



# ADA Website Accessibility Lawsuits: Current Legal Landscape and Risk Mitigation Strategies

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## Outline



- ◆ What is web accessibility?
  - ◇ Guidelines for making website/app accessible
- ◆ Background on Title III of the ADA as applied to web accessibility
- ◆ Significant case law
- ◆ Risk mitigation strategies
- ◆ GOAL: Broad Overview and Awareness

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## What is Web Accessibility?

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## According to the Web Accessibility Initiative (W3C):



- ◆ Means that “[w]ebsites, tools, and technologies are designed and developed so that people with disabilities can use them”
- ◆ Disabilities that affect web access: auditory, cognitive, neurological, physical, speech, visual
- ◆ Screen reader software vocalizes both visible text and invisible code (alt text) embedded beneath graphics
- ◆ 57 million people in the U.S. had disabilities per July 2012 Census Bureau Report



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## Benefits of Web Accessibility



- ◆ May increase the number of possible visitors, users, or customers to a website or app. May also help mobile users, older users, users with low-bandwidth connections, and with optimizing site content for search engines to index
- ◆ Financial – more sales, services provided, registrations, ads viewed, and content consumed
- ◆ Reduce Risk of Title III ADA Lawsuits:
  - ◆ 2019 – 11,053
  - ◆ 2020 – 10,982

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## Obstacles to Full Accessibility



- ◆ Cost to achieve may be significant for larger sites
- ◆ Websites/apps are updated often
- ◆ Alternative means of access may be more efficient
- ◆ Third-party content

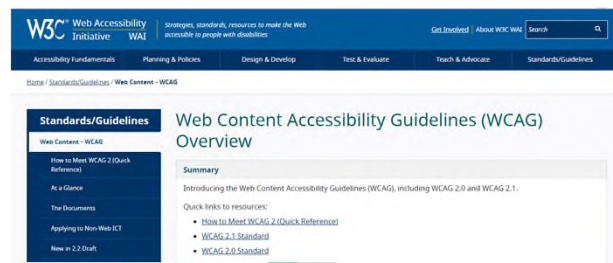
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## W3C Web Content Accessibility Guidelines (WCAG)



- ◆ Guidelines developed with the goal of providing a single shared standard for web content accessibility that meets the needs of individuals, organizations, and governments internationally
- ◆ Conformance Levels A, AA, AAA
- ◆ WCAG 2.0 Level A and Level AA Success Criteria adopted under Section 508 of the Rehabilitation Act



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## WCAG 2.1 at a Glance (1)



### Perceivable

- ◆ Provide **text alternatives** for non-text content
- ◆ Provide **captions and other alternatives** for multimedia
- ◆ Create content that can be **presented in different ways**, including by assistive technologies, without losing meaning
- ◆ Make it easier for users to **see and hear content**

### Operable

- ◆ Make all functionality available from a **keyboard**
- ◆ Give users **enough time** to read and use content
- ◆ Do not use content that causes **seizures** or physical reactions
- ◆ Help users **navigate and find content**
- ◆ Make it easier to use **inputs other than keyboard**

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## WCAG 2.1 at a Glance (2)



### Understandable

- ◆ Make text **readable and understandable**
- ◆ Make content appear and operate in **predictable** ways
- ◆ Help users **avoid and correct mistakes**

### Robust

- ◆ Maximize **compatibility** with browsers and user tools

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# WCAG 2.1, Guideline 1.1 Text Alternatives



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**1. Perceivable** §

Information and user interface components must be presentable to users in ways they can perceive.

**Guideline 1.1 Text Alternatives** §

Provide text alternatives for any non-text content so that it can be changed into other forms people need, such as large print, braille, speech, symbols or simpler language.

**Success Criterion 1.1.1 Non-text Content** §

(Level A)

All **non-text content** that is presented to the user has a **text alternative** that serves the equivalent purpose, except for the situations listed below.

**Controls, Input:** If non-text content is a control or accepts user input, then it has a name that describes its purpose. (Refer to [Success Criterion 4.1.2](#) for additional requirements for controls and content that accepts user input.)

**Time-Based Media:** If non-text content is time-based media, then text alternatives at least provide descriptive identification of the non-text content. (Refer to [Guideline 1.2](#) for additional requirements for media.)

**Text:** If non-text content is a test or exercise that would be invalid if presented in text, then text alternatives at least provide descriptive identification of the non-text content.

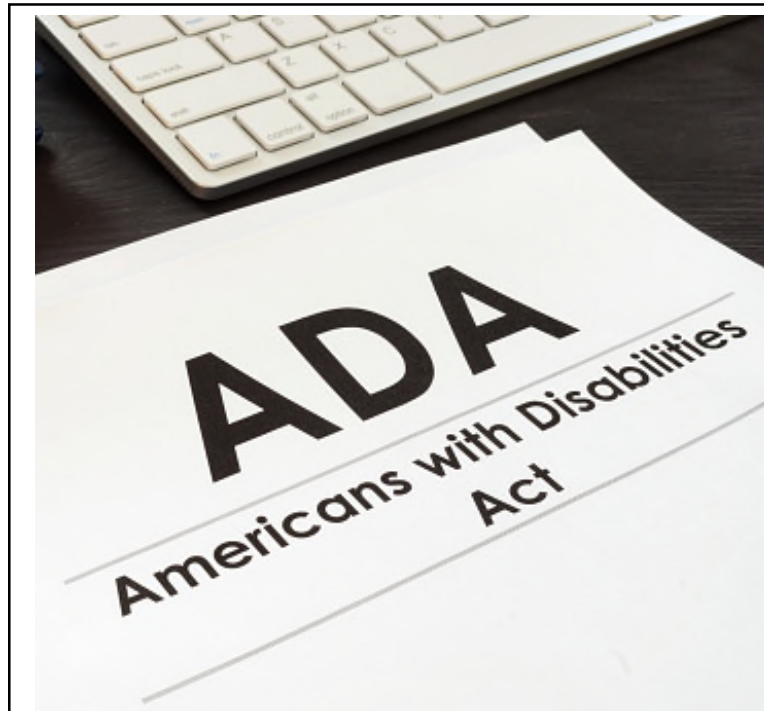
**Sensory:** If non-text content is primarily intended to create a specific sensory experience, then text alternatives at least provide descriptive identification of the non-text content.

**CAPTCHA:** If the purpose of non-text content is to confirm that content is being accessed by a person rather than a computer, then text alternatives that identify and describe the purpose of the non-text content are provided, and alternative forms of CAPTCHA using output modes for different types of sensory perception are provided to accommodate different disabilities.

**Decoration, Formatting, Invisible:** If non-text content is pure decoration, is used only for visual formatting, or is not presented to users, then it is implemented in a way that it can be ignored by assistive technology.

**Guideline 1.2 Time-based Media** §

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# Title III Background

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## Americans with Disabilities Act of 1990



- ◆ A civil rights law passed in 1990, amended in 2008
- ◆ Forbids discrimination against disabled individuals in employment (Title I), public services (Title II), and public accommodations (Title III)
- ◆ **Title III:** “[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)
- ◆ DOJ has responsibility for issuing regulations implementing Title II/III, and enforcement
- ◆ Private enforcement authorized - injunctive relief and attorneys’ fees. Damages available under equivalent state laws such as California's Unruh Civil Rights Act

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## Forms of Discrimination



- ◆ Failure to take steps as may be necessary to ensure no disabled individual is excluded, denied services, segregated, or otherwise treated differently due to absence of auxiliary aids and services. 42 U.S.C. § 12182(b)(2)(A)(iii)
- ◆ Public accommodation must furnish appropriate auxiliary aids and services when necessary to ensure effective communication with disabled individuals. 28 C.F.R. § 36.303(c)(1)
- ◆ DOJ defines auxiliary aids and services to include accessible electronic and information technology or other methods of making visually delivered materials available to the blind and those with low vision. 28 C.F.R. § 36.303(b)(2)
- ◆ Includes tech making website readable by screen reader

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## No Specific Web Accessibility Standards Adopted for Private Sector



### Architectural Barriers

- ◆ DOJ issued detailed technical standards for compliance in the ADA Standards for Accessible Design in 1991, adopted updated standards in 2010
- ◆ Examples: size and number of parking spaces, height requirements for sales and services counters, path of travel requirements

### No Similar Standards Adopted for Websites

- ◆ DOJ has taken the position that websites are covered since 1996
- ◆ Issued notice of proposed rulemaking in 2010 for web accessibility requirements and withdrew it in 2017
- ◆ Has entered settlements requiring companies to comply with the WCAG 2.0, 2.1

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## What is a Public Accommodation? (1)



- ◆ Listed in the statute and DOJ regulations. 42 U.S.C. § 12181(7); 28 C.F.R. § 36.104
- ◆ Expansive list covering “most physical locations in which individuals will find themselves in their daily lives”
- ◆ Neither list explicitly includes websites resulting in litigation over whether websites are a “public accommodation”



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## What is a Public Accommodation? (2)



- ◆ Places of lodging (hotels, etc.)
- ◆ Restaurants/bars
- ◆ Theaters, stadiums
- ◆ Service establishments (doctors' office, travel, dry cleaner, etc.)
- ◆ Retail Stores (sales or rental)
- ◆ Specific Public Transportation stations
- ◆ Convention Centers (public gathering)
- ◆ Museums/Libraries (places of public display or collection)
- ◆ Parks (places of recreation)
- ◆ Private schools (places of education)
- ◆ Day care centers (social service centers)

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## Significant Case Law



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## Are Websites/Apps Subject to the ADA?



- ◆ Answer may depend on jurisdiction and business
- ◆ Websites of businesses that have physical locations where goods and services are offered. *Nat'l Fed'n of the Blind v. Target Corp.*, (N.D. Cal. 2006) (Yes); *Gil v. Winn-Dixie Stores Inc.*, (11th Cir. April 7, 2021) (No)
- ◆ Websites of online-only businesses. *Nat'l Ass'n of the Deaf v. Netflix*, (D. Mass. 2012) (Yes); *Martinez v. MyLife.com*, (E.D.N.Y. Nov. 1, 2021) (No)



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## *Robles v. Domino's Pizza LLC*- Case No. 2:16-cv-06599 (C.D. Cal.)



- ◆ Robles alleged he attempted to order a customized pizza on Domino's website and app but could not because they were not accessible with his screen-reader software
- ◆ Filed suit in 2016 claiming Domino's violated Title III and the Unruh Civil Rights Act
- ◆ Domino's argued, in part, that the ADA does not cover Domino's online offerings
- ◆ District Court held that ADA applies but dismissed the case on primary jurisdiction grounds related to DOJ's failure to issue standards on website compliance

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



- ◆ Public accommodations must provide auxiliary aids/services necessary to make visual materials available to the blind
- ◆ ADA regulates “the services of a place of a public accommodation, not services in a place of public accommodation”
- ◆ Nexus - the alleged inaccessibility of the website/app impedes access to the goods and services of Domino's physical pizza franchises – which are places of public accommodation
- ◆ There were other ways to order but online was the primary means and was heavily advertised



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*Robles v. Domino's Pizza LLC*- Case No. 2:16-cv-06599,  
2021 WL 2945562 (C.D. Cal. June 23, 2021)



- ◆ SCOTUS denies review, case remanded
- ◆ Cross-motions for summary judgment, Domino's motion denied. Plaintiff's motion granted as to the website; denied as to the app
- ◆ Domino's ordered to conform its website to WCAG 2.0
- ◆ Unruh statutory damages were limited to \$4000. Plaintiff was not entitled to \$4000 per visit to the website because Plaintiff encountered the same barrier, an inaccessible website, and therefore the same violation

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*Gil v. Winn-Dixie Stores Inc.*, 993 F.3d 1266  
(11<sup>th</sup> Cir. April 7, 2021)



- ◆ Gil sued W-D alleging he could not access its website using screen reader software. Wanted to order prescriptions for pick up/download coupons for use at W-D's stores
- ◆ District Court – W-D violated the ADA, the website is a gateway to its physical stores
- ◆ Eleventh Circuit – reversed, website (1) is not a public accommodation and (2) did not pose an “intangible barrier” to access to the goods, services, privileges, or advantages of W-D’s physical stores

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*Thurston v. Omni Hotels Mgmt. Corp.*, 69 Cal.  
App. 5<sup>th</sup> 299 (September 23, 2021)



- ◆ Thurston alleged in state court under California’s Unruh Act that her screen reader software could not read Omni’s online reservation system, and this prevented her from visiting Omni’s physical locations
- ◆ Jury found Thurston had no intent to use the website to make a reservation. Defense verdict
- ◆ Affirmed – plaintiff must demonstrate an intent to use a defendant’s services to have standing to bring a claim under the Unruh Act
- ◆ Plaintiff is seeking review



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## Risk Mitigation Strategies

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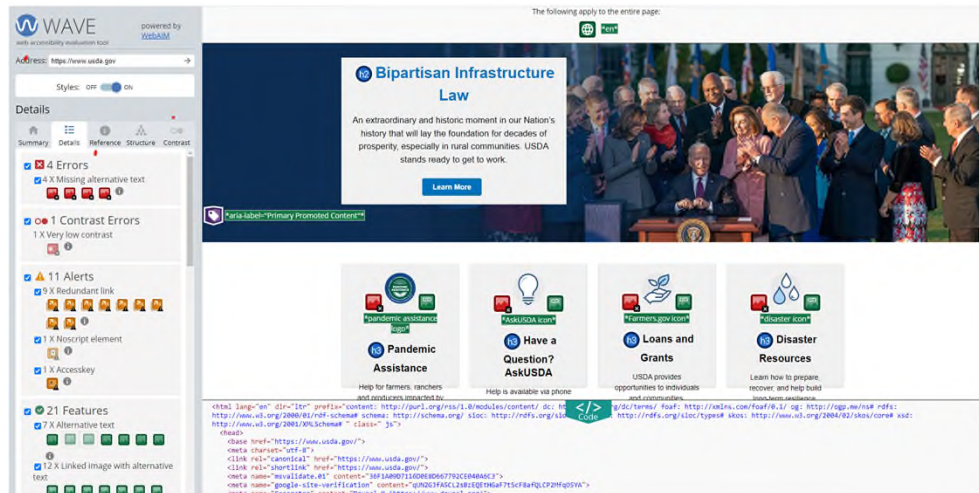
## Web Accessibility Evaluation Tools (1)

- ◆ Developed and made available as a free community service by WebAIM at Utah State University
- ◆ “Has been used to evaluate the accessibility of millions of web pages”
- ◆ [www.wave.webaim.org](http://www.wave.webaim.org)



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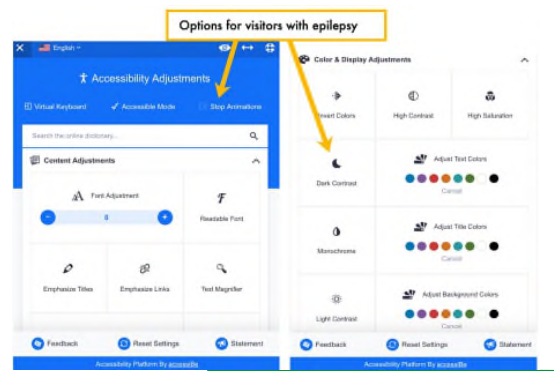
# Web Accessibility Evaluation Tools (2)



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# Accessibility Overlays

- ◆ Accessibility interface that allows persons with specific disabilities to adjust the website’s user interface to their personal needs
- ◆ Runs an AI-based application in the background that optimizes a website’s accessibility level constantly
  - ◆ Adapts to screen readers
  - ◆ Keyboard functions



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## Manual Conformance



- ◆ Audit of each page of website against WCAG success criteria
- ◆ Code and content enhancements
- ◆ Staff training
- ◆ Cost and time involved may be significant
- ◆ Post machine readable PDFs, provide closed captioning/embedded transcripts for videos and podcasts
- ◆ Option to start with an overlay and then work towards manual conformance

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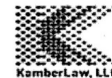
## Demand Letters



- ◆ Does the website owner have a physical location that is a public accommodation?
- ◆ Are there alternative means provided for accessing the services of the business?
- ◆ Are the assertions made in the letter accurate?
- ◆ Can the alleged violations be fixed quickly?

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& KILPELA

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*Sent Via Federal Express*

January 4, 2016

Chief Legal Officer

Re: [www.████████.com](http://www.████████.com), including Notice of Preservation Obligation

**FOR SETTLEMENT PURPOSES ONLY**

Dear Sir or Madam:

We represent disabled individuals throughout the United States who use the Internet to facilitate their access to goods and services, and whose rights to access those goods and services are protected under the Americans with Disabilities Act (the "ADA"). These individuals have disabilities that include: blindness and low vision, deafness and hearing loss, learning disabilities, cognitive limitations, mobility impairments, speech disabilities, photosensitivity and combinations of these.

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Thank You

Any questions?

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