHIATRIC ASS’N (May 27, 2021), <https://www.psychiatry.org/newsroom/news-releases/New-Nationwide-Poll-Shows-an-Increased-Popularity-for-Telehealth-Services>.

<sup>23</sup> *Notification of Enforcement Discretion for Telehealth Remote Communications during COVID-19*, HHS.GOV (last updated Jan. 20, 2021), <https://www.hhs.gov/hipaa/for-professionals/special-topics/emergency-preparedness/notification-enforcement-discretion-telehealth/index.html>.

<sup>24</sup> *Id.*

<sup>25</sup> Saba Aziz, *Telemedicine Use is Rising Amid COVID-19 Pandemic. Will it Become The Norm?*, GLOBAL NEWS (May 29, 2021), <https://globalnews.ca/news/7902460/telemedicine-future-covid-canada/>.

<sup>26</sup> Richard E. Glazier et al., *Shifts in Office and Virtual Primary Care During The Early COVID-19 Pandemic In Ontario, Canada*, CANADIAN MED. ASS’N J. (Feb. 8, 2021), <https://www.cmaj.ca/content/193/6/E200>.

<sup>27</sup> *Province Expanding Telehealth Ontario Resources*, ONTARIO NEWSROOM (Mar. 16, 2020), <https://news.ontario.ca/en/release/56332/province-expanding-telehealth-ontario-resources>.

<sup>28</sup> *Ontario Health Insurance Plan*, ONTARIO MINISTER OF HEALTH MINISTER OF LONG-TERM CARE (Mar. 13, 2020), <https://www.health.gov.on.ca/en/pro/programs/ohip/bulletins/4000/bul4745.aspx>; R. Sacha Bhatia et al., *Vital Care Use before and during the COVID-19 Pandemic: a Repeated Cross-Sectional Study*, CMAJOPEN (Feb. 17, 2021), <https://www.cmajopen.ca/content/9/1/E107>.

The rise of COVID-19 saw a rise in the use of telehealth in both the U.S. and Ontario.<sup>29</sup> Both locations faced the pandemic in much the same way, by easing restrictions for healthcare providers and allowing greater flexibility.<sup>30</sup> By allowing for greater flexibility, citizens in both locations can experience the benefits of telehealth. Unfortunately, with benefits come barriers.

### **A. Benefits and Barriers to Telehealth**

In the U.S., telehealth offers many benefits including shorter wait times, easy access to healthcare, reduced or eliminated travel times, and reduced exposure to communicative diseases.<sup>31</sup> Ontario also benefits from telehealth in much the same manner: greater access to healthcare services by underserved populations, reduced travel time, and increased health education.<sup>32</sup> These benefits can prove fruitful for individuals with disabilities. For example, an individual with a mobility disability that makes it difficult to access transportation to and from a doctor's office could remain in their home for their doctor's visit. Likewise, if an individual has a disability that suppresses their immune system, the reduced contact with other patients in the waiting rooms could prove to be lifesaving.

In addition to the benefits of easy access and reduced exposure, the reduced wait times may lead to earlier interventions and more consistent therapy at a reduced costs for individuals with cognitive disabilities, such as Autism Spectrum Disorder (ASD).<sup>33</sup> For example, a U.S. study found that parents using a telehealth training program to teach them how to implement applied behavioral analysis for a child with ASD had lower weekly treatment costs than parents receiving the same training from in-home behavioral consultant visits.<sup>34</sup> Likewise, an Ontarian study of a hybrid telehealth program that combined self-directed web-based instructions with remote training to teach parents how to implement Reciprocal Imitation Training for their child with ASD found that the parents involved improved their

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<sup>29</sup> *Telehealth in the Pandemic—How Has It Changed Health Care Delivery in Medicaid and Medicare?*, GAO (Sep. 9, 2022), [<sup>30</sup> \*Id.\*](https://www.gao.gov/blog/telehealth-pandemic-how-has-it-changed-health-care-delivery-medicaid-and-medicare#:~:text=We%20found%20that%20the%20number,March%202020%20to%20February%202021); Rui Fu, Virtual and In-Person Visits by Ontario Physicians in the COVID-19 Era, J. Telemedicine and Telecare 1 (2022).</a></p>
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<sup>31</sup> *What is Telehealth?*, *supra* note 17.

<sup>32</sup> *Excellent Care for All*, ONTARIO, MINISTRY OF HEALTH, MINISTRY OF LONG-TERM CARE (last visited November 1, 2021), [https://www.health.gov.on.ca/en/pro/programs/ecfa/action/primary/pri\\_telemedecine.aspx](https://www.health.gov.on.ca/en/pro/programs/ecfa/action/primary/pri_telemedecine.aspx).

<sup>33</sup> Timothy Ore, *How Effective Is the Use of Telehealth for Children with Autism Spectrum Disorder?*, 4 INT'L. J. PSYCHIATRY RSCH. 1, 2 (Mar. 9, 2021), <https://scivisionpub.com/pdfs/how-effective-is-the-use-of-telehealth-for-children-with-autism-spectrum-disorders-1588.pdf>.

<sup>34</sup> *Id.* at 3.

intervention skills and their children improved in imitation skills.<sup>35</sup> Despite telehealth's benefits, there is still work to be done to ensure those benefits are accessible to individuals with disabilities.

It has been posited that obstructiveness in home telehealth technology is defined as “a summary evaluation by the user based on characteristics or effects associated with the technology that are perceived as undesirable and physically and/or psychologically prominent.”<sup>36</sup> Included in this definition is a dimension of usability that relates to “accessibility for users with functional impairments” and the “lack of user . . . accessibility.”<sup>37</sup> An expert in disability law, Professor Blake Reid at the University of Colorado, suggests that a part of this inaccessibility is because telehealth platforms “presume that all users can see, hear, and speak verbal English.”<sup>38</sup> Reid's argument is insightful because it points to an underlying assumption that all telehealth users engage in telehealth platforms the same and without the need for extra assistance. This presumption cannot be further from the truth, and indeed, it can be argued that the reliance on it has caused the main barrier to telehealth for individuals with disabilities: the inconsistent implementation of assistive technology on websites that host telehealth services.

This inconsistency can be seen by the fact that many websites lack accessibility features such as closed-captioning, alternate and large text options, and audio descriptions of the webpage's content.<sup>39</sup> These types of technologies can help individuals with hearing and visual impairments communicate with the healthcare professionals on the screen by providing those individuals with alternative means of communication that can be more easily read or heard.<sup>40</sup> Likewise, without consistent compatibility with speech recognition programs, head pointers, or eye-gaze tracking systems, individuals with physical disabilities that prevent them from using the mouse due to poor dexterity may not be able to interact with the telehealth website at all.<sup>41</sup> In addition, individuals with cognitive disabilities such as ASD, learning disabilities, and mental health disabilities, might have difficulty

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<sup>35</sup> *Id.*

<sup>36</sup> Brian K. Hensel, George Demiris, & Karen L. Courtney, *Defining Obstructiveness in Home Telehealth Technology: A Conceptual Framework*, 13 J. AM. MED. INFORMATICS ASS'N 428 (2006), <https://academic.oup.com/jamia/article/13/4/428/777277?login=true>.

<sup>37</sup> *Id.*

<sup>38</sup> Blake E. Reid, Christian Vogler & Zainab Alkebsi, *Telehealth and Telework Accessibility in a Pandemic-Induced Virtual World*, 92 U. COLO. L. REV. F. 1, 3 (2021), <https://scholar.law.colorado.edu/articles/1321/>.

<sup>39</sup> Rupa S. Valadez et al., *Ensuring Full Participation of People with Disabilities in an Era of Telehealth*, 28 J. AM. MED. INFORMATICS ASS'N 389 (2020), <https://academic.oup.com/jamia/article/28/2/389/5988542>.

<sup>40</sup> *Diverse Abilities and Barriers in How People with Disabilities Use the Web*, WEB ACCESSIBILITY INITIATIVE (last updated May 15, 2017), <https://www.w3.org/WAI/people-use-web/abilities-barriers/#cognitive>.

<sup>41</sup> *Developing Accessible Websites*, UNIV. WASH., <https://www.washington.edu/accessibility/web/> (last visited Jan. 14, 2022).

understanding telehealth websites due to complex web page navigation and layouts, long passages of unbroken text without illustrations to support understanding, and blinking or flickering content.<sup>42</sup>

The aforementioned barriers to telehealth websites may not only prevent disabled users from interacting with their healthcare provider, but also may prevent them from accessing their private health information through patient portals.<sup>43</sup> Patient portals allow patients to access information, like their lab results, medication referrals, and immunization records,<sup>44</sup> and have been shown to be a large factor in the willingness of patients to complete a telehealth program.<sup>45</sup> Unfortunately, the benefits of patient portals may also be inaccessible to individuals who use assistive technology,<sup>46</sup> suggesting that individuals with disabilities may have a lower completion rate of telehealth programs than those without disabilities.

In the U.S., the Department of Health and Human Services (HHS) has offered suggestions aimed at improving access to telehealth by reducing the previously discussed barriers.<sup>47</sup> For example, it suggests that telehealth companies conform to digital accessibility guidelines laid out by sections 504 and 508 of the 1973 Rehabilitation Act.<sup>48</sup> Although this is a step in the right direction, the proposed solution does have a drawback: compliance with these sections is only voluntary for private telehealth companies.<sup>49</sup> This is because both sections of the Rehabilitation Act are mandatory only for federal agencies or companies that receive federal funding.<sup>50</sup> This means that a disabled telehealth user who relies on a federally funded telehealth program will be met with a relatively accessible telehealth website, while a different telehealth user who relies on a private telehealth company may be greeted by an inaccessible website simply because the private company chose not to comply with the guidelines.

Although telehealth offers many benefits, it unfortunately may come with thorns of inaccessibility. It is important to note however, that because of the “heterogeneity of the disability community” these benefits and barriers will be experienced differently by different individuals.<sup>51</sup> So while an individual with ASD may have success with a telehealth program, another individual with the same

<sup>42</sup> *Diverse Abilities and Barriers in How People with Disabilities Use the Web*, *supra* note 40.

<sup>43</sup> Valadez et al., *supra* note 39.

<sup>44</sup> *What Is a Patient Portal?*, HEALTHIT.GOV (last updated Sep. 29, 2017), <https://www.healthit.gov/faq/what-patient-portal>.

<sup>45</sup> Kristin Nicole Gmunder, Jose W Ruiz, Dido Franceschi & Maritza M Suarez, *Factors to Effective Telemedicine Visits during the COVID-19 Pandemic*, PUBMED (Aug 27, 2021), <https://pubmed.ncbi.nlm.nih.gov/34254936/>.

<sup>46</sup> Valadez et al., *supra* note 39.

<sup>47</sup> *Improving Access to Telehealth*, TELEHEALTH.HHS.GOV (last updated Feb 9, 2021), <https://telehealth.hhs.gov/providers/health-equity-in-telehealth/improving-access-to-telehealth/>.

<sup>48</sup> *Id.*

<sup>49</sup> 29 U.S.C. §§ 794, 794(d); *Improving Access to Telehealth*, *supra* note 47.

<sup>50</sup> § 794; § 794(d); *Improving Access to Telehealth*, *supra* note 47.

<sup>51</sup> Valadez et al., *supra* note 39.



disability using the same telehealth program may achieve a lower level of success. This is not to say that telehealth companies and telehealth platform providers must account for every possible grade of disability within each category of disability when designing and implementing their product because this may be too impractical and expensive, but they must provide the necessary tools to allow for a more flexible and adaptable platform aimed at encompassing all disabilities.

As mentioned earlier, examples of barriers to telehealth include technological accessibility barriers, regulatory barriers, legislative barriers, and infrastructural barriers.<sup>52</sup> Although outside of the scope of this Note, it is important to keep in mind that the lack of infrastructure needed to provide broadband services to remote areas is also an area of important discussion.<sup>53</sup> While this section discussed the technological barriers, the next couple of sections will discuss the legislative factors in the inaccessibility equation.

### III. THE AMERICANS WITH DISABILITIES ACT (ADA)

Signed into law by President George H.W. Bush on July 26, 1990, the Americans with Disabilities Act (ADA) is the primary civil rights law in the United States aimed at ensuring equal access for individuals with disabilities.<sup>54</sup> The Act was implemented when Congress found that individuals with disabilities still faced discrimination in areas such as employment, housing, public accommodations, education, and health services despite the improvements to the historical isolation and segregation of such individuals.<sup>55</sup> Congress found that this discrimination takes many forms including “outright intentional exclusion” and denies individuals with disabilities a chance to participate equally in the same opportunities that individuals without disabilities enjoy.<sup>56</sup>

To help stem the tide of this discrimination, Congress modeled the ADA after the Civil Rights Act of 1964, which prevents discrimination based on race, color, religion, sex, or national origin, and Section 504 of the Rehabilitation Act of 1973.<sup>57</sup> The ADA’s goal was not only providing “a clear and comprehensive national mandate,”<sup>58</sup> but also “consistent, enforceable” standards for eliminating disability discrimination.<sup>59</sup> The backbone of this national mandate is the Act’s definition of disability: “a physical or mental impairment that substantially limits

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<sup>52</sup> Annaswamy et al., *supra* note 13.

<sup>53</sup> *See Id.*; *See also* George M. Powers, Lex Frieden & Vinh Nguyen, *Telemedicine: Access to Health Care for People with Disabilities*, 17 HOUS. J. HEALTH L. & POL’Y 7 (2017).

<sup>54</sup> *Introduction to the ADA*, ADA.GOV, [https://www.ada.gov/ada\\_intro.htm](https://www.ada.gov/ada_intro.htm) (last visited Jan. 15, 2022).

<sup>55</sup> 42 U.S.C. § 12101(a).

<sup>56</sup> *Id.*

<sup>57</sup> *Introduction to the ADA*, *supra* note 54.

<sup>58</sup> § 12101(b).

<sup>59</sup> *Id.*

one or more major life activities.”<sup>60</sup> If the definition is the backbone, the Act’s three titles are its face. Each title aims to prevent disability-based discrimination in a specific category. For instance, Title I concerns employment<sup>61</sup> and Title II concerns public services, such as public transportation.<sup>62</sup> However, the star of the show (at least for purposes of this Note) is Title III and its prohibition against disability-based discrimination in public accommodations.<sup>63</sup>

Title III makes it illegal to discriminate against a person on the basis of disability “in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any public accommodation by any person who owns, leases . . . or operates a place of public accommodation.”<sup>64</sup> Discrimination under Title III can take many forms including a public accommodation failing to make reasonable modifications in its “policies, practices, or procedures” for an individual with a disability and failing to take steps to ensure that a person with a disability is not treated differently because they do not have auxiliary aids and services.<sup>65</sup> A public accommodation is described as any private business that affects commerce.<sup>66</sup> The Act breaks public accommodations down into twelve categories based on the type of good or service the accommodation provides.<sup>67</sup>

The sixth category is important for telehealth purposes because it groups pharmacies, offices of healthcare providers, and hospitals into a single category.<sup>68</sup> Each of these places of public accommodations provide healthcare goods and services to both individuals with and without disabilities. Without the inclusion of these locations in the enumerated categories, individuals with disabilities would be excluded from vital healthcare services like medication management, doctor’s visits, and surgeries simply because the hospital or doctor’s office was not accessible.

For all the good the ADA has done in ensuring that individuals with disabilities receive equal treatment in the aforementioned public accommodations, the Act still needs much improvement to truly end disability-based discrimination.<sup>69</sup> For example, although individuals with disabilities can enter healthcare facilities, much of the physical equipment such as exam tables and chairs, x-rays, and weighing scales remain inaccessible.<sup>70</sup> Access to physical equipment is beyond the

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<sup>60</sup> *Id.* § 12102(1)(A).

<sup>61</sup> *Id.* §§ 12111-12117.

<sup>62</sup> *Id.* §§ 12131-12165.

<sup>63</sup> *Id.* §§ 12181-12189.

<sup>64</sup> 42 U.S.C. § 12182(a).

<sup>65</sup> *Id.* § 12182(b)(2)(A)(ii)-(iii).

<sup>66</sup> *Id.* § 12181(7).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* § 12181(7)(F).

<sup>69</sup> Elizabeth Pendo, *Shifting the Conversation: Disability, Disparities and Healthcare Reform*, 6 FIU L. REV. 400, 89 (2011),

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1876558](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1876558).

<sup>70</sup> *Id.*

scope of this Note; however, it does not make the need any less important. As mentioned at the beginning of this Note, the ADA is deficient in ensuring telehealth accessibility via websites because websites are not required to be accessible under the Act.<sup>71</sup> Because website accessibility is not required, U.S. courts are split on how to apply Title III to the virtual world; the next section discusses this split.

### **A. ADA Application to Telehealth Websites and the Jurisdictional Split**

As mentioned earlier, the ADA prevents disability-based discrimination in places of public accommodation,<sup>72</sup> but when applied to the Internet and telehealth, the mandate against discrimination is anything but “consistent.”<sup>73</sup> The ADA was adopted before the rise of the Internet as we know it today<sup>74</sup> and as a result, the Internet is not listed in Title III’s enumerated categories of public accommodation.<sup>75</sup> This lack of an explicit mandate regarding internet access has caused a jurisdictional split among courts as to whether Title III and its protection against disability-based discrimination applies to the Internet.<sup>76</sup> In his paper entitled *Internet Architecture and Disability*, Reid posits that one of the main reasons for this debate is the distinction between the Internet being a physical “place” or an ethereal nonphysical “place” within the meaning of Title III.<sup>77</sup> This distinction is crucial to understanding the jurisdictional split because it is where most of Title III’s litigation concerning the Internet lies.<sup>78</sup> It is equally important for understanding internet accessibility to telehealth because the jurisdictional split can help make up for the lack of case law concerning Title III and telehealth.<sup>79</sup>

The jurisdictional split regarding Internet accessibility consists of three main lines of thought.<sup>80</sup> First, the standalone website theory advanced by the First,<sup>81</sup>

<sup>71</sup> Annaswamy et al., *supra* note 13.

<sup>72</sup> 42 U.S.C. § 12182(a).

<sup>73</sup> *Id.* at § 12101(b).

<sup>74</sup> Lex Frieden, *When the Americans with Disabilities Act Goes Online: Application of the Americans with Disabilities Act to the Internet and the Worldwide Web*, NATIONAL COUNCIL ON DISABILITY (July 10, 2003), <https://ncd.gov/publications/2003/July102003>.

<sup>75</sup> 42 U.S.C. § 12181(7).

<sup>76</sup> Reid et al., *supra* note 38, at 7; Annaswamy et al., *supra* note 13.

<sup>77</sup> Reid, *supra* note 11, at 597.

<sup>78</sup> *Id.*

<sup>79</sup> Reid et al., *supra* note 38, at 7.

<sup>80</sup> *Id.*

<sup>81</sup> *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 19-20 (1st Cir. 1994) (reasoning "By including travel service among the list of services considered public accommodations, Congress clearly contemplated that service establishments include providers of services which do not require a person to physically enter an actual physical structure." And to " limit the application of Title III to physical structures which persons must enter to obtain goods and services would run afoul of the purposes of the ADA and would severely frustrate Congress's intent . . . ."); *Nat'l Ass'n of the Deaf v. Netflix*, 869 F. Supp. 2d 196, 201-02 (D. Mass. 2012) (holding businesses that

Second,<sup>82</sup> Fourth,<sup>83</sup> and Seventh<sup>84</sup> Circuits holds that “freestanding” websites are just as much a place of public accommodations as any physical location and therefore need to be accessible.<sup>85</sup> Second the “nexus” theory advanced by the Ninth<sup>86</sup> and Eleventh<sup>87</sup> Circuits holds that a website can be a place of public accommodation so long as there is a substantial nexus, or link, between the website

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provide services, like streaming video, in the home are public accommodations because “the ADA covers the services ‘of’ a public accommodation, not services ‘at’ or ‘in’ a public accommodation”).

<sup>82</sup> *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 32-33 (2d Cir. 1999) (finding unpersuasive argument that “because insurance policies are not used in places of public accommodation they do not qualify as goods or services of a place of public accommodation.” Court reasoned Title III language “suggests to us that the statute was meant to guarantee more than mere physical access.”)

<sup>83</sup> *Mejico v. Alba Web Designs, LLC*. 515 F.Supp.3d 424, 433-34 (W.D. Va. 2021) (agreeing with first circuit that places of public accommodation are not limited to physical... establishments and instead include commercial websites that offer goods and services. Thus the fact that Alba has no physical location open to the public is not dispositive...” and that “The First Circuit’s reasoning applies with equal — if not greater — force in the modern world....”) (Internal quotes omitted).

<sup>84</sup> *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999) (The core meaning of Title III is that no owner or operator of a physical place such as a store or an electronic place such as a website that is open to the public can prevent a disabled person from using its services).

<sup>85</sup> Reid et al, *supra* note 38, at 7.

<sup>86</sup> *Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 952-55 (N.D. Cal. 2006) (describing that under Nexus theory discrimination in a public accommodation not limited to on site premises nor use of a physical space); *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1116 (N.D. Cal. 2011) (“While the retail stores that sell Facebook gift cards may be places of public accommodation, Young does not allege that Facebook, Inc. ‘owns, leases... or operates’ those stores. Facebook’s Internet service thus do not have a nexus to a physical place of public accommodation . . .”).

<sup>87</sup> *Ariza v. Walters & Mason Retail, Inc.*, 516 F. Supp. 3d 1350, 1354 (S.D. Fl. 2021) (“Although the Eleventh Circuit has not directly addressed whether websites are places of public accommodation within the meaning of the ADA, the Eleventh Circuit has held that a plausible claim for violation of the ADA exists where a website is a service that facilitates the use of a physical location.”); *Gomez v. Bang & Olufsen Am., Inc.*, No. 1:16-CV-23801, 2017 WL 1957182 at \*3 (S.D. Fla. Feb. 2, 2017) (“[T]he court concludes that . . . if a plaintiff alleges that a website’s inaccessibility impedes the plaintiff’s access to a specific, physical, concrete space, and establishes some nexus between the website and the physical place . . ., the plaintiff’s ADA claim can survive a motion to dismiss.”) (Internal quotes omitted).

and the physical place which the website represents.<sup>88</sup> Third, the Third<sup>89</sup> and Fifth<sup>90</sup> Circuits subscribe to the belief that not only standalone websites, but also websites with a “nexus” to the physical place, are not places of public accommodation and do not need to be accessible.<sup>91</sup>

It is important to note that while the Sixth, Eighth, and Tenth Circuits have remained silent on the topic, a district court in the Sixth Circuit has hinted at subscribing to the nexus theory but has not fully embraced it.<sup>92</sup> Although there are many examples of website-related Title III litigation, the next section will examine the three jurisdictional theories.

### 1. Standalone Theory: *National Federation of the Blind v. Scribd*

This case was initiated when a blind individual was unable to read the content on Scribd’s digital library because it was not compatible with screen reading programs that could convert the content into audio or braille formats.<sup>93</sup> Scribd took the stance that the word “place” in “place of public accommodation” is useless if it does not refer to a physical place.<sup>94</sup> Scribd also argued that because the examples listed in Title III’s twelve categories are limited to physical places; all of Title III must apply only to such places.<sup>95</sup> The Vermont court in the Second Circuit, however, ruled that Scribd’s website and apps were public accommodations under the Title and therefore needed to be accessible.<sup>96</sup> The court reasoned that because neither the statute title nor the section title uses the word “place” but instead implements the words “public accommodation,” the accommodation only needs to be open to the public but not necessarily a physical place.<sup>97</sup> Because of this, the court continued, a website does not need to be shown to have a connection to a physical place, but only needs to be shown that its provided goods or services falls

<sup>88</sup> Reid et al., *supra* note 38, at 7.

<sup>89</sup> Peoples v. Discover Fin. Servs., Inc., 387 F. App’x 179, 183 (3d Cir. 2010) (“Our court is among those that have taken the position that the term [public accommodation] is limited to physical accommodations”); Anderson v. Macy’s Inc., No. 2:12-CV-00556, 2012 WL 3155717, at \*4 (W.D. Pa. Aug. 2, 2012) (dismissing Title III claim against Macy’s Online because “a website is not a physical accommodation”).

<sup>90</sup> Zaid v. Smart Fin. Credit Union, No. H-18-1130, 2019 WL 314732, at \*6 (S.D. Tx. Jan. 24, 2019) (“While websites may be affiliated with brick-and-mortar businesses that are places of public accommodation, that does not render the businesses’ websites themselves places of public accommodation.”).

<sup>91</sup> Reid et al, *supra* note 38, at 7.

<sup>92</sup> Castillo v. Jo-Ann Stores, LLC., 286 F. Supp. 3d 870, 881 (N.D. Oh. 2018) (plaintiff sufficiently alleged nexus between website and physical place but court does not determine if website is place of public accommodation).

<sup>93</sup> Nat’l Fed’n of the Blind v. Scribd Inc., 97 F. Supp. 3d 565, 567 (D. Vt. 2015).

<sup>94</sup> *Id.* at 572.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 575-76.

<sup>97</sup> *Id.* at 572.

within one of the twelve enumerated categories to be considered a public accommodation.<sup>98</sup> The court further noted that reading the statute in the defendant's favor would create the absurd result of allowing a disabled customer receiving services from a non-physical place, like a door-to-door salesman, to be discriminated against, while at the same time preventing discrimination of the same services in a physical place like the salesman's office.<sup>99</sup>

## 2. Nexus Theory: *Robles v. Domino's Pizza* and *Ouellette v. Viacom*

In *Robles v. Domino's Pizza*, the plaintiff, a blind individual, was unable to use Domino's website and app for the pizza delivery service because they were incompatible with screen readers.<sup>100</sup> The plaintiff sought a permanent injunction requiring Domino's compliance with the Web Content Accessibility Guidelines.<sup>101</sup> As expected, Domino's claimed that Title III does not apply to websites.<sup>102</sup> The court held that Domino's website and app are places of public accommodation and therefore subject to Title III<sup>103</sup> by relying on Title III's definition of discrimination<sup>104</sup> and the Department Of Justice's (DOJ) definition of "ancillary aids and services."<sup>105</sup> The court reasoned that the critical fact in its analysis was the nexus between Domino's website, app, and the restaurant's physical store.<sup>106</sup> This nexus was established because Domino's customers use the website and app to find restaurant locations and order pizzas.<sup>107</sup> In other words, Domino's website and app "facilitate access to goods and services of a place of public accommodation — Domino's physical restaurants."<sup>108</sup> While this court found a nexus between Domino's physical location and its virtual location, other courts, as demonstrated by the *Ouellette v. Viacom*<sup>109</sup> case discussed below, have found no such nexus when the business in question lacks a definite physical location.

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<sup>98</sup> *Id.* at 573-74.

<sup>99</sup> Nat'l Fed'n of the Blind v. Scribd Inc., 97 F. Supp. 3d at 572-73.

<sup>100</sup> *Robles v. Domino's Pizza, LLC.*, 913 F.3d 898, 902 (9th Cir. 2019).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 902-03.

<sup>103</sup> *Id.* at 904.

<sup>104</sup> *Id.*; 42 U.S.C. § 12182(b)(2)(A)(iii) (discrimination is failure to "take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services").

<sup>105</sup> *Robles*, 913 F.3d at 904-05; 28 C.F.R. § 36.303(b)(2) ("accessible electronic and information technology" or "other effective methods of making visually delivered materials available to individuals who are blind or have low vision.").

<sup>106</sup> *Robles*, 913 F.3d at 905.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Ouellette v. Viacom*, No. CV 10-133-M-DWM-JCL, 2011 WL 1882780 (D. Mont. Mar. 31, 2011).

The plaintiff in *Ouellette* claimed that both Google and MySpace violated Title III because not only had both websites failed to provide their terms of use in audio format, but also provided those terms only in block texts which made it difficult for the plaintiff to read.<sup>110</sup> The court dismissed the Title III claim because, by only alleging that the “[d]efendants’ conduct ha[d] impeded his access to certain internet websites . . . ,” the plaintiff failed to assert a nexus between the companies’ websites and a physical location to which those companies could be tied.<sup>111</sup> The court reasoned that without an allegation that a website restricts “access to a specific physical, concrete space,”<sup>112</sup> the services available on that website are not subject to Title III’s public accommodation requirement.<sup>113</sup>

### 3. Websites Are Not Public Accommodations: *Zaid v. Smart Financial Credit Union*

The plaintiff in this case argued that Smart Financial’s website was inaccessible because of its incompatibility with the screen reading software the plaintiff used to read the company’s online information for prospective members including its location and services.<sup>114</sup> The plaintiff argued that Smart Financial’s website should be accessible because the phrase “other service establishment” used in section (7)(F) of the ADA’s twelve categories was broad enough to encompass websites.<sup>115</sup> The court, however, disagreed and held that the website was not a place of public accommodation.<sup>116</sup> The court reached this conclusion by relying on Fifth Circuit precedent “requiring that a place of public accommodation be a physical place.”<sup>117</sup> Additionally, the court relied on the Fifth Circuit’s use of the principle of *ejusdem generis* which states that “when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed.”<sup>118</sup> Because the phrase “other service establishment” in category (7)(F) only refers to other physical locations like those listed in the statute, the court further reasoned that the website was not of the same class as the other establishments listed in the category since it did “not have a distinct physical

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<sup>110</sup> *Id.* at \*2.

<sup>111</sup> *Id.* at \*5.

<sup>112</sup> *Id.* at \*5 (quoting *Access Now, Inc. v. Sw. Airlines, Co.*, 227 F.Supp.2d 1312, 1321 (S.D.Fla.2002), *affirmed* 385 F.3d 1324, 1329 (11th Cir. 2004)).

<sup>113</sup> *Id.* at \*5 (citing *Peoples v. Discover Fin. Servs., Inc.*, No. CIV. A.08-2024, 2009 WL 3030217, \*2 (E.D.Pa. 2009)).

<sup>114</sup> *Zaid v. Smart Fin. Credit Union*, No. CV H-18-1130, 2019 WL 314732, at \*1 (S.D. Tex. Jan. 24, 2019).

<sup>115</sup> *Id.* at \*6.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* (quoting *Magee v. Coca-Cola Refreshments USA, Inc.*, 833 F.3d 530, 534 (5th Cir. 2016)).

place of business.”<sup>119</sup> In closing, the court noted that “[w]hile websites may be affiliated with brick-and-mortar businesses that are places of public accommodation, that does not render the businesses’ websites themselves places of public accommodation.”<sup>120</sup>

## **B. Discussion**

As Reid suggested,<sup>121</sup> and as the previous cases demonstrate, the main focus of website-related Title III litigations is on the word “place” and its relation to a physical, brick-and-mortar location. This raises the question as to how different jurisdictions would rule on a case involving the accessibility of a telehealth website. It seems safe to say that courts subscribing to the *Zaid* line of thought would conclude that such a website would not be covered under Title III.<sup>122</sup> Like the court in *Zaid*,<sup>123</sup> a similar court might find that, despite much of the same services provided in the doctor's office, a nonphysical telehealth website is unlike the other physical healthcare facilities listed in section (7)(F) of the ADA's twelve categories. To be sure, section (7)(F) is the same category which the court held could not contain websites because of their lack of physicality.<sup>124</sup>

Similarly, as with a hypothetical ruling in a *Zaid*-related court, it is also safe to say that a court aligning itself with the *Scribd* court and the “standalone” website theory would hold that an inaccessible telehealth website is a place of public accommodation.<sup>125</sup> Such a hypothetical court might rely on the court's reasoning in *Scribd*<sup>126</sup> and conclude that because healthcare providers' offices, hospitals, and pharmacies are listed as public accommodations under Title III,<sup>127</sup> the telehealth website would also be a public accommodation. The court may also conclude that holding the website to be covered under Title III would prevent the absurd result of condoning inaccessible online healthcare services while refusing to condone those same inaccessible healthcare services in a physical healthcare facility.

It might be a bit more difficult, however, to determine how a nexus court might rule on an inaccessible telehealth website. On the one hand, as Reid proposes, nexus courts might conclude that such a website is a place of public accommodation because there is a direct connection between the healthcare services it provides and the brick-and-mortar doctor's office in which those services are also provided.<sup>128</sup> On the other hand, because healthcare providers can now use platforms such as

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*Id.*

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*Zaid*, No. CV H-18-1130, 2019 WL 314732, at \*1.

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Reid, *supra* note 11, at 597.

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*Zaid*, WL 314732, at \*6.

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*Id.*

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*Id.*

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Nat'l Fed'n of the Blind v. Scribd Inc., 97 F. Supp. 3d 565, 575-76 (D. Vt. 2015).

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*Id.* at 573-74.

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42 U.S.C. § 12181(7)(F).

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Reid et al, *supra* note 38, at 8.



Apple FaceTime, Facebook Messenger video chat, Google Hangouts video, Zoom, and Skype<sup>129</sup> — platforms that are traditionally seen as social media and not tied to a physical location — a nexus court following the same reasoning as the court in *Ouellette*<sup>130</sup> might conclude that, despite the healthcare services provided on the website, there is no nexus between such services and a physical social media location. As a result, such a court would not hold an inaccessible telehealth website to be a place of public accommodation.

The range of outcomes depending on which jurisdiction a telehealth provider and patient happened to reside in can leave them in an ambiguous position regarding accessibility to telehealth websites. Despite the fact that both Congress and the DOJ have acknowledged that the ADA applies to websites,<sup>131</sup> the “inconsistent court decisions, differing standards for determining web accessibility, and repeated calls for Department action . . . ,” led the DOJ to propose regulations in 2010 aimed at resolving the confusion.<sup>132</sup> Unfortunately, just seven years later, the Department withdrew from its investigation into proposed regulations thus leaving those calls for guidance still unanswered.<sup>133</sup>

Although the ADA ensures that individuals with disabilities are protected from discrimination in physical places of public accommodations, this protection does not officially extend to the nonphysical virtual world. As a result, U.S. telehealth users are largely left to the coincidence of jurisdictional location to resolve their accessibility needs. The next section will discuss an alternative regulatory scheme aimed at mandating website accessibility.

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<sup>129</sup> *Notification of Enforcement Discretion for Telehealth Remote Communications during COVID-19, supra* note 23.

<sup>130</sup> *Ouellette v. Viacom*, No. CV 10-133-M-DWM-JCL, 2011 WL 1882780, at \*5 (D. Mont. Mar. 31, 2011) (quoting *Access Now, Inc. v. Southwest Airlines, Co.*, 227 F.Supp.2d 1312, 1321 (S.D.Fla.2002), affirmed 385 F.3d 1324, 1329 (11th Cir. 2004)).

<sup>131</sup> *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations*, 75 Fed. Reg. 43460-01, 43463-64 (proposed July 26, 2010); Letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Division, Department of Justice, to Tom Harkin, U.S. Senator (Sept. 9, 1996), <https://www.justice.gov/crt/foia/file/670621/download> (last visited Oct. 18, 2021) (“covered entities that use the Internet to provide information regarding their programs, goods or services must be prepared to offer those communications through accessible means.”); Brief of the United States as Amicus Curiae in Support of Appellant at 7, *Hooks v. OKbridge, Inc.*, 232 F.3d 208 (5th Cir. 2000) (No. 99-50891), 1999 WL 33806215 (arguing statutory language of Title III does not prevent its application to the Internet).

<sup>132</sup> *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations*, 75 Fed. Reg. 43460-01 at 43464.

<sup>133</sup> *Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions*, 82 Fed. Reg. 60932-01, 60932 (Dec. 26, 2017).

#### IV. THE ACCESSIBILITY FOR ONTARIANS WITH DISABILITIES ACT (AODA)

Signed into law June 13, 2005, the AODA is based off the earlier Ontarians with Disabilities Act (ODA).<sup>134</sup> The ODA of 2001 was enacted to “improve opportunities for persons with disabilities and to provide for their involvement in the identification, removal and prevention of barriers to their full participation in the life of the province.”<sup>135</sup> To this effect, the Act required public transportation organizations, educational institutions, and hospitals to create and publicly share accessibility plans.<sup>136</sup> These accessibility plans included information such as steps the organization took to remove barriers for people with disabilities and a list of policies the organization would review in the future to identify such barriers.<sup>137</sup> Despite the fact that the ODA was seen as a step in the right direction in removing barriers for persons with disabilities, the Act was also criticized as weak and ineffective.<sup>138</sup> As it stood, the Act did not require the implementation nor enforcement of the actions set forth in the accessibility plans.<sup>139</sup> This lack of teeth resulted in the enactment of the AODA.<sup>140</sup>

The AODA has a stated purpose of “developing, implementing and enforcing accessibility standards in order to achieve accessibility for Ontarians with disabilities . . . on or before January 1, 2025.”<sup>141</sup> With this purpose in mind, Ontario became the first Canadian province and one of the first jurisdictions in the world to implement a specific goal and timeframe for obtaining accessibility.<sup>142</sup> Ontario also became the first jurisdiction to enact accessibility standards<sup>143</sup> by “providing for the involvement of persons with disabilities, of the government of Ontario and of representatives of industries and of various sectors of the economy in the development of the accessibility standards.”<sup>144</sup> These accessibility standards, which will be discussed in more detail later in this section, are implemented in areas such

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<sup>134</sup> Julie Rodier, *A Narrative Policy Analysis of the Accessibility for Ontarians with Disabilities Act, 2005: Exploring Implementation in Municipal Recreation*, 62-63 (2010) (Masters thesis, University of Waterloo), <https://uwspace.uwaterloo.ca/handle/10012/5569?show=full>.

<sup>135</sup> S.O. 2001, c. 32, s. 1.

<sup>136</sup> *Id.* ss. 14 (1)-15(4).

<sup>137</sup> *Id.* ss. 14 (3), 15(3).

<sup>138</sup> Meaghan Shannon, *A Comparison of Ontario's Accessibility for Ontarians with Disabilities Act and the Canadian Copyright Act: Compliance, Enforcement, Risks, and the Implications for Ontario Community Colleges*, MASTER OF STUDIES IN LAW RESEARCH PAPERS REPOSITORY, 8 (2016) (University of Western Ontario), <https://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1001&context=mslp>.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> Accessibility for Ontarians with Disabilities Act, S.O. 2005, c. 11, s. 1 (Can.).

<sup>142</sup> *About Accessibility Laws*, ONTARIO (last updated May 3, 2022),

<https://www.ontario.ca/page/about-accessibility-laws#section-0>.

<sup>143</sup> *Id.*

<sup>144</sup> Accessibility for Ontarians with Disabilities Act, S.O. 2005, c. 11, s. 1 (Can.).

as employment, transportation, customer service, and information and communication.<sup>145</sup>

Like the ADA, the backbone of the AODA is its extensive definition of disability which includes “any degree of physical disability [such as] diabetes mellitus, epilepsy, . . . [and] muteness or speech impediment.”<sup>146</sup> This definition also includes developmental and learning disabilities and mental disorders.<sup>147</sup> To go along with its extensive definition of disability, the Act has an equally extensive definition of barrier which means “anything that prevents a person with a disability from fully participating in all aspects of society” including barriers related to architecture, information and communication; an individual’s attitude toward another with a disability; and technology.<sup>148</sup> These barriers closely resemble the accessibility standards and can be said to help underscore what the standards are designed to do — mainly remove barriers.

### **A. Accessibility Standards**

As mentioned earlier, the AODA’s accessibility standards are the workhorse of the Act and cover topics such as information and communication, employment, transportation, the design of public spaces, and customer service<sup>149</sup> and generally apply to every organization or person that provides goods or services to the public and has at least one employee in Ontario.<sup>150</sup> Like the accessibility plans in the ODA, the accessibility standards require an affected organization or person, with the help of a standard development committee,<sup>151</sup> to create policies and practices that identify and remove barriers for individuals with disabilities.<sup>152</sup> Unlike the ODA’s accessibility plans, however, the accessibility standards require the affected organization to actually implement and comply with the adopted policies within the time frame laid out in the standard.<sup>153</sup> The standards also go a step further than the accessibility plans by requiring the affected organization provide the Minister with progress reports on the implementation of the standards.<sup>154</sup> Similarly, the affected organization must file an annual accessibility

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<sup>145</sup> Accessibility for Ontarians with Disabilities Act, O. Reg. 165/16, s. 1 (Can.).

<sup>146</sup> Accessibility for Ontarians with Disabilities Act, S.O. 2005, c. 11, s. 2 (Can.).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> Accessibility for Ontarians with Disabilities Act, O. Reg. 165/16, s. 1 (Can.).

<sup>150</sup> O. Reg. 191/11, s. 1(3).

<sup>151</sup> Accessibility for Ontarians with Disabilities Act, S.O. 2005, c. 11, ss. 8 (1)-(4) (Can.) (The standard development committee is appointed by the Deputy Minister in charge of the overall administration of the AODA. The committee is composed of representatives of the industries or organizations to which the standards apply; and persons with disabilities).

<sup>152</sup> *Id.* s. 6 (6).

<sup>153</sup> *Id.* ss. 6 (6), 13.

<sup>154</sup> *Id.* s. 11 (1).

report for review by a director.<sup>155</sup> The director uses the accessibility report to determine if the organization has complied with the accessibility standard.<sup>156</sup>

Of particular note is the information and communication accessibility standard. This standard has requirements relating to providing accessible information in such categories as emergency procedures, educational materials, and library information; but it is the requirement to provide accessible websites and web content that is the most relevant for telehealth purposes.

### 1. Information and Communication Standards: Accessible Websites and Web Content

Although the accessibility standards generally apply to every person or organization with at least one employee in Ontario, the requirement to provide accessible websites and web content narrows the applicability. This requirement not only applies to government entities, but also Ontarian public sector organizations, like hospitals and organizations with fifty or more employees in Ontario.<sup>157</sup> The requirement also mandates that affected organizations must have made their websites accessible in a specific timeframe.<sup>158</sup> First, the organizations' websites must have conformed to the Web Content Accessibility Guidelines (WCAG) 2.0 Level A standard by January 1, 2014.<sup>159</sup> The WCAG — which will be discussed later in this section — is an international standard that focuses on making web content like text and images accessible to individuals with disabilities.<sup>160</sup> Next, these organizations' websites must have adhered to WCAG 2.0 Level AA by January 1, 2021.<sup>161</sup> This timeframe was consistent with the AODA's overall goal of achieving an accessible Ontario by the year 2021. Because the deadline for compliance has passed, these websites should already be in compliance. The mandate to provide accessible websites does have limitations and exceptions, however.

One limitation of the mandate is that it only applies to websites and web content that “an organization controls directly or through a contractual relationship that allows for modification . . . and web content published . . . after

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<sup>155</sup> Accessibility for Ontarians with Disabilities Act, S.O. 2005 c. 11, s. 16 (Can.); Accessibility for Ontarians with Disabilities Act, S.O. 2005, c. 11, s. 30 (2) (Can.) (A director is appointed by the Deputy Minister and is responsible for applying the AODA and its regulations to the affected persons or organizations).

<sup>156</sup> Accessibility for Ontarians with Disabilities Act, S.O. 2005, c. 11, s. 16 (Can.).

<sup>157</sup> Accessibility for Ontarians with Disabilities Act, O. Reg. 191/11, ss. 14 (1)-(2), 2 (Can.).

<sup>158</sup> *Id.* s. 14 (4).

<sup>159</sup> *Id.*

<sup>160</sup> *Web Content Accessibility Guidelines (WCAG) Overview*, WEB ACCESSIBILITY INITIATIVE (last updated Sept. 6, 2022), <https://www.w3.org/WAI/standards-guidelines/wcag/>.

<sup>161</sup> Accessibility for Ontarians with Disabilities Act, O. Reg. 191/11, s. 14 (4) (Can.).

January 1, 2012.”<sup>162</sup> This means that while an organization, like YouTube, that hosts user-made content on their website may not be required to make that content accessible because it is not directly controlled by the organization, another organization, like a telehealth platform, would be required to have accessible web content because it directly controls its content. Another limitation is that the affected organizations do not need to conform to the live captions and pre-recorded audio descriptions criteria of the WCAG 2.0 Level AA.<sup>163</sup> Despite this limitation, the affected organization must still comply with the Level A criterion of pre-recorded captions.<sup>164</sup> Finally, an affected organization does not need to conform to the WCAG if, based on certain criteria, compliance is found to be impracticable.<sup>165</sup> For those organizations to which the requirement to provide an accessible website and web content applies, the WCAG criteria also applies.

## 2. WCAG 2.0

The WCAG was developed by the World Wide Web Consortium (W3C), an international organization headed by the original creator of the web.<sup>166</sup> Its mission is to make the web available to everyone.<sup>167</sup> With this goal in mind, the WCAG was created to help web developers make accessible websites by focusing on four principles of development: perceivability, operability, understandability, and robustness.<sup>168</sup> Each of these principles are broken down into guidelines that developers can follow to ensure their websites meet each principle.<sup>169</sup> Under each guideline, developers can find different success criteria they can implement to help meet each guideline.<sup>170</sup> Furthermore, each success criteria are graded on a level of increased accessibility from A to AAA, with AAA being the most accessible.<sup>171</sup>

The WCAG’s principles, guidelines, and success criteria cover a wide variety of topics. For example, if one were to look in the principle entitled perceivable, they would find the guideline entitled “distinguishable.”<sup>172</sup> Under the guideline of distinguishable is the Level AA criterion of resizable text which

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<sup>162</sup> *Id.* s. 14 (5).

<sup>163</sup> *Id.* s. 14 (4).

<sup>164</sup> *Id.*; *How to Meet WCAG (Quick Reference)*, WEB ACCESSIBILITY INITIATIVE (last updated Oct. 4, 2019), [https://www.w3.org/WAI/WCAG21/quickref/?currentsidebar=%23col\\_overview&version=2.0#top](https://www.w3.org/WAI/WCAG21/quickref/?currentsidebar=%23col_overview&version=2.0#top).

<sup>165</sup> Accessibility for Ontarians with Disabilities Act, O. Reg. 191/11, s. 14 (6) (Can.).

<sup>166</sup> About W3C, W3C, <https://www.w3.org/Consortium/facts.html> (last visited Sept. 26, 2021).

<sup>167</sup> *Id.*

<sup>168</sup> *How to Meet WCAG (Quick Reference)*, *supra* note 160.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

suggests that developers make their websites' text resizable "up to 200 percent without loss of content or functionality."<sup>173</sup> The purpose of this criterion is to "ensure that visually rendered text, including text-based controls . . . can be scaled successfully so that it can be read directly by people with mild visual disabilities."<sup>174</sup>

Another example relates to the assistive technology discussed earlier. To find this example one must first look under the robustness principle which helps to ensure that web content is "robust enough that it can be interpreted by a wide variety of user agents, including assistive technologies."<sup>175</sup> Then, under the compatibility guideline, one can find the Level A criterion entitled, "Name, Role, Value."<sup>176</sup> This criterion is designed to ensure that "all user interface components [of a website] enable[] compatibility with assistive technology, such as screen readers, screen magnifiers, and speech recognition software, used by people with disabilities."<sup>177</sup> By implementing this criterion and others like it, web developers of telehealth platforms could help ensure that a disabled telehealth user could effectively use the platform. While the WCAG seeks to ameliorate the online difficulties faced by individuals with disabilities, compliance with it is only voluntary;<sup>178</sup> the AODA seeks to make it mandatory.

## **B. Regulatory Oversight: Compliance and Enforcement**

The teeth that were lacking in the ODA can be found in the AODA's use of penalties for failure to comply with the accessibility standards and the accessibility reports. If the director in charge of overseeing the accessibility standards determines that an organization or individual has not complied with the accessibility standards or reporting requirements, the director can issue a number of penalties including payment of a fine.<sup>179</sup> The amount of a fine is based on the severity of the contravention, the individual's or organization's history of contravention, and whether the violator is an individual or an organization.<sup>180</sup> For example, if an unincorporated organization committed a major contravention, defined as "a contravention that may pose a health or safety risk to persons with disabilities,"<sup>181</sup> that organization may face a daily penalty of up to \$50,000.<sup>182</sup> This

<sup>173</sup> *How to Meet WCAG (Quick Reference)*, *supra* note 160.

<sup>174</sup> *Understanding Success Criterion 1.4.4: Resize Text*, WEB ACCESSIBILITY INITIATIVE, <https://www.w3.org/WAI/WCAG21/Understanding/resize-text.html> (last visited Dec. 30, 2021).

<sup>175</sup> *How to Meet WCAG (Quick Reference)*, *supra* note 160.

<sup>176</sup> *Id.*

<sup>177</sup> *Understanding Success Criterion 4.1.2: Name, Role, Value*, WEB ACCESSIBILITY INITIATIVE, <https://www.w3.org/WAI/WCAG21/Understanding/name-role-value.html#benefits> (last visited Dec. 30, 2021).

<sup>178</sup> Annaswamy et al., *supra* note 13.

<sup>179</sup> Accessibility for Ontarians with Disabilities Act, S.O. 2005, c. 11, ss. 21 (3)-(4) (Can.).

<sup>180</sup> Accessibility for Ontarians with Disabilities Act, O. Reg. 191/11, s. 83 (1) (Can.).

<sup>181</sup> *Id.* s. 83 (2).

<sup>182</sup> *Id.* s. 83 (1).

means that if a telehealth provider with fifty or more employees in Ontario does not conform its website to the WCAG standard, it could face a daily fine of \$50,000 or more depending on its incorporation status.

## V. COMPARISON OF THE AMERICANS WITH DISABILITIES ACT AND THE ACCESSIBILITY FOR ONTARIANS WITH DISABILITIES ACT

Both the ADA and the AODA help ensure that physical places such as restaurants, stores, and doctors' offices are accessible to individuals with disabilities, but when it comes to accessibility of the nonphysical virtual world of telehealth, each act takes a different approach. As mentioned earlier, the fact that the ADA does not officially recognize websites as places of public accommodations has caused the Act's "clear and comprehensive national mandate"<sup>183</sup> to devolve into jurisdictional confusion and inconsistent application. Instead of requiring compulsory adherence to the same accessibility standards as brick-and-mortar locations, the U.S. has a policy of "encourag[ing] self-regulation with regard to the Internet and . . . regulat[ing] only where self-regulation is insufficient and government involvement may be necessary."<sup>184</sup> While the ADA's self-regulation of the internet might stem from the notion that the Act is "intended to give public accommodations maximum flexibility in meeting the statute's requirement,"<sup>185</sup> this voluntary standard is insufficient.<sup>186</sup> How can we expect telehealth platforms to voluntarily meet the statute's requirements — despite the level of flexibility given — when the platforms' developers are unsure as to whether they fall under the statute in the first place? It is time for a change. It is time for government involvement.

The needed government involvement in the internet and telehealth websites can be seen in the AODA. In contrast to the ADA's reliance on litigation and self-regulation to achieve accessibility in telehealth, the AODA relies on compulsion.<sup>187</sup> First, the Ontarian legislature, through the AODA, made it clear that websites and web content are barriers for individuals with disabilities and need to be accessible.<sup>188</sup> This is in contrast to the DOJ and the U.S. legislature that affirmed that websites must be accessible but have not codified this affirmation in the ADA. Second, unlike the ADA's reactive litigation strategy, the AODA's

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<sup>183</sup> 42 U.S.C. § 12101(b).

<sup>184</sup> *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations*, 75 Fed. Reg. 43460, 43463 (proposed July 26, 2010).

<sup>185</sup> *Robles v. Domino's Pizza, LLC.*, 913 F.3d 898, 908 (9th Cir. 2019) (quoting *Reed v. CVS Pharmacy, Inc.*, No. CV 17-3877-MWF (SKX), 2017 WL 4457508 at \*5 (C.D. Cal Oct. 3, 2017)).

<sup>186</sup> 75 Fed. Reg. 43460-01 at 43463.

<sup>187</sup> Malhotra & Rusciano, *supra* note 12.

<sup>188</sup> O. Reg. 191/11, s. 14 (4) (Can.).

proactive strategy of requiring telehealth platforms to submit accessibility reports<sup>189</sup> can help ensure that those platforms maintain their accessibility so as to prevent litigation in the first place.

Third, the AODA's adherence to the WCAG<sup>190</sup> provides a consistent measurable standard by which telehealth companies can be judged and to which those companies can conform. It can be rightfully argued, however, that the lack of a live caption requirement under the AODA<sup>191</sup> will prevent individuals with hearing impairments from getting the most out of their telehealth visit. This is a valid concern, but there are those who would argue that the lack of such a requirement is a cost-saving measure as some businesses and organizations are finding it difficult to meet the financial burden of providing Level A's pre-recorded closed captioning criterion.<sup>192</sup>

Likewise, others have argued that reliance on the WCAG alone is problematic because the standard focuses on individuals with sensory disabilities at the expense of individuals with cognitive disabilities.<sup>193</sup> While the WCAG's success criteria does cater to sensory disabilities, many of those criteria are also designed to benefit multiple disabilities including cognitive disabilities.<sup>194</sup> This focus on benefiting multiple disabilities in a single criterion helps make the WCAG a flexible standard. Another argument that might be made against the AODA's reliance on the WCAG is that the AODA does not require compliance with Level AAA. A counter to this is that this level, as per the W3C's advice, is not

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<sup>189</sup> S.O. 2005, c. 11, ss. 14-16 (Can.).

<sup>190</sup> O. Reg. 191/11, s. 14 (4) (Can.).

<sup>191</sup> *Id.*

<sup>192</sup> See Kathleen Smith, *Providing Closed Captioning on Council Meetings Too Costly, Suggest Town Staff*, GODERICH SIGNAL-STAR (Mar. 25, 2021), <https://www.goderichsignalstar.com/news/providing-closed-captioning-on-council-meetings-too-costly-suggests-town-staff>.

<sup>193</sup> Reid, *supra* note 11, at 618.

<sup>194</sup> See *Understanding Success Criterion 1.4.5: Images of Text*, WEB ACCESSIBILITY INITIATIVE, <https://www.w3.org/WAI/WCAG21/Understanding/images-of-text.html> (last visited Jan. 14, 2022) (explaining benefits to people with low vision, people with visual tracking problems and people with cognitive disabilities that affect reading); See also *Understanding Success Criterion 2.4.2: Page Titled*, WEB ACCESSIBILITY INITIATIVE, <https://www.w3.org/WAI/WCAG21/Understanding/page-titled.html> (last visited Jan. 14, 2022) (explaining benefits to people with visual disabilities by helping them differentiate content; benefits to people with cognitive disabilities by helping them identify titles and content; benefits to people with mobility impairments that rely on audio navigation); See also *Understanding Success Criterion 2.2.1: Timing Adjustable*, WEB ACCESSIBILITY INITIATIVE, <https://www.w3.org/WAI/WCAG21/Understanding/timing-adjustable.html> (last visited Jan. 14, 2022) (explaining benefits to people with physical disabilities who need more time to react; benefits to people with visual disabilities who need more time to find items on screen; benefits to people with cognitive disabilities who need more time to read and understand).



recommended for a general policy because “it is not possible to satisfy all Level AAA Success Criteria for some content.”<sup>195</sup>

The fourth and final difference between the ADA and the AODA’s approach to ensuring accessible telehealth websites is how they implement penalties. The aforementioned jurisdictional confusion under the ADA means that a private telehealth platform that comes under fire for its inaccessibility may or may not receive a penalty based on its jurisdictional location. When it does receive a penalty, however, it may come in a variety of different forms including injunctive relief or a \$50,000 fine.<sup>196</sup> The AODA, on the other hand, provides a more dependable penalty system because it specifically addresses accessible websites and what is to be done when a website is not accessible. The ability to issue a \$50,000 per day penalty,<sup>197</sup> however, might be seen as too harsh a penalty; thus, making the ADA’s penalty more viable.

## VI. IMPLICATIONS OF MANDATING WEB ACCESSIBILITY UNDER THE ADA

What can the DOJ learn from the AODA’s implementation? Perhaps the most important takeaway is to officially adopt websites as places of public accommodations under Title III. By categorizing websites as places of public accommodations, the DOJ could virtually eliminate the jurisdictional confusion, create a more dependable penalty system, and put telehealth and other web developers on notice of their duty to provide accessible websites. The DOJ made it clear, however, that any potential application of the ADA to websites would be limited to sites that offer goods and services “whether [by] hosting their own web site or participating in a hosts web site.”<sup>198</sup> The ADA, the department continued, would not be applicable to personal or non-commercial web content posted on a public accommodation’s website.<sup>199</sup> This potential application mirrors that of the AODA<sup>200</sup> and might be implemented by enacting a similar provision. This theoretical provision would likewise not exclude telehealth platforms as places of public accommodation because these platforms own their own content, are usually implemented on a host website, and are not for personal or non-commercial use.<sup>201</sup>

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<sup>195</sup> *Understanding Conformance*, W3C, <https://www.w3.org/TR/UNDERSTANDING-WCAG20/conformance.html> (last visited Jan. 6, 2022).

<sup>196</sup> 42 U.S.C.A. §§ 12188(b)(2)(A)(i), (C)(i).

<sup>197</sup> O. Reg. 191/11, s. 83 (1) (Can.).

<sup>198</sup> *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations*, 75 Fed. Reg. at 43465.

<sup>199</sup> *Id.*

<sup>200</sup> O. Reg. 191/11, s. 14 (5) (Can.).

<sup>201</sup> See Bill Siwicki, *Comparing 11 Top Telehealth Platforms: Company Execs Tout Quality, Safety, EHR Integrations*, HEALTHCAREITNEWS (Aug. 2, 2017, 10:10am),

To be sure, the fact that various healthcare facilities are already among Title III's twelve categories<sup>202</sup> will help cement the platforms' roles as public accommodations.

It may be argued that the AODA is inapplicable to U.S. telehealth because the major Ontario telehealth providers (OTN and Telehealth Ontario) are funded by the Ontario government<sup>203</sup> and would have to comply with sections 508<sup>204</sup> if they were in a similar situation in the US; thus, leaving their status as a public accommodation superfluous. However, this argument is misguided. If implemented in the same manner in the U.S., the AODA would still be applicable to private telehealth companies through its fifty-employee requirement.<sup>205</sup> Many private U.S. telehealth providers have fifty or more employees. For example, Lumahealth has ninety employees, eVisit has 100 employees, and Teledoc Health boasts 2000 employees.<sup>206</sup> Because these and other U.S. telehealth companies have the requisite number of employees, they would fall within the AODA's mandate.

The second takeaway from the AODA is its implementation of the WCAG. In its proposal for adopting web accessibility, the DOJ emphasized that, "[a]ny regulation the Department adopts must provide specific guidance to help ensure [w]eb access . . . without hampering innovation and technological advancement on the [w]eb."<sup>207</sup> While it may be argued that the WCAG is not one hundred percent perfect, it can allow for innovation. In his study of visual web design in relation to the AODA/WCAG standards, Arezoo Abyazani found that the "AODA is not a limitation for designers' creativity if they consider it in the early stages of their design" and that by "exploring the visual design criteria of accessibility guidelines, it is possible to improve the usability and aesthetics of all websites."<sup>208</sup> Abyazani's findings suggest that if implemented by the ADA, the WCAG would give telehealth platform developers the specific guidance to ensure web accessibility while leaving room for innovation and creativity. To bridge the gap between accessibility and creativity, however, a web developer must have access to the correct resources.

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<https://www.healthcareitnews.com/news/comparing-11-top-telehealth-platforms-company-execs-tout-quality-safety-ehr-integrations>; See also Blink Session, *Telehealth Platforms: Build Vs Buy*, TELEHEALTH.TRAINING, <https://telehealth.training/articles/Telehealth-Platforms-Build-vs-Buy> (last visited Jan. 6, 2022).

<sup>202</sup> 42 U.S.C.A. § 12181(7)(F).

<sup>203</sup> *Partnering to Connect*, OTN, <https://otn.ca/about/partnering-to-connect/> (last visited Jan. 3, 2022); See *Get Medical Advice: Telehealth Ontario*, ONTARIO (last updated Oct. 21, 2021), <https://www.ontario.ca/page/get-medical-advice-telehealth-ontario>.

<sup>204</sup> 29 U.S.C. §§ 794, 794(d).

<sup>205</sup> O. Reg. 191/11, ss. 2, 14 (1)-(2) (Can.).

<sup>206</sup> *eVisit Competitors or Alternatives*, OWLER,

<https://www.owler.com/company/evisit/competitors> (last visited Jan. 6, 2022).

<sup>207</sup> *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations*, 75 Fed. Reg. at 43464.

<sup>208</sup> Arezoo Abyazani, *Bridging the Gap: An Exploration of Visual Design Criteria Found in the "Accessibility for Ontarians with Disabilities Act, 2005" (AODA)* (Apr. 2019) (Master's thesis, York University) (on file with YorkSpace Institutional Repository).

The final takeaway stems from the DOJ's question: "What resources and services are available to public accommodations . . . to make their Web sites accessible?"<sup>209</sup> As with most new things, it seems like there is always someone who will seize the opportunity to capitalize on it; the AODA is no different. Since the AODA's inception, there has been a number of online companies dedicated to helping businesses reach AODA compliance.<sup>210</sup> One company, for example, accomplishes this goal by providing automated accessibility testing that identifies issues on a website which do not conform to the WCAG standard.<sup>211</sup> In addition to automated testing, the company also employs individuals with disabilities who manually test a website using assistive technology to ensure that it is WCAG compliant.<sup>212</sup> By taking advantage of the resources provided by this company, along with the roughly 170 other companies listed on the W3C website,<sup>213</sup> telehealth platform developers could remain in compliance with an ADA imposed WCAG standard.

## VII. CONCLUSION

In its notice of a proposed mandate for web accessibility, the DOJ noted that, "[a]s use of the Internet to provide and obtain healthcare information increases, the inability of individuals with disabilities to also access this information can potentially have a significant adverse effect on their health."<sup>214</sup> While written nearly eleven years ago, this statement still rings true, especially when the coronavirus and the increased use of telehealth are factored into the equation. The lack of website compatibility with assistive technology presents a technological barrier to telehealth for individuals with disabilities.<sup>215</sup> Because many of these individuals cannot use screen readers, speech recognition programs, and closed

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<sup>209</sup> Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. at 43466.

<sup>210</sup> See *Take on Digital Accessibility with accessiBe's Expert Services Department!*, ACCESSIBE, <https://accessibe.com/services> (last visited Jan. 8, 2022); see also *AODA Website Compliance and Compliance Software*, AUDIOEYE, <https://www.audioeye.com/aoda-compliance> (last visited Jan. 8, 2022).

<sup>211</sup> *Automated Accessibility Testing & Manual Evaluation*, ESSENTIAL ACCESSIBILITY, <https://www.essentialaccessibility.com/accessibility-solutions/automated-and-manual-evaluation> (last visited Jan. 8, 2022).

<sup>212</sup> *Id.*

<sup>213</sup> *Web Accessibility Evaluation Tool List*, W3C (last visited Jan. 8, 2022), <https://www.w3.org/WAI/ER/tools/>.

<sup>214</sup> Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. at 43462.

<sup>215</sup> Annaswamy et al., *supra* note 13.

captions on telehealth platforms, they may indeed be subject to the adverse health effects alluded to by the DOJ.<sup>216</sup>

Likewise, the ADA and the AODA both present legislative barriers to telehealth. The ADA's barrier comes from its lack of an official mandate to provide web accessibility.<sup>217</sup> The AODA's barrier, on the other hand, stems from the lack of a requirement to provide live captions.<sup>218</sup> While the AODA has limitations, its compulsory mandate to provide accessible websites<sup>219</sup> in accordance with the international WCAG standard is one that the DOJ should consider implementing in the ADA.

While this Note is not intended to solve every aspect of the web accessibility issue, it is meant to help lay the groundwork for a possible solution. Hopefully, sometime in the near future, this Note will be anachronistic. For this Note to be anachronistic, the virtual world must change so that there are no more jurisdictional splits, no more crossed fingers hoping that a website has live captions, and no more litigations over the implementation of assistive technology. Access to accessible websites should not be based on the coincidence of location, but on the coincidence of being *human*. Since we are all human, we all deserve accessible websites — it is a right. This right will not be recognized, however, unless and until we demand universal accessible websites.

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<sup>216</sup> Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. at 43462.

<sup>217</sup> Annaswamy et al., *supra* note 13.

<sup>218</sup> O. Reg. 191/11, s. 14 (4) (Can.).

<sup>219</sup> *Id.*