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## A "Slam Dunk" Against Discrimination: The Lawsuit That Could Spearhead Accessibility in the Digital World

Ellenor Brown

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**A “SLAM DUNK” AGAINST DISCRIMINATION: THE LAWSUIT  
THAT COULD SPEARHEAD ACCESSIBILITY IN THE DIGITAL  
WORLD**

*Ellenor Brown\**

*Despite our increased reliance on transportation network companies (“TNCs”) and other sharing economy services, like Uber, Lyft, and Airbnb, the United States government has let the promises and protections of the Americans with Disabilities Act (“ADA”) lag behind the proliferation of the Internet. The U.S. Department of Justice (“DOJ”) is currently trying to fill this gap in a new lawsuit against Uber Technologies, Inc., using the company’s wait time fee structure to allege impermissible discrimination under the ADA. The DOJ must first establish the ADA’s applicability to Uber and other TNCs, with traditional transportation service companies providing a regulatory roadmap. The DOJ is far more likely than past private litigants to achieve this categorization, as it avoids the often-fatal arbitration clause that binds all Uber app users and is motivated to create some kind of legal precedent rather than settle for monetary compensation. The lawsuit also has the potential to influence the current federal circuit split regarding the ADA’s general applicability to websites and mobile applications as public accommodations, which will have far-reaching implications for disability access in the twenty-first century.*

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### I. INTRODUCTION

Imagine a woman living in Kentucky who relies on a manual wheelchair for mobility purposes. She, along with hundreds of thousands of Americans across the country, uses rideshare services like Uber and Lyft regularly for a variety of transportation needs—to visit family and friends, pursue leisure activities, and sometimes to commute to work.<sup>1</sup> However, once her Uber driver arrives, it takes the woman longer than the average able-bodied American to enter the vehicle due to her wheelchair. She must fold the wheelchair up, store it in the trunk, and rely on the assistance of the Uber driver or her nursing assistant to get in the backseat.<sup>2</sup> Even though she is waiting outside for her Uber upon the driver’s arrival, she is unable

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<sup>1</sup> See Complaint & Demand for Jury Trial at 3, 7, *United States v. Uber Techs., Inc.*, No. 21-8735, 2021 WL 5233076 (N.D. Cal. Nov. 10, 2021).

<sup>2</sup> *Id.* at 6, 8.

to begin the trip within the two-minute window allotted by the Uber app like an able-bodied rider could.<sup>3</sup> As a result, because of her physical disabilities, she is automatically charged a wait time fee in the Uber app, over which neither she nor her Uber driver has any control.<sup>4</sup> For many Americans, this is a lived experience of discrimination that they face daily because of their disabilities.

The Americans with Disabilities Act (“ADA”) protects disabled Americans from discrimination in public places, including in places of employment and transportation services.<sup>5</sup> The ADA defines discrimination broadly as “any physical or mental impairment that substantially limits one or more major life activities” of an individual.<sup>6</sup> When faced with an instance of disability discrimination, a disabled person has the right to bring a lawsuit and be made whole.<sup>7</sup> That said, this remedy has become much more difficult for plaintiffs to achieve in today’s increasingly digital world—the ADA was enacted in 1990 and has not been amended to reflect current changes in technology and corresponding digital access, or lack thereof.<sup>8</sup> Not only do web- and mobile application-based companies like Uber have arbitration clauses that can present an initial litigation barrier for potential plaintiffs, but such companies also consistently maintain that they do not fall under the auspices of the ADA’s anti-discrimination provisions in the first place.

After years of private plaintiffs bringing unsuccessful suits which have ended in settlement, the United States Department of Justice (“DOJ”), the government agency tasked with enforcing the ADA,<sup>9</sup> has taken matters into its own hands. In November 2021, the DOJ sued Uber alleging that the wait time fee policy described above is impermissible discrimination against disabled Americans

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<sup>3</sup> *Id.* at 8.

<sup>4</sup> *Id.* at 4.

<sup>5</sup> *See* 42 U.S.C. §§ 12101–12213

<sup>6</sup> *Id.* § 120102(4)(A).

<sup>7</sup> *Id.* § 12188(a).

<sup>8</sup> Ahmed J. Kassim & Laura Lawless, *The ADA and Website Accessibility Post-Domino’s: Detangling Employers’ and Business Owners’ Web and Mobile Accessibility Obligations*, 56 TORT TRIAL & INS. PRAC. L.J. 53, 54 (2021).

<sup>9</sup> 42 U.S.C. § 12188(b).

under Title III of the ADA.<sup>10</sup> The DOJ is a unique litigant in this area of jurisprudence in three ways: (1) the DOJ is not subject to the same arbitration clause as individual app users are; (2) the DOJ's complaint alleges objective disability discrimination rooted in company policy, whereas prior suits have centered around individual instances of subjective discrimination against riders by drivers themselves; and, (3) the DOJ is incentivized to create sorely-needed precedential case law rather than settle for monetary damages like prior litigants. Still, an initial hurdle for the DOJ will be establishing that the ADA applies to Uber and its peer sharing economy<sup>11</sup> companies in the first place, and *U.S. v. Uber Technologies, Inc.* will likely compel the Northern District of California, a court within the Ninth Circuit, to formally make that determination.

For years, scholars have argued that transportation network companies (“TNCs”) like Uber and Lyft should be subject to the same ADA regulatory framework as traditional taxi companies.<sup>12</sup> There are two possible provisions under which the ADA arguably applies to Uber and other TNCs. The ADA prohibits disability discrimination by (1) certain public accommodations enumerated in an exhaustive list,<sup>13</sup> and (2) private providers of transportation available to the general public.<sup>14</sup> There is currently a circuit split that leaves the applicability of the ADA's public accommodations

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<sup>10</sup> See Complaint & Demand for Jury Trial at 3, 7, *United States v. Uber Techs., Inc.*, No. 21-8735, 2021 WL 5233076 (N.D. Cal. Nov. 10, 2021).

<sup>11</sup> “Sharing economy” refers to the industry of companies with business models which “involve[] short-term peer-to-peer transactions to share use of idle assets and services or to facilitate collaboration.” Gordon Scott & Katrina Munichello, *Sharing Economy*, INVESTOPEDIA (Oct. 30, 2020), <https://www.investopedia.com/terms/s/sharing-economy.asp> [<https://perma.cc/3FB2-4AZ5>]. Such transactions are usually facilitated by an online platform that handles contact and payment between users. *Id.*

<sup>12</sup> See, e.g., Katrina M. Wyman, *Taxi Regulation in the Age of Uber*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 1 (2017); Rachael Reed, *Disability Rights in the Age of Uber: Applying the Americans with Disabilities Act of 1990 to Transportation Network Companies*, 33 GA. ST. U. L. REV. 517 (2017).

<sup>13</sup> 42 U.S.C. §§ 12182, 12181(7). Uber is arguably subject to the public accommodations provision under the “terminal, depot, or other station used for specified public transportation” list item. *Id.* § 12181(7)(G).

<sup>14</sup> *Id.* § 12184.

provision to TNCs unresolved, and the DOJ's lawsuit has the potential to change, or at least further destabilize, antiquated notions of the ADA's applicability to only physical locations.

Federal circuit courts are split as to whether the public accommodations provision applies to websites and mobile applications. Importantly, the Ninth Circuit requires that a website be tied to a service provided at a physical location for the ADA to apply,<sup>15</sup> so the DOJ likely cannot successfully argue that Uber is subject to the ADA under the public accommodations provision unless it overcomes this precedent. Therefore, it seems as though the DOJ is attempting to persuade the Northern District of California to classify TNCs as private providers of public transportation services, thereby subjecting TNCs to the prohibitions outlined in ADA Title III. If the DOJ is successful, that would be the first time a court affirmatively holds that the ADA applies to TNCs, and potentially other sharing economy platforms, providing crucial recourse for victims of disability discrimination in the twenty-first century.

This Article analyzes the propriety and significance of the DOJ's lawsuit, explaining why the DOJ's initiation of this lawsuit promises to disrupt the pattern of previous unsuccessful ADA-related litigation against Uber and immensely improve sharing economy accessibility for disabled Americans. Part II examines the ADA's applicability to rideshare companies in light of the current regulatory structure for traditional taxi companies and previous suits against TNCs by private actors. Part III discusses the substance of the DOJ's complaint, as well as Uber's subsequent response and argues that the DOJ's suit will likely succeed due to major differences between the current lawsuit and the previous suits—namely the DOJ's desire to create precedential case law applying the ADA to a TNC. Finally, Part IV explores the widespread implications of the DOJ's lawsuit, particularly regarding the unsettled ADA jurisprudence and lack of regulatory guidance for both websites as public accommodations and TNCs as private providers of public transportation. Ultimately, ridesharing apps and other TNCs like Uber should be held to the same ADA standards as other private transportation providers under ADA Title III so that

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<sup>15</sup> See Kassim & Lawless, *supra* note 8.

disabled Americans can be protected from transportation discrimination.

## II. THE ADA'S APPLICABILITY TO RIDESHARE COMPANIES

The ADA was enacted in 1990 to protect the civil rights of disabled Americans, specifically by preventing disability discrimination in “all areas of public life, including jobs, schools, transportation, and all public and private places that are open to the general public.”<sup>16</sup> The Act incorporates four distinct titles covering various aspects of public life, including Public Accommodations and Services Operated by Private Entities (Title III).<sup>17</sup> The ADA defines disability as “a physical or mental impairment that substantially limits one or more major life activities” of an individual<sup>18</sup> and provides that the term “disability” should be construed as broadly as possible.<sup>19</sup> The federal and municipal regulatory frameworks currently applicable to traditional taxicab companies provide a roadmap for potential regulation of TNCs like Uber under the ADA, and the numerous failed attempts at establishing precedential case law applying the ADA to Uber demonstrates the importance of both the DOJ's current lawsuit and the need to explicitly update the ADA to include modern TNCs.

### A. Title III and the Department of Transportation's Regulations

Title III of the ADA expressly prohibits “discrimination based on disability by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce.”<sup>20</sup> Among other actions, discrimination includes a transportation entity's failure to make reasonable modifications to provide adequate services to disabled people, so long as those

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<sup>16</sup> *What Is the Americans with Disabilities Act (ADA)?*, ADA NAT'L NETWORK, <https://adata.org/learn-about-ada> [<https://perma.cc/5HRE-Q3GY>] (last visited Feb. 6, 2022).

<sup>17</sup> 42 U.S.C. ch. 126.

<sup>18</sup> *Id.* § 12101(1)(A).

<sup>19</sup> *Id.* § 120102(4)(A).

<sup>20</sup> Complaint & Demand for Jury Trial at 1, *United States v. Uber Techs., Inc.*, No. 21-8735, 2021 WL 5233076 (N.D. Cal. Nov. 10, 2021) (citing 42 U.S.C. § 12184(a)); Reed, *supra* note 12, at 521.

modifications can be made without fundamentally altering the nature of the transportation service.<sup>21</sup> At present, there is no case law that has established whether Uber or other rideshare companies qualify as a transportation entity under the scope of Title III. Prior private plaintiffs have attempted to establish Uber’s status as such, but Uber has repeatedly settled these cases outside the courtroom.<sup>22</sup> The lack of precedent covering Uber’s classification under the ADA has left little guidance when interpreting whether Title III applies to modern, app-based TNCs.<sup>23</sup>

The United States Department of Transportation (“DOT”) has enacted corresponding regulations which provide additional guidance as to what is currently required of Title III public transportation providers, and what could, depending on the outcome of the DOJ’s lawsuit, be required of TNCs. These regulations clarify that, while taxi service providers do not have to provide specific vehicles adapted for accessibility, those service providers can violate the ADA in a few key ways. These violations include: (1) refusing service to disabled passengers who are able to use the provided vehicles; (2) refusing to assist disabled passengers in loading or stowing their mobility devices like wheelchairs and walkers; and, (3) “charging higher fares or fees for carrying individuals with disabilities and their equipment than are charged to other persons”<sup>24</sup>—the violation most applicable to the DOJ’s lawsuit. Private transportation companies like airport shuttle services and local taxi companies that provide services to the general public are required to comply with the general prescriptions of Title III, as well as the more nuanced requirements of the DOT regulations.

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<sup>21</sup> 42 U.S.C. §§ 12184(b)(2)(A), 12182(b)(2)(A)(ii).

<sup>22</sup> See, e.g., Joint Stipulation of Dismissal, *Ramos v. Uber Techs., Inc.*, No. 5:14-cv-00502 (W.D. Tex. Aug. 3, 2015).

<sup>23</sup> A “TNC” is defined as “a business model that offers prearranged rides or car rentals for a fee, utilizing an online application (app) via a mobile device to connect passengers or automobile renters with drivers/car owners.” *Transportation Network Company*, INT’L RISK MGMT. INST., INC., <https://www.irmi.com/term/insurance-definitions/transportation-network-company-tnc> [<https://perma.cc/2MMC-QF83>] (last visited Mar. 7, 2022).

<sup>24</sup> 49 C.F.R. § 37.29(b), (c).

### *B. Title III's Application to Traditional Taxi Companies*

While the ADA does not list traditional privately-operated taxicab companies as one of Title III's twelve enumerated public accommodations categories,<sup>25</sup> these companies typically fall under the prohibition against discrimination by private entities that provide public transportation services.<sup>26</sup> Like Uber and Lyft, these companies are “primarily engaged in the business of transporting people[,] and [their] operations affect commerce.”<sup>27</sup> Therefore, it would appear that the prohibitions of Title III apply squarely to taxi providers. If a taxi company is subject to the requirements of ADA Title III, the DOT's corresponding regulations govern the company's activities as well.<sup>28</sup>

Taxicab regulation has traditionally been decentralized and conducted at the municipal level;<sup>29</sup> New York City provides perhaps the most developed example for comparison with potential regulation of TNCs under ADA Title III. Each year, New York City auctions off a discrete number of individual taxicab licenses, also called medallions, which allow license holders to operate taxis on City streets.<sup>30</sup> Auction winners commonly hold the medallions as assets for long periods of time, subleasing them to other drivers when the medallion holder no longer wishes to operate a taxi himself.<sup>31</sup> This licensing system could easily be applied to Uber drivers as well, permitting municipalities to better protect disabled riders by increasing regulatory oversight.

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<sup>25</sup> See 42 U.S.C. §§ 12181(7)(A)–(L).

<sup>26</sup> *Id.* § 12184(a).

<sup>27</sup> *Id.*

<sup>28</sup> See 49 C.F.R. § 37.21 (“This part applies to . . . [a]ny private entity that provides specified public transportation; and [a]ny private entity that is not primarily engaged in the business of transporting people but operates a demand responsive or fixed route system.”).

<sup>29</sup> SAMUEL R. STALEY, CATHERINE ANNIS & MATTHEW KELLY, INST. FOR JUST., REGULATORY OVERDRIVE: TAXI REGULATIONS, MARKET CONCENTRATION AND SERVICE ABILITY 1, 4–6 (Oct. 2018), <https://ij.org/wp-content/uploads/2018/10/Taxi-WhitePaper.pdf> [<https://perma.cc/EHQ7-55TG>] (Oct. 2018).

<sup>30</sup> Wyman, *supra* note 12, at 2.

<sup>31</sup> *Id.* at 2–3.

As NYU School of Law Professor Katrina M. Wyman explains, “[t]here historically have been five pillars of taxi regulation,” including quantity limits on entry into the business, establishment of uniform fares, health and safety regulations for both taxi drivers and passengers, and universal service requirements.<sup>32</sup> Fare levels are typically regulated in order to balance the bargaining power between a passenger and a driver—a passenger hailing a taxi from the sidewalk is “poorly positioned to assess whether a fare that a taxi is proposing is reasonable because [she] lack[s] essential information.”<sup>33</sup> This same information asymmetry justifies regulations around passenger safety, including requiring training and background checks for drivers, as well as ensuring that taxi vehicles themselves are safe and insured.<sup>34</sup> Similar pillars of regulation should inform TNC regulation moving into the twenty-first century, particularly when it comes to ensuring that disabled riders are able to equally access services available to able-bodied riders.

Universal service, the fifth pillar of taxicab regulation, is driven primarily by “a non-discrimination principle, and reflects a commitment to avoiding” inequitable, as opposed to inefficient, outcomes.<sup>35</sup> While anti-discrimination regulation traditionally has been rooted in concerns about drivers discriminating against passengers based on their race or intended destination,<sup>36</sup> this concern has spread to discrimination against physically disabled passengers as well.<sup>37</sup> For example, in 2014, the New York City Taxi and Limousine Commission set a goal that half of all yellow taxis available in the City would be wheelchair-accessible by 2020 in order to comply with a settlement order that followed litigation by disability rights advocates under the ADA.<sup>38</sup> As of September 2020, there were 1,696 wheelchair-accessible, private for-hire vehicles in

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<sup>32</sup> *Id.* at 31.

<sup>33</sup> *Id.* at 40. Such essential information includes knowing when the next taxi will pass by and what fare that second taxi will charge. *See id.*

<sup>34</sup> *Id.* at 49–50.

<sup>35</sup> *Id.* at 67–68.

<sup>36</sup> *Id.* at 68.

<sup>37</sup> *See id.* at 70–74.

<sup>38</sup> *Id.* at 70–77.

New York City.<sup>39</sup> The New York City Taxi and Limousine Commission's 2021 Annual Report reflects that 3,733 wheelchair-accessible, public for-hire vehicles are available in all five city boroughs.<sup>40</sup> This trend of increased access for disabled passengers of traditional taxi companies demonstrates the necessity of providing similar access for disabled riders who opt for TNCs instead, as well as the importance of establishing with finality that the ADA applies to such TNCs, so that those companies adapt accordingly.

### C. Past ADA Litigation Against Rideshare Companies

Uber and its peer rideshare-technology companies are not explicitly subject to the same anti-disability discrimination regulations as traditional taxi companies. In fact, Uber and Lyft have “a fairly abysmal record when it comes to serving” its disabled passengers, including numerous disputes regarding the companies' alleged failure to provide wheelchair-accessible vehicles for disabled riders.<sup>41</sup> Although, as discussed above, transportation companies are not required to provide wheelchair-accessible vehicles under Title III, Uber's generally “poor record serving customers with disabilities” has resulted in lawsuits alleging that Uber violated the ADA by failing to ensure that riders who use wheelchairs “receive equal service from the company” in other ways.<sup>42</sup> For example, in *Ramos v. Uber Technologies, Inc.*,<sup>43</sup> the

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<sup>39</sup> *For-Hire Vehicle Wheelchair Accessibility Evaluation Report*, N.Y.C. TAXI & LIMOUSINE COMM'N 2 (May 2021), [https://www1.nyc.gov/assets/tlc/downloads/pdf/fhv\\_wheelchair\\_accessibility\\_report\\_2020.pdf](https://www1.nyc.gov/assets/tlc/downloads/pdf/fhv_wheelchair_accessibility_report_2020.pdf) [<https://perma.cc/EWN9-DWQM>] (defining private for-hire vehicles to include “companies ranging from small community-based car services to the app-based dispatching providers Uber, Lyft, and Via”).

<sup>40</sup> *2021 Annual Report*, N.Y.C. TAXI & LIMOUSINE COMM'N 12 (Jan. 2022), [https://www1.nyc.gov/assets/tlc/downloads/pdf/annual\\_report\\_2021.pdf](https://www1.nyc.gov/assets/tlc/downloads/pdf/annual_report_2021.pdf) [<https://perma.cc/6LMU-PV9L>].

<sup>41</sup> Andrew J. Hawkins, *Uber Discriminates Against People with Disabilities, New DOJ Lawsuit Alleges*, VERGE (Nov. 10, 2021, 2:04 PM), <https://www.theverge.com/2021/11/10/22774771/uber-disabled-discrimination-lawsuit-justice-department> [<https://perma.cc/36NY-MZVW>].

<sup>42</sup> *Id.*

<sup>43</sup> *Ramos v. Uber Techs. Inc.*, No. SA-14-CA-502-XR, 2015 WL 758087 (W.D. Tex. Feb. 20, 2015).

three plaintiffs alleged that Uber and Lyft violated the ADA by failing to ensure that the companies' local pool of drivers included wheelchair-accessible vehicles for use by wheelchair-bound app users who must ride in appropriately-adapted vehicles.<sup>44</sup> Uber and Lyft responded that they are not transportation service providers, but are instead mobile transaction companies that do nothing more than facilitate a transaction between drivers and riders.<sup>45</sup> Thus, Uber and Lyft argued that their only responsibility under the ADA, if any, is to ensure that their apps are accessible to disabled users under the public accommodations provision of Title III.<sup>46</sup> While the court in *Ramos* acknowledged the plaintiffs' claim as plausible, the court declined to explicitly address the question of the companies' ADA obligations, and the parties settled out of court.<sup>47</sup>

Other suits relate to individual Uber drivers' direct discrimination against disabled Uber riders. These drivers, however, are not considered to be employees by Uber.<sup>48</sup> Instead, Uber continues to insist that its drivers are independent contractors and therefore are held at arm's length from the company, a status which not only allows Uber to avoid providing employment benefits like insurance to their drivers,<sup>49</sup> but also provides Uber some protection

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<sup>44</sup> *Id.* at \*1.

<sup>45</sup> See Reed, *supra* note 12, at 527.

<sup>46</sup> *Ramos*, 2015 WL 758087, at \*5. Examples of app accessibility include ensuring that the technology is compatible with commonly-used screen-reading software for vision-impaired users. See Josephine Meyer, *Accessible Websites and Mobile Applications Under the ADA: The Lack of Legal Guidelines and What This Means for Businesses and Their Customers*, 44 SEATTLE U. L. REV. 16, 24–25 (2020).

<sup>47</sup> Reed, *supra* note 12, at 527.

<sup>48</sup> Shannon Bond, *Uber and Lyft to Continue Treating Drivers as Independent Contractors*, NPR (Nov. 4, 2020, 4:02 PM), <https://www.npr.org/2020/11/04/931435959/uber-and-lyft-to-continue-treating-drivers-as-independent-contractors> [<https://perma.cc/W9LJ-2SMD>]. Uber has fended off numerous suits by its drivers who have argued that they are employees and are therefore entitled to benefits, like insurance and overtime pay. *Id.* At present, Uber's employees are still classified as independent contractors without access to those sorts of employment benefits. *Id.*

<sup>49</sup> Kate Conger & Kellen Browning, *A Judge Declared California's Gig Worker Law Unconstitutional. Now What?*, N.Y. TIMES (Aug. 23, 2021),

from being held responsible for the acts of individual drivers.<sup>50</sup> In *National Federation of the Blind of California v. Uber Technologies, Inc.*, the plaintiffs alleged multiple occasions when an Uber driver refused to pick up a disabled rider when the driver arrived at the pick-up location and saw that the rider had a service dog.<sup>51</sup> The court denied Uber’s motion to dismiss for failure to state a claim, in which Uber raised the same transaction-company defense presented in *Ramos*—but again, the court declined to provide any precedent as to Uber’s obligations under Title III of the ADA, and the parties settled out of court.<sup>52</sup>

The primary challenge that plaintiffs face when bringing these claims is asserting that Uber and Lyft fall within the scope of ADA Title III, which covers “private companies that provide transportation services.”<sup>53</sup> Uber has consistently avoided applying Title III protections to its business model by raising the same argument as in its numerous employment status lawsuits:<sup>54</sup> that Uber is “not a fleet operator but a ‘technology platform’ that maintains a hands-off relationship with the drivers and passengers who use its app.”<sup>55</sup> Uber has consistently raised the defense that it is a self-identified “technology,” rather than “transportation” company,<sup>56</sup> and

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<https://www.nytimes.com/2021/08/23/technology/california-gig-worker-law-explained.html> [<https://perma.cc/A7GD-HY28>].

<sup>50</sup> See Erin Mulvaney, *Uber, Lyft Talk Responsibility on Assaults but Deny in Court*, BLOOMBERG L. (Mar. 2, 2020, 5:16 AM), <https://news.bloomberglaw.com/daily-labor-report/uber-lyft-talk-responsibility-on-assaults-but-deny-in-court> [<https://perma.cc/KJ5B-DEQU>].

<sup>51</sup> Reed, *supra* note 12, at 527.

<sup>52</sup> *Id.* at 528.

<sup>53</sup> *Id.* at 519.

<sup>54</sup> See Bryan Casey, *Uber’s Dilemma: How the ADA May End the On-Demand Economy*, 12 U. MASS. L. REV. 124, 153–54 (2017); see also Reed, *supra* note 12, at 527.

<sup>55</sup> Casey, *supra* note 54, at 138.

<sup>56</sup> See, e.g., *Ramos v. Uber Techs., Inc.*, No. SA-14-CA-502-XR, 2015 WL 758087 (W.D. Tex. Feb. 20, 2015); *Nat’l Fed’n of the Blind v. Uber Techs., Inc.*, 103 F. Supp. 3d 1073 (2015); *Access Living of Metro. Chi. v. Uber Techs., Inc.*, 351 F. Supp. 3d 1141 (2018); see also Reed, *supra* note 12, at 527 (“Defendants characterized their business as ‘simply mobile-based ridesharing platforms to connect drivers and riders.’ Under the defendants’ theory, a [transportation

federal courts have yet to resolve the dispute or provide clear guidance as to what TNCs' ADA obligations may be.<sup>57</sup>

Common to all of the prior ADA lawsuits against TNCs is their outcome: These lawsuits have settled out of court or through arbitration. Therefore, each complaint failed to establish clear case law or guidance regarding the ADA's applicability to modern, app-based transportation services.<sup>58</sup> In addition to the settlement-induced lack of case law, plaintiffs also face mandatory arbitration agreements. For Uber, its users must agree to Uber's Terms of Service before using the app, and these Terms include an arbitration agreement requiring that users "resolve any claim that [they] may have against Uber on an individual basis in arbitration . . . and not in a court of law."<sup>59</sup> Uber's Terms also explicitly state that the binding arbitration agreement covers "any dispute, claim, or controversy . . . relating to . . . [a user's] access to or use of" the Uber app and its rideshare services.<sup>60</sup> Presumably, the "access" covered in Uber's arbitration agreement includes physical access to Uber vehicles, as well as access to Uber's services via the company's mobile app.

Despite Uber's attempt to avoid class actions and other litigation by burying an arbitration clause in the depths of its Terms of Service, courts have varied in their determinations of the clause's enforceability.<sup>61</sup> In *Meyer v. Uber Technologies, Inc.*, the Second Circuit denied Uber's motion to compel arbitration in a class-action price-fixing lawsuit because the plaintiff rider "did not have reasonably conspicuous notice of the Terms of Service and did not

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network company] need only ensure that people with disabilities can access and use the company's mobile application to satisfy its ADA obligations.").

<sup>57</sup> Reed, *supra* note 12, at 520.

<sup>58</sup> Lorelei Laird, *When Sharing Isn't Caring*, 103 A.B.A. J. 16, 17 (May 2017).

<sup>59</sup> *U.S. Terms of Use*, UBER, <https://www.uber.com/legal/en/document/?name=general-terms-of-use&country=united-states&lang=en> [<https://perma.cc/C5B2-CKLP>] (last visited Jan. 24, 2021).

<sup>60</sup> *Id.*

<sup>61</sup> See Matthew Morris, *Your Forced Arbitration Is Now Arriving: How Pre-dispute Mandatory Arbitration Clauses in the Uber Application Reflects the Widening Gap Between Consumers and Businesses*, SETON HALL L. SCH. STUDENT SCHOLARSHIP 3, 4–5 (2020).

unambiguously manifest assent” to Uber’s arbitration clause.<sup>62</sup> Similarly, the First Circuit has held that plaintiffs suing Uber were not reasonably notified of the arbitration agreement in Uber’s Terms and therefore did not provide unambiguous consent to the clause.<sup>63</sup> Uber has not moved to compel arbitration in the present case; Uber’s preferred first step in these types of cases is to move to dismiss on other grounds, like for summary judgment or failure to state a claim.<sup>64</sup> However, even if plaintiffs survive the arbitration clause and can continue with their lawsuits, the amount of time and expenses associated with further pursuing litigation makes Uber’s sizeable settlement offers highly desirable to the average civil litigant. In the present case, however, the DOJ is not only exempt from any arbitration clause because it is not a user of the Uber app, but also does not have the same financial incentive to settle to which previous plaintiffs have conceded.

### III. UNITED STATES V. UBER TECHNOLOGIES, INC.

On November 10, 2021, the DOJ sued Uber, alleging several violations of Title III of the ADA.<sup>65</sup> The DOJ’s Complaint alleged that Uber discriminates against disabled riders by refusing to override automatic wait time fee charges to accommodate app users who, due to their disabilities, require more than the allotted two minutes to enter an Uber vehicle and begin their trip.<sup>66</sup> The lawsuit represents a novel federal examination into the ADA-compliance affairs of sharing economy<sup>67</sup> technology companies like Uber,<sup>68</sup>

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<sup>62</sup> *Id.* at 11–12; *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 79 (2d Cir. 2017).

<sup>63</sup> *Morris*, *supra* note 61, at 15.

<sup>64</sup> *See Nat’l Fed’n of the Blind of Cal. v. Uber Techs., Inc.*, 103 F. Supp. 3d 1073 (N.D. Cal. 2016) (denying motion to dismiss for failure to establish standing and failure to state a claim).

<sup>65</sup> Complaint & Demand for Jury Trial at 1, 11, *United States v. Uber Techs., Inc.*, No. 21-8735, 2021 WL 5233076 (N.D. Cal. Nov. 10, 2021).

<sup>66</sup> *Id.* at 1–2.

<sup>67</sup> *Scott & Munichello*, *supra* note 11 (defining a sharing economy as the industry of companies with business models which “involve[] short-term peer-to-peer transactions to share use of idle assets and services or to facilitate collaboration”).

<sup>68</sup> *See Cristiano Lima, DOJ Flexes Civil Rights Muscle in Disabilities Lawsuit Against Uber*, WASH. POST (Nov. 11, 2021, 9:05 AM),

sending “a powerful message” that Uber cannot permit passengers to face monetary penalties as a consequence of physical disabilities that are beyond their control.<sup>69</sup> As the DOJ stated in a press release accompanying its Complaint, “Uber and other companies that provide transportation services must ensure equal access for all people, including those with disabilities.”<sup>70</sup>

#### A. *The DOJ’s Complaint*

The DOJ’s lawsuit is groundbreaking and will likely succeed in establishing that Uber and other TNCs must comply with ADA Title III for two reasons. First, rather than alleging specific instances of disability discrimination by individual drivers, the DOJ is alleging that Uber’s entire wait time fee policy discriminates against riders who require more time than the allotted two-minute window to enter an Uber driver’s vehicle.<sup>71</sup> The DOJ’s allegation is company policy-based and far more objective than previous allegations, which will potentially prevent Uber from using its go-to defense that it is a transaction facilitator, rather than a transportation company, and is not responsible for individual driver conduct.<sup>72</sup> Second, and as previously mentioned, the DOJ is not bound by Uber’s boilerplate arbitration clause. Further, the DOJ also seems determined to create precedent that binds Uber and other TNCs to the proscriptions of the ADA. Thus, the likelihood of settlement is decreased compared to past litigation, especially because the DOJ is not as financially incentivized as most prior private litigants have been.

In its Complaint, the DOJ explicitly alleges that Uber’s ADA violation stems from “its policies and practices of imposing ‘wait

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<https://www.washingtonpost.com/politics/2021/11/11/doj-flexes-civil-rights-muscle-disabilities-lawsuit-against-uber/> [<https://perma.cc/96U6-AUYS>] (“It’s the first high-profile civil rights lawsuit brought against a major tech company during the Biden era.”).

<sup>69</sup> Press Release, Off. of Pub. Affs., Just. Dep’t, Justice Department Sues Uber for Overcharging People With Disabilities (Nov. 10, 2021), <https://www.justice.gov/opa/pr/justice-department-sues-uber-overcharging-people-disabilities> [<https://perma.cc/XD5N-93E3>].

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

<sup>71</sup> Complaint & Demand for Jury Trial, *United States v. Uber Techs., Inc.*, No. 21-8735, 2021 WL 5233076 (N.D. Cal. Nov. 10, 2021).

<sup>72</sup> See Casey, *supra* note 54, at 138.

time' fees on passengers with disabilities who, because of disability, require more time than that allotted by Uber to board the vehicle."<sup>73</sup> Uber began charging wait time fees to riders in 2016, and the fee is charged "starting two minutes after the vehicle arrives at the pickup location . . . until the vehicle begins its trip."<sup>74</sup> The imposition of the wait time fee is completely controlled by Uber's technology, including GPS tracking of the Uber driver, and neither drivers nor riders are able to override the automatic fee charge regardless of the reason for the boarding delay.<sup>75</sup> The DOJ's complaint implies that the allotted time of two minutes is seemingly arbitrary, rather than rooted in any empirical basis:<sup>76</sup>

Many passengers with disabilities require more than two minutes to board or load into a vehicle for various reasons, including because they may use mobility aids and devices such as wheelchairs and walkers that need to be broken down and stored in the vehicle or because they simply need additional time to board the vehicle.<sup>77</sup>

Though the imposition of wait time fees is seemingly automatic, the DOJ acknowledges that Uber has, in the recent past and only upon request, issued refunds to some disabled passengers who were charged the fees.<sup>78</sup> But in many instances, Uber has denied such refunds, and there is no apparent explanation for this inconsistency.<sup>79</sup> The DOJ further illustrates the impact of this discrimination by telling the stories of two disabled Uber passengers who rely heavily on Uber rides for transportation and have been charged numerous wait time fees despite their every effort to swiftly enter their Uber, making them feel like "second-class citizens."<sup>80</sup>

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<sup>73</sup> Complaint & Demand for Jury Trial at 1, *United States v. Uber Techs., Inc.*, No. 21-8735, 2021 WL 5233076 (N.D. Cal. Nov. 10, 2021).

<sup>74</sup> *Id.* at 4.

<sup>75</sup> *Id.* at 4–5.

<sup>76</sup> See *Wait Time Fees and Refunds*, UBER, <https://help.uber.com/riders/article/wait-time-fees-and-refunds?nodeId=469f1786-1543-4c83-abbf-ddccb7826fc2> [<https://perma.cc/TL5Z-BTD9>] (last visited Feb. 6, 2022) ("Wait time fees and thresholds may vary by location. In certain markets, additional wait time charges may apply to your trip depending on how busy it is.").

<sup>77</sup> Complaint & Demand for Jury Trial at 5, *United States v. Uber Techs., Inc.*, No. 21-8735, 2021 WL 5233076 (N.D. Cal. Nov. 10, 2021).

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

<sup>79</sup> *Id.* at 5, 8.

<sup>80</sup> *Id.* at 5–8.

### B. *Uber's Response*

Uber has been quick to respond publicly to the DOJ's allegations, asserting that it is a mere technology company with "no statutory obligation" to modify its current policy under the ADA.<sup>81</sup> Representatives for Uber have criticized the DOJ's lawsuit, insisting that the company "had been in active discussions with the DOJ about how to address any [disability] concerns or confusion before this surprising and disappointing lawsuit."<sup>82</sup> Somewhat remarkably, Uber has acknowledged that, though "[w]ait-time fees are charged to all riders to compensate drivers after two minutes of waiting," the fees "were never intended for riders who are ready at their designated pickup location but need more time to get into the car."<sup>83</sup>

Uber has also stated that its app was updated a week prior to the lawsuit's filing<sup>84</sup> to "automatically waive fees for any rider who certifies they are disabled,"<sup>85</sup> but it is unclear whether this change was in response to conversations with the DOJ and rumblings of an impending lawsuit, or because Uber knows it should be subject to Title III of the ADA and seeks to comply out of reputation-motivated good will. Uber continues to assert that it provides refunds for wait time fees charged to disabled riders, but the DOJ's complaint alleges otherwise. Regardless of whether it believes it is subject to ADA Title III, Uber has explicitly commented that it "fundamentally disagree[s] that our policies violate the ADA and will keep improving our products to support everyone's ability to easily move around their communities."<sup>86</sup>

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<sup>81</sup> Defendant's Motion to Dismiss at 6–7, 10, *United States v. Uber Techs., Inc.*, No. 21-8735, 2021 WL 5233076 (N.D. Cal. Jan. 14, 2022).

<sup>82</sup> Malathi Nayak & Jackie Davalos, *Uber Sued by U.S. Over Wait-Time Fee for Disabled Passengers*, BLOOMBERG (Nov. 10, 2021, 12:57 PM) <https://www.bloomberg.com/news/articles/2021-11-10/uber-sued-by-u-s-over-wait-time-fees-for-disabled-passengers> [<https://perma.cc/4H9T-MGXR>] (quoting Matt Kallman, spokesperson for Uber).

<sup>83</sup> *Id.*

<sup>84</sup> Joe Hernandez, *An Uber Fee Unfairly Impacts Riders with Disabilities, a DOJ Lawsuit Says*, NPR (Nov. 10, 2021, 3:53 PM), <https://www.npr.org/2021/11/10/1054407560/justice-department-uber-wait-time-riders-disabilities> [<https://perma.cc/CU83-TG5X>].

<sup>85</sup> Nayak & Davalos, *supra* note 82.

<sup>86</sup> Hawkins, *supra* note 41 (quoting Uber spokesperson, Matt Kallman).

In the wake of the DOJ's lawsuit and resulting media attention, Uber has published webpages providing guidance for disabled riders in the "Help" subsection of its company website.<sup>87</sup> Uber's website now states that disabled riders "can request a refund or waiver of wait time fees if their disability impacts their ability to board a vehicle within a few minutes of the driver's arrival at the designated pickup location."<sup>88</sup> Citing certain provisions of ADA Title III, Uber also now has a portal that account holders can use to certify that they are disabled within the ADA's definition and therefore require extra time boarding Uber vehicles.<sup>89</sup> Presumably, once a user has self-identified as disabled, they will no longer automatically be charged a wait time fee. Uber also provides resources and guides for users with a variety of disabilities, which appear to address the allegations in prior lawsuits like driver discrimination, but do not address Uber's own complicity in discrimination via wait time fees.<sup>90</sup> Based on current website guidance, disabled users can still be erroneously charged wait time fees after certifying that they are disabled, and Uber does not provide any clear metric that it will use to evaluate whether a self-certified disabled rider will receive a wait time fee waiver for future rides.<sup>91</sup>

### C. Title III Should Apply to Uber and Its Peers

Lack of access to rideshare transportation services has long plagued users in the disabled community; however, it appears that the Biden Administration's DOJ is finally ready to pick up the slack

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<sup>87</sup> See *I Have a Disability. How Do I Request a Wait Time Fee Refund or Waiver?*, UBER, <https://help.uber.com/riders/article/i-have-a-disability-how-do-i-request-a-wait-time-fee-refund-or-waiver-?nodeId=6e395964-7d4d-4521-a1a0-c78910a1c685> [<https://perma.cc/BGY2-RASZ>] (last visited Feb. 6, 2022). This particular webpage did not exist as of October 23, 2021. *Uber Help Accessibility*, INTERNET ARCHIVE WAYBACKMACHINE (Oct. 23, 2021), <https://web.archive.org/web/20211023111321/https://help.uber.com/riders/section/accessibility?nodeId=fab02244-735f-4a03-9781-201644262564> [<https://perma.cc/BYZ3-LRML>].

<sup>88</sup> *I Have a Disability. How Do I Request a Wait Time Fee Refund or Waiver?*, *supra* note 87.

<sup>89</sup> See *id.*

<sup>90</sup> See *Accessibility*, UBER, <https://www.uber.com/us/en/about/accessibility/> [<https://perma.cc/ZQP7-AJVG>] (last visited Feb. 6, 2022).

<sup>91</sup> *I Have a Disability. How Do I Request a Wait Time Fee Refund or Waiver?*, *supra* note 86.

left by Congress's failure to update the private transportation provision of the ADA since its pre-Internet enactment.<sup>92</sup> Not only is *U.S. v. Uber Technologies* “the first high-profile civil rights lawsuit brought against a major tech company during the Biden era,” but also the lawsuit is viewed by some as a possible “harbinger of what’s to come from the [DOJ] and other federal civil rights watchdogs, which are now stacked with prominent Big Tech antagonists.”<sup>93</sup>

The focus of the DOJ’s Complaint on objective, structural discrimination, like wait time fee charges, as opposed to the individual and subjective discrimination against riders alleged in lawsuits like *Ramos* and *National Federation of the Blind*, is a dramatic departure from prior jurisprudence that has grappled with rideshare companies’ obligations under the ADA. The DOJ’s shift in focus and litigation strategy will likely result in a ruling that binds Uber to the proscriptions of the ADA as a transportation service company and achieve sorely-needed equity for disabled users throughout the United States, so much so that some experts have praised the suit as a “slam dunk case of discrimination against people with disabilities.”<sup>94</sup> While the DOJ is finally taking a huge step in the right direction for improving disability rights and access in the private sector, neither the issue nor the need for relief are new; but at least this time, the potential outcome could be.

Though there is a lack of supporting case law, disability activists and scholars argue that Uber, Lyft, and other TNCs fit squarely within the domain of Title III because, “[f]rom a rider’s point of view, a TNC’s service does not end with connecting to a driver. The rider’s experience includes not only this initial connection, but also the ride itself. Even the companies’ own promotional language suggests this result.”<sup>95</sup> The ADA defines “specified public

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<sup>92</sup> See 42 U.S.C. § 12184.

<sup>93</sup> Lima, *supra* note 68.

<sup>94</sup> Cat Zakrzewski, *Justice Department Sues Uber for Charging “Wait Time” Fees to Passengers with Disabilities*, WASH. POST (Nov. 10, 2021, 4:55 PM), <https://www.washingtonpost.com/technology/2021/11/10/justice-department-uber-disabilities/> [<https://perma.cc/3UEP-PW4C>] (quoting Blake Reid, clinical professor and specialist in technology policy and disability law at University of Colorado Law School).

<sup>95</sup> Reed, *supra* note 12, at 520.

transportation,” under Title III as any non-aircraft transportation conveyance “that provides the general public with general or special service on a regular and continuing basis.”<sup>96</sup> The Statute’s definition is broad, and a court could easily find that the Statute encompasses the transportation service that Uber provides. Uber drivers pick up and drop off customers at a specific destination (“conveyance”), anyone can download and use the Uber app for such conveyance (“general public”), and app users can take advantage of Uber’s transportation service at any time (“on a regular and continuing basis”).<sup>97</sup> Using this definition-based analysis, the DOJ will likely be able to establish early on that Title III does in fact apply to Uber and other TNCs. Thus, the DOJ’s likelihood of success relies, first, upon establishing that Title III of the ADA applies to Uber as a transportation service and, second, upon convincing the court that the characterization of Uber’s wait time fee policy constitutes impermissible discrimination against disabled riders under the ADA.

If the court in this case finds that Uber is a transportation service provider and therefore falls under the auspices of Title III and the DOT’s corresponding regulations, the adaptations and amendments to Uber’s current policies would be minimal—in no way requiring the complete overhaul of company structure that Uber seems to fear. Compliance with the ADA could potentially require mandating disability training for and ADA adherence by drivers, as well as ensuring that disabled passengers are not subjected to higher fees than abled passengers.<sup>98</sup> Uber’s new disability self-reporting portal, discussed above, is one such example of ensuring that disabled passengers are not wrongfully charged; but, given the portal’s infancy, it is not yet clear whether this adaptation will be effective. The self-identification honor system may also raise some authentication issues down the road; but, with the ADA’s insistence on a broad construction of the term “disability,” this should be permissible. Additionally, Uber asserts in its Motion to Dismiss that it already has a policy of “generally refunding” wait time fees if a

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<sup>96</sup> 42 U.S.C. § 12181(10) (parenthesis omitted).

<sup>97</sup> Reed, *supra* note 12, at 530–31.

<sup>98</sup> Complaint & Demand for Jury Trial at 9–10, *United States v. Uber Techs., Inc.*, No. 21-8735, 2021 WL 5233076 (N.D. Cal. Nov. 10, 2021).

disabled user has been mistakenly charged.<sup>99</sup> Nevertheless, as discussed above, it seems that Uber's attempts to circumvent the DOJ's ADA violation allegations are a direct reaction to the DOJ's lawsuit, and the court could potentially see this retroactive response as a persuasive reason to create precedent applying the ADA to Uber to ensure that, in the future, accessibility will not have to be established in a piecemeal, case-by-case fashion.

#### IV. WEBSITE ACCESSIBILITY UNDER THE ADA

*U.S. v. Uber Technologies* has the potential to create precedential case law that will force Uber and other TNCs to comply with the ADA as private transportation providers. Further, the suit represents a new ripple in the pond of current unsettled jurisprudence dealing with the ADA's governance of website accessibility for disabled Americans. Accessible website features, or a lack thereof, are crucial factors affecting the way that individuals with disabilities can interact with the plethora of information and communication that is available via the Internet.<sup>100</sup> Over 12% of Americans live with a physical disability,<sup>101</sup> and ensuring equal access to the Internet is fundamental to permit all users to experience the "active, democratic participation in public life and broader society" that the Internet affords.<sup>102</sup>

Inaccessible websites can impact Americans with a wide variety of disabilities, including neurological, physical, speech, auditory, and visual.<sup>103</sup> Such users disproportionately grapple with websites that have complex navigation mechanisms, insufficient time limits to respond to prompts or complete tasks, reliance on voice interactions, and content that lacks text, video, or audio alternatives.<sup>104</sup> Examples of adaptations that website hosts can

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<sup>99</sup> Def.'s Motion to Dismiss at 8, *United States v. Uber Techs., Inc.*, No. 21-8735, 2021 WL 5233076 (N.D. Cal. Jan. 14, 2022).

<sup>100</sup> Approximately 88.5% of the American population uses the Internet. Meyer, *supra* note 46, at 22.

<sup>101</sup> *Id.* at 22.

<sup>102</sup> *Id.* (quoting Nicola Lucci, *Internet Content Governance and Human Rights*, VAND. J. ENT. & TECH. L. 809, 822 (2014)).

<sup>103</sup> *Id.* at 23–24.

<sup>104</sup> *Id.* at 24–25.

employ to ensure equal accessibility for disabled users include equipping all video content with closed captioning,<sup>105</sup> programming website content to be compatible with commonly-used assistive technology, and allowing users ample time to read, comprehend, and interact with website content.

#### A. *The Web Content Accessibility Guidelines 2.0*

The World Wide Web Consortium (“W3C”), an organization whose mission is to “lead the World Wide Web to its full potential by developing protocols and guidelines that ensure the long-term growth of the Web,”<sup>106</sup> first enacted its “Web Content Accessibility Guidelines” (“WCAG 2.0”) in 2008.<sup>107</sup> These guidelines attempt to “provid[e] a single shared standard for web content accessibility that meets the needs of individuals, organizations, and governments internationally.”<sup>108</sup> Last updated in 2018, a new update to the WCAG 2.0 will be finalized by mid-2022.<sup>109</sup>

Though the WCAG 2.0 are mere guidelines rather than legal mandates, the recommendations serve an important purpose in filling the gaps left by the lack of legal guidance for web developers attempting to “make web content more accessible to people with disabilities.”<sup>110</sup> The WCAG 2.0 is organized by four conceptual principles that guide its website accessibility effort: (1) perceivable; (2) operable; (3) understandable; and, (4) robust.<sup>111</sup> Each principle is supported by guidelines intended to provide a “framework and overall objectives” for web developers, and each guideline is reinforced by “testable success criteria” spanning three levels or

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<sup>105</sup> See *Innes v. Bd. of Regents of the Univ. Sys. of Md.*, 29 F. Supp. 3d 566, 569 (D. Md. 2014).

<sup>106</sup> *W3C Mission*, W3C, <https://www.w3.org/Consortium/mission.html> [<https://perma.cc/47LN-NSNB>] (last visited Feb. 22, 2022).

<sup>107</sup> Shawn Lawton Henry, *WCAG 2 Overview*, W3C WEB ACCESSIBILITY INITIATIVE (Feb. 1, 2022), <https://www.w3.org/WAI/standards-guidelines/wcag/> [<https://perma.cc/4F3M-A8PC>].

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

<sup>109</sup> *See id.*

<sup>110</sup> *See Meyer, supra* note 46, at 15–16, 26.

<sup>111</sup> *Web Content Accessibility Guidelines 2.0*, W3C WEB ACCESSIBILITY INITIATIVE, <https://www.w3.org/TR/WCAG20/> [<https://perma.cc/FZ86-HYFU>] (last visited Mar. 6, 2022).

degrees of conformance based on “the needs of different groups and different situations.”<sup>112</sup>

Guidelines under the perception principle provide ways for disabled Internet users to access information via: “text alternatives for any non-text content,” like large print, braille, and speech; alternatives for “time-based media,” like captions for video content; a variety of content layouts; and, ensuring distinction among website content features.<sup>113</sup> The operability principle centers around functionality—a user should be able to access all content on a given website using only a keyboard, and users should be provided enough time to navigate and interact with various content.<sup>114</sup> Similarly, the understandability principle aims to provide for website content that is readable and operates in predictable ways through consistent navigational mechanisms.<sup>115</sup> Finally, the robustness principle safeguards a disabled user’s ability to access the website using adaptive or assistive technology.<sup>116</sup> Here, the WCAG 2.0 aims to “maximize [a website’s] compatibility with current and future user agents, including assistive technologies.”<sup>117</sup>

*B. How Sharing Economy Platforms Comply with Available Accessibility Guidelines*

Companies like Uber, Lyft, Airbnb, and Zipcar make up a relatively novel economic model called the “sharing economy,” a model which “involves short-term peer-to-peer transactions to share use of idle assets and services or to facilitate collaboration.”<sup>118</sup> These

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *See id.*

<sup>115</sup> *See id.*

<sup>116</sup> *See id.*

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

<sup>118</sup> Scott & Munichello, *Sharing Economy*, *supra* note 11. Other examples of sharing economy platforms include Lime, <https://www.li.me/en-US/home> [<https://perma.cc/SZJ9-2W38>], and Rover, <https://www.rover.com/> [<https://perma.cc/6PTQ-K72Q>]. These companies, like Uber, are not only potentially subject to ADA Title III depending on the outcome of the DOJ’s current suit but are also already informally subjected to case law that requires websites themselves to be accessible to Internet users with a variety of disabilities.

transactions are usually facilitated by an online platform that handles contact and payment between users.<sup>119</sup>

The DOJ's lawsuit has already had a tangible ripple effect both within Uber's own corporate policies and procedures, as well as among Uber's peer sharing economy corporations. As discussed above, Uber's own accessibility webpages have been updated to reflect its tardy attempt to establish an appearance of providing equal services to disabled riders.<sup>120</sup> On its main accessibility webpage, Uber provides information for riders with a variety of disabilities, including mobility and visual disabilities, as well as riders who require service animals.<sup>121</sup> For mobility-limited riders, Uber provides direct links to its wheelchair-accessible vehicle program ("Uber WAV") and provides information about the processes and policies for riding with a service animal.<sup>122</sup> The webpage also provides several different resources for blind or low-vision users about how to use the app with adapted features and functions.<sup>123</sup>

Airbnb, a travel accommodations provider, represents perhaps the most closely-analogous sharing economy model to Uber, as Airbnb facilitates a transaction between a traveler looking for a place to stay and a homeowner making use of their vacant space.<sup>124</sup> Therefore, Airbnb's operations present questions of both physical ADA compliance in the listed properties and digital accessibility through Airbnb's website and mobile app. A comparison of Airbnb's accessibility webpage as of March 2022,<sup>125</sup> with a record

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This one-foot-in, one-foot-out position is reflected by these companies' compliance with the WCAG 2.0 metrics in their websites and mobile applications.

<sup>119</sup> See Scott & Munichello, *Sharing Economy*, *supra* note 11.

<sup>120</sup> See *Accessibility*, *supra* note 89.

<sup>121</sup> *Id.*

<sup>122</sup> See *id.*

<sup>123</sup> See *id.*

<sup>124</sup> *What Is Airbnb and How Does It Work?*, AIRBNB, <https://www.airbnb.com/help/article/2503/what-is-airbnb-and-how-does-it-work> [<https://perma.cc/ZZJ5-BSQZ>] (last visited March 22, 2022).

<sup>125</sup> See *generally Accessibility at Airbnb*, AIRBNB, <https://www.airbnb.com/accessibility> (last visited March 22, 2022) [<https://perma.cc/UC7V-VDSA>].

of the same page captured on October 2021,<sup>126</sup> demonstrates the impact that the DOJ's entry into the world of Internet ADA compliance has already had. The current version of the webpage is more visually distinctive, as well as interactive, and it provides a more perceptively-accessible experience for site visitors.<sup>127</sup> The font is larger, and there is frequent use of contrasting bold, black text over a white background.<sup>128</sup> The photos used as example app interfaces are also larger and more detailed than the examples provided on the older version of the webpage.<sup>129</sup>

In terms of the substantive information that is displayed, the current webpage provides significantly more hyperlinks, which directly guide visitors towards other webpages that cover specific services of interest to disabled Airbnb guests. These pages include available search features for properties, Airbnb's goals of fulfilling the WCAG 2.0 for its website and app, and an FAQ section directing users to other policies and help pages.<sup>130</sup> Perhaps most notably, the current Airbnb website is more explicit about Airbnb's ongoing accessibility efforts, including organizations Airbnb is working with, such as the National Federation of the Blind and the United Spinal Association, as well as how those efforts are being achieved through research and advocacy.<sup>131</sup> Accessibility information is very sparse on the older version of Airbnb's webpage, likely reflecting increased attention toward sharing economy compliance with the ADA in the wake of the DOJ's lawsuit.<sup>132</sup>

Another comparable sharing economy platform is Lime, the "micro-mobility" provider of free-floating "shared scooters, bikes

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<sup>126</sup> *Airbnb Is for Everybody*, INTERNET ARCHIVE WAYBACKMACHINE (Oct. 5, 2021), <https://web.archive.org/web/20211005043636/https://www.airbnb.com/d/accessibility> [<https://perma.cc/6CLZ-7CL7>].

<sup>127</sup> See *Accessibility at Airbnb*, *supra* note 125.

<sup>128</sup> See *id.*

<sup>129</sup> Compare *Accessibility at Airbnb*, *supra* note 125 with *Airbnb Is for Everybody*, *supra* note 126.

<sup>130</sup> See *Accessibility at Airbnb*, *supra* note 125.

<sup>131</sup> Compare *Accessibility at Airbnb*, *supra* note 125 with *Airbnb Is for Everybody*, *supra* note 126.

<sup>132</sup> See *Airbnb Is for Everybody*, *supra* note 126.

and transit vehicles”<sup>133</sup> that can be located and activated on an urban sidewalk using a mobile application.<sup>134</sup> Users are charged based on the length of their ride using their credit card information stored in the app.<sup>135</sup> Lime differs notably from Uber and Airbnb not in the mobile application feature of its service but in its equipment—Lime itself owns the fleet of shared vehicles that it provides to riders.<sup>136</sup> Lime then independently contracts with community members who charge and maintain the vehicles.<sup>137</sup>

Regarding physical ADA compliance, as of March 2022, Lime’s website has a page dedicated to providing information about its “adaptive vehicles designed for riders that have unique mobility needs.”<sup>138</sup> Dubbed the “Lime Able Program,” Lime offers three different bikes and scooters adapted for accessibility, including seats, three wheels instead of two, and storage space.<sup>139</sup> Unlike typical Lime rentals, which are conducted on a per-ride basis and are initiated by the user seeking out a vehicle on the sidewalk, the Lime Able Program features 24-hour rental periods for disabled users in select cities, as well as home delivery of the vehicles so that disabled users can more easily access the service.<sup>140</sup> Notably, program members can access these adapted vehicles for a \$5 refundable deposit, and delivery of the selected vehicle is free.<sup>141</sup> This program demonstrates a genuine and dedicated effort by Lime to provide equal access to its services for disabled members of the public. In addition, the fact that the program appears to predate the

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<sup>133</sup> *About Us*, LIME, <https://www.li.me/about-us> [<https://perma.cc/KZ96-ZLPT>] (last visited March 22, 2022).

<sup>134</sup> Brett Helling, *Explore Your City: How Lime Scooters Work for Riders in 2022*, RIDESTER, <https://www.ridester.com/lime-scooters/> [<https://perma.cc/SHR2-NAA7>] (Feb. 22, 2022).

<sup>135</sup> *Id.*

<sup>136</sup> See Susan Carpenter, *In the Van with the ‘Juicers’ Who Round Up and Recharge Lime Scooters*, N.Y. TIMES (Oct. 25, 2019), <https://www.nytimes.com/2019/10/25/business/lime-bird-scooters-rechargers.html> [<https://perma.cc/8S35-3875>].

<sup>137</sup> *See id.*

<sup>138</sup> *We Believe in Mobility for All*, LIME, <https://www.li.me/en-us/adaptive-vehicles/> [<https://perma.cc/F95M-8FQY>] (last visited Mar. 22, 2022).

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

<sup>140</sup> *See id.*

<sup>141</sup> *See id.*

DOJ's lawsuit against Uber indicates that Lime may be an early and advanced competitor in the realm of ADA compliance in the sharing economy.<sup>142</sup>

*C. The Circuit Split Regarding ADA Applicability to Standalone Websites*

In evaluating whether websites and mobile applications are subject to the requirements of the ADA, the federal circuit courts disagree about whether a website must be tied to a good or service provided at a physical location in order to fall under the scope of Title III.<sup>143</sup> At present, “there are no specific laws or guidelines for mobile accessibility,” but the DOJ has been able to make headway in this area by initiating investigations and intervening in “private lawsuits against numerous organizations regarding the accessibility of websites and mobile applications.”<sup>144</sup> These investigations and interventions usually lead to “mandated application of the [WCAG 2.0] to mobile applications in [the DOJ's] settlement orders with these organizations.”<sup>145</sup> Due to the lack of concrete guidance from Congress and the Supreme Court, the circuit courts have been left to interpret what the ADA explicitly states about the accessibility requirements of public accommodations and apply it to novel circumstances.

In the past, certain circuits have evaluated websites and apps under the public accommodations provision of ADA Title III.<sup>146</sup> The

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<sup>142</sup> See *We Believe in Mobility for All*, INTERNET ARCHIVE WAYBACKMACHINE (Apr. 30, 2021), <https://web.archive.org/web/20210430214907/https://www.li.me/en-us/adaptive-vehicles/> [<https://perma.cc/A7R7-EDHJ>].

<sup>143</sup> Amrita Srivastava, *Legal Issues for Mobile Applications: Accessibility*, MOBILE APPS. 100:300 (2021), [https://www.westlaw.com/Document/I70d20165ffa411e79382a27023aa709a/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://www.westlaw.com/Document/I70d20165ffa411e79382a27023aa709a/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0) [<https://perma.cc/C9AT-CVG5>].

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> See, e.g., *Cullen v. Netflix*, 880 F. Supp. 2d 1017 (N.D. Cal. 2012); *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 197 (D. Mass. 2012); *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381 (E.D.N.Y. 2017); *Earl v. eBay*,

ADA prohibits discrimination against disabled individuals in “any place of public accommodation,” which is defined as a private entity whose operations affect commerce and fall into one of the twelve enumerated and exclusive categories.<sup>147</sup> Courts in the First, Second, and Seventh Circuits have all held that websites and mobile apps are places of public accommodation for ADA purposes “regardless of their nexus to a physical location.”<sup>148</sup> For example, when the District of Massachusetts decided that Netflix was subject to the provisions of Title III as a public accommodation, the court held that “it would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not.”<sup>149</sup>

On the other side of the split, courts in the Third, Sixth, Ninth, and Eleventh Circuits have held that, in order for websites and mobile apps to be considered places of public accommodation under Title III, there must be “a nexus between the website and an actual physical location.”<sup>150</sup> Using the same example of Netflix, the Northern District of California ruled that “Netflix’s online streaming service was *not* a place of public accommodation within the meaning of the ADA because Netflix’s services are *only* provided online.”<sup>151</sup>

In the past, the DOJ has attempted to address and resolve this split via its rulemaking authority to no avail.<sup>152</sup> In 2010, the DOJ sought public comment to adopt possible website accessibility standards as part of its existing ADA regulations.<sup>153</sup> The DOJ then

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Inc., 599 F. App’x 695 (9th Cir. 2015); *Magee v. Coca-Cola Refreshments USA, Inc.*, 833 F. 3d 530 (5th Cir. 2016).

<sup>147</sup> Srivastava, *supra* note 143. The twelve public accommodation categories include hotels, restaurants and bars, movie theaters and other entertainment venues, places of public gathering, sales establishments, service establishments, transportation depots, libraries and museums, parks and other places of recreation, places of education, social service centers, and places of exercise and recreation. 42 U.S.C. § 12181(7).

<sup>148</sup> Srivastava, *supra* note 143.

<sup>149</sup> *Id.* (citing *Nat’l Ass’n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d at 200).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* (citing *Cullen v. Netflix*, 880 F. Supp. 2d 1017) (emphasis added)).

<sup>152</sup> Kassim & Lawless, *supra* note 8, at 57–58.

<sup>153</sup> Meyer, *supra* note 46, at 19.

proposed a rule that “would amend the ADA and its implementing regulation, in order to establish requirements for making the goods, services, benefits, etc. offered by public accommodations via the internet, specifically at sites on the World Wide Web, accessible to individuals with disabilities.”<sup>154</sup> Five years later, the DOJ announced its plans to publish a Notice of Proposed Rulemaking addressing the issue, but the publication never came to fruition, and the announcement was later withdrawn.<sup>155</sup> The DOJ’s last word on the subject came in 2017, when the U.S. Attorney General’s Office suggested that the lack of legal guidance on ADA applicability to websites was a minor issue, stating that “the absence of a specific regulation does not serve as a basis for noncompliance with a statute’s requirements.”<sup>156</sup> Rather, a website or app’s “noncompliance with a voluntary technical standard for website accessibility [like the WCAG 2.0] does not necessarily indicate noncompliance with the ADA.”<sup>157</sup>

Despite the circuit split as to a website’s connection with a physical location discussed above, the circuit courts are “nearly unanimous” in holding that “a website can and should be construed as providing ‘services of a place of public accommodation’ under the ADA *where the site’s inaccessibility impedes access to goods and services of physical locations.*”<sup>158</sup> This jurisprudence will be crucial to the DOJ’s case and others like it moving forward, particularly if the DOJ approaches its arguments against Uber from the public accommodations provision, as well as the private transportation provider provision.

*D. The Ninth Circuit’s Approach: Robles v. Domino’s Pizza, LLC*

Moving forward, it is likely that the DOJ’s litigation strategy in *U.S. v. Uber Technologies* will be informed by the Ninth Circuit’s narrow construction of ADA applicability to websites, which results

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<sup>154</sup> Srivastava, *supra* note 143.

<sup>155</sup> Meyer, *supra* note 46, at 19–20. It has been suggested that this shift was a result of changing administrations and a resulting shift in priorities at the DOJ. *See id.* at 20–21.

<sup>156</sup> *Id.* at 21 (quoting then-Assistant Attorney General Stephen E. Boyd).

<sup>157</sup> *Id.*

<sup>158</sup> Kassim & Lawless, *supra* note 8, at 60.

in ADA obligations arising only when there is a nexus between that website and a service provided at a physical location.<sup>159</sup> The Ninth Circuit recently revisited the issue of website accessibility and the lack of corresponding regulatory guidance in *Robles v. Domino's Pizza, LLC*.<sup>160</sup> In that case, the plaintiff alleged that the Domino's website and mobile app violated the ADA because the platforms were not compatible with the plaintiff's commonly-used screen-reading software.<sup>161</sup> Rather than apply the WCAG 2.0 as an alternative guideline structure in the absence of comparable regulatory guidelines, as urged by the plaintiff, the district court dismissed the suit, citing concerns that the lack of "clear web accessibility regulations from the DOJ would violate Domino's due process rights."<sup>162</sup>

The plaintiff appealed, and Domino's responded by arguing that "companies were not required under the law to make their websites and mobile apps fully accessible if they offered customers with disabilities other options for accessing their goods and services, such as a telephone hotline."<sup>163</sup> The Ninth Circuit remanded the case, holding in accordance with precedent that "Title III of the ADA covers websites with a nexus to a physical place of public accommodation, relying heavily on the fact that the Domino's app and website are two of the most[-]used ways to order take-out and delivery."<sup>164</sup> While this holding is not particularly surprising to those familiar with Ninth Circuit jurisprudence in the area of website accessibility, the Ninth Circuit notably added that "liability for not having an accessible website, even with no regulation on the subject, does not violate due process rights of a business covered by Title III"; therefore, the plaintiff's claim was viable despite the DOJ's lack of regulatory guidance regarding the ADA's applicability to websites.<sup>165</sup>

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<sup>159</sup> See *Cullen v. Netflix*, 880 F. Supp. 2d 1017 (N.D. Cal. 2012).

<sup>160</sup> *Robles v. Domino's Pizza, LLC*, 913 F.3d 898 (9th Cir. 2019).

<sup>161</sup> *Id.* at 902.

<sup>162</sup> *Kassim & Lawless, supra* note 8, at 59.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

The holding in *Robles v. Domino's Pizza* will be important to the DOJ's litigation and other subsequent lawsuits, as it permits disabled plaintiffs to sue alleging failure to provide accessible websites and apps even though said plaintiffs do not have clear federal regulatory guidelines under which to argue.<sup>166</sup> Ideally, however, the DOJ's lawsuit against Uber will initiate federal guidance either from Congress or from the DOJ itself. Thus far, the DOJ "has opined that the ADA applies to the Internet, but it has not clarified exactly what standards commercial websites must meet to comply with Title III."<sup>167</sup> Importantly, however, the preamble to the DOJ's existing ADA regulations (originally enacted in 1991) states that "the regulations should be interpreted to keep pace with 'emerging technology.'"<sup>168</sup> The DOJ's effort to continuously update the ADA's regulatory framework is reflected in later-enacted regulations, requiring Title III public accommodations (which the DOJ has stated should encompass "web pages") to "furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities."<sup>169</sup> Despite the DOJ's expectation of accessibility on websites and mobile apps, "it has never adopted specific technical regulations under Title III"<sup>170</sup> and has consistently failed to carry out any effective rulemaking, as discussed above.<sup>171</sup> Based on the DOJ's recent action against Uber, however, it seems the Agency is trying a new approach to creating ADA law around technology companies via court orders and settlement agreements rather than independent regulatory rule-making.

## V. CONCLUSION

Disabled Americans deserve equal access to the same website and app-based services available to those without disabilities.

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<sup>166</sup> *Robles v. Domino's Pizza*, 913 F.3d at 906–07.

<sup>167</sup> Kassim & Lawless, *supra* note 8, at 56.

<sup>168</sup> *Id.* (citing 56 Fed. Reg. 35544-01, 35566 (July 26, 1991)).

<sup>169</sup> *Id.* (citing 28 C.F.R. § 36.303(c)(1)). Appropriate auxiliary aids include Braille alternatives, screen-reading software programs, and other adaptations for visual and hearing impairment. *Id.*

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

Ideally, the DOJ will successfully use *U.S. v. Uber Technologies* as a catalyst for explicitly applying the ADA to Uber and other TNCs, whether through case law, direct amendments to the ADA itself, or changes in DOT and DOJ regulatory guidance. The result of the litigation is also likely to address the circuit split regarding the ADA's scope when it comes to website accessibility, as well as provide a foothold from which advocates and lawmakers can broaden the scope of Title III to ensure that disabled individuals' rights are protected in accordance with the original goals of the ADA. Though neither the issue of the ADA's outdatedness nor the need for digital accessibility for the disabled are new, the DOJ's lawsuit has the potential to spur ADA amendment or adaptation to protect the rights of the disabled as society progresses further toward reliance on digitally-enabled products and services.