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## ESSAY

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### GETTING FROM POINTS A TO POINTS B: WAYFINDING, PUBLIC ACCOMMODATIONS, AND THE ADA

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A few turnings later and I was thoroughly lost. There is a school of thought which says that you should consult a map on these occasions, but to such people I merely say, ‘Ha! What if you have no map to consult? What if you have a map but it’s of the Dordogne?’<sup>1</sup>

#### INTRODUCTION

“To effectuate its sweeping purpose, the Americans with Disabilities Act (ADA) forbids discrimination against disabled individuals in major areas of public life,”<sup>2</sup> including public accommodations. The thesis of this Essay is that, under the ADA, public accommodations must be prepared to facilitate independent wayfinding to ensure access to, and effective communication inside, the relevant environment. While there is currently no case law which

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<sup>†</sup> University of Pennsylvania Law School, J.D. 1972. <http://www.ferleger.com> [<https://perma.cc/SHT8-DKVU>]. I acknowledge with thanks the astute editorial assistance of Emily Horwitz.

<sup>1</sup> DOUGLAS ADAMS, *THE LONG DARK TEATIME OF THE SOUL* 156 (1988).

<sup>2</sup> *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001).

accepts or rejects this contention, I argue that the statutory and regulatory text requires this interpretation, and that wayfinding fits neatly within the textual structure. Moreover, existing relevant ADA case law tends to support this thesis.<sup>3</sup>

The ADA guarantees people with disabilities access to public accommodations. Getting in the door is not enough. Assistance in getting from Point A to Point B, as independently as possible, is required. Independent wayfinding has become a simple and reasonable means for providing that assistance in the built environment. Appropriate mechanisms for effective communication were not frozen as of the 1990 enactment of the ADA. Such mechanisms certainly include methods of unassisted independent wayfinding—which are increasingly available as technology evolves. As demonstrated in this Essay, that evolution is encompassed in the key ADA regulation.

Wayfinding refers to techniques used by travelers to find relatively unmarked routes or locations.<sup>4</sup> The term has been applied to navigation across land and sea by ancient peoples,<sup>5</sup> to conceptualizing a city,<sup>6</sup> and to the use of signage and visual and sensory clues in the built environment.<sup>7</sup> A contemporary and perhaps timeless definition of wayfinding is found in the analysis by Paul Symonds and his colleagues: Wayfinding is “[t]he cognitive, social and corporeal process and experience of locating, following or discovering a route through and to a given space.”<sup>8</sup>

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<sup>3</sup> See *infra* notes 52–55.

<sup>4</sup> See Anna Charisse Farr, Tristan Kleinschmidt, Prasad Yarlagadda & Kerrie Mengersen, *Wayfinding: A Simple Concept, a Complex Process*, 32 *TRANSP. REVS.* 715, 715 (2012) (“On the surface, wayfinding appears to be the straightforward process of moving oneself from a current location to a desired destination in a timely manner. Humans have successfully undertaken this process employing various means of guidance such as the stars, sextants, maps, the compass and more recently global positioning systems (GPS).”). Farr and coauthors note other conceptualizations of wayfinding such as “the consistent use and organization of sensory cues from the external environment,” “the process of moving through space with the goal of reaching a spatial destination,” and “the process of identifying a current location and knowing how to get to a desired destination as quickly and effortlessly as possible.” *Id.* at 715-16.

<sup>5</sup> E.g., M.R. O’CONNOR, *WAYFINDING: THE SCIENCE AND MYSTERY OF HOW HUMANS NAVIGATE THE WORLD* 3-5 (2019). Polynesian navigation of the South Seas is often cited as an example of early wayfinding, the use of the sun, stars, wind, waves, and currents to map one’s way across the ocean. For a fascinating account of the work and mapmaking of Tupaia, an *arioi* priest, advisor and master navigator the Leeward Society Islands in collaboration with members of the crew of James Cook’s *Endeavour*, between 1769 and 1770, see Lars Eckstein & Anja Schwarz, *The Making of Tupaia’s Map: A Story of the Extent and Mastery of Polynesian Navigation, Competing Systems of Wayfinding on James Cook’s Endeavour, and the Invention of an Ingenious Cartographic System*, 54 *J. PAC. HIST.* 1 (2019).

<sup>6</sup> KEVIN LYNCH, *THE IMAGE OF THE CITY* 4 (1960) (describing how wayfinding creates a broad frame of reference for living in a city).

<sup>7</sup> PAUL ARTHUR & ROMEDI PASSINI, *WAYFINDING: PEOPLE, SIGNS, AND ARCHITECTURE* 3 (1992) (noting how signs, maps, environmental cues, and architectural cues impact wayfinding).

<sup>8</sup> Paul Symonds, David H.K. Brown & Valeria Lo Iacono, *Exploring an Absent Presence: Wayfinding as an Embodied Sociocultural Experience*, *SOCIO. RSCH. ONLINE*, Feb. 2017, ¶ 4.12.

In this Essay, I argue why wayfinding is important in Part I, provide the legal context of wayfinding in Part II, and outline public accommodation communication obligations under the ADA in Part III. In Part IV, I discuss how wayfinding could provide more effective communication than guided assistance before concluding that unassisted independent wayfinding is required in order to get from Points A to Points B as independently as possible.

## I. WHY WAYFINDING?

The need to “wayfind” is universal. We all need to move from countless points A to points B, and we utilize many mechanisms to do so. Disabilities limit the utility of common mechanisms. Aural mechanisms are of little or no use to the deaf or hard of hearing. Visual systems do not work for the blind. Complex, cluttered, or ill-positioned signs may be incomprehensible to people with cognitive or mental impairments, or with a variety of physical disabilities.

Wayfinding signage is an architectural requirement under the implementing regulations of the ADA.<sup>9</sup> That mandated signage, however, is minimal. Current regulations provide specifications for static wayfinding signs, in braille, identifying access to exits and entrances, restrooms, elevators, places of emergency refuge, and the like.<sup>10</sup> This level of required access is very limited and has been described as “a valuable floor but too narrowly focused [on people with disabilities to align with the need and opportunity to design] for an increasingly diverse world.”<sup>11</sup> A user must be able to read Braille and to be able to locate (and willing to touch) the surfaces of the signs. Once inside the store, museum, airport, arboretum, hospital, or the like, a person who is blind or visually impaired must still “get around.” Independent orientation, movement, and location of targeted needs requires communication of relevant information from the host location to the customer or visitor. “Where am I?” “Which way to . . . ?” “What is behind me, to my left, right or down this or that aisle?” “Which way to the exit?”

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<sup>9</sup> U.S. DEP’T OF JUST., 2010 ADA STANDARDS FOR ACCESSIBLE DESIGN 71-74, 186-94 (2010) [hereinafter 2010 ADA STANDARDS].

<sup>10</sup> The 2010 *ADA Standards for Accessible Design* specify that ADA-compliant signs are necessary in the following public areas: exits, areas of refuge, inaccessible entrances, elevators, and restrooms; accessible check-out aisles and amusement park ride access points; and devices that assist the disabled. *Id.* at 71-74.

<sup>11</sup> See Mary A. Hums, Samuel H. Schmidt, Andrew Novak & Eli A. Wolff, *Universal Design: Moving the Americans with Disabilities Act from Access to Inclusion*, 26 J. LEGAL ASPECTS SPORT 36, 40 (2016) (quoting Valerie Fletcher, *Inclusive/Universal Design: People at the Center of the Design Process*, in THE ROUTLEDGE COMPANION FOR ARCHITECTURE DESIGN AND PRACTICE, at 251, 257 (Mitra Kanaani & Dak Kopeck, eds. 2016)); Aries Ardit, *Rethinking ADA Signage Standards for Low-Vision Accessibility*, J. VISION, May–June 2017, at 1 (arguing that mere “acceptable accessibility” provided by compliance with the ADA falls far short of what should be accomplished for individuals with low vision).

“Which way to the checkout line?” The static “Braille” signage model is of even less utility for people with many other disabilities.

The most familiar nonstatic form of wayfinding is the traditional “guide,” that is, a human aide to point the way or accompany people with disabilities along routes to their desired destinations. While this may in some situations be desirable, it is likely unnecessarily expensive and impractical; the compensation and expense inherent in a human guide is, by definition, a more costly and complex endeavor than the other options discussed in this Essay.<sup>12</sup> An alternative method of wayfinding is what I refer to as “independent wayfinding.” Independent wayfinding permits the person with disabilities to navigate the built environment without the guidance of another person. Independent wayfinding is a fundamental need for many people with disabilities navigating the built environment.<sup>13</sup> Mere signage is often insufficient. An expensive human guide is often unnecessary and undermines the ADA’s goal of supporting the independence of people with disabilities.

Federal law addresses interior signage for accessibility and wayfinding.<sup>14</sup> Apart from the Braille and signs required by current law, there is ample

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<sup>12</sup> For example, the average base salary of a tour guide in the United States is \$22.83 per hour. *Tour Guide Salary in United States*, INDEED, <https://www.indeed.com/career/tour-guide/salaries> [<https://perma.cc/6S5M-T9ZL>]. That salary does not include employers’ costs such as training, benefits, and taxes. For wayfinding in relatively small establishments, such as a supermarket or home goods store, it would make little sense economically for there to be a designated human guide for people with disabilities; the typical customer service or salesperson can typically assist. Even in those situations, the independent wayfinding described in this Essay, which is facilitated by electronic mechanisms, provides the disabled person with independence in movement through the establishment.

To be sure, sometimes a human guide is appropriate or even essential. For example, guiding a medical patient to an examination or treatment room warrants that human touch, as do other private or delicate situations. Moreover, in situations in which a programmable electronic GPS guide might be sufficient for a non-disabled person, an individual with developmental disabilities or dementia might need a human guide.

<sup>13</sup> Vikas Upadhyay & M. Balakrishnan, *Accessibility of Healthcare Facility for Persons with Visual Disability*, 2021 IEEE INT’L CONF. ON PERVERSIVE COMPUTING & COMM’NS WORKSHOPS & OTHER AFFILIATED EVENTS, 87, 87 (2021) (“Unassisted wayfinding is a fundamental need but has been challenging for persons with visual disabilities (PVDs). Wayfinding in healthcare facilities is even more challenging because of additional mental stress.”).

<sup>14</sup> In the United States, accessibility for wayfinding and interior signage are regulated by the 1990 ADA and the standards adopted pursuant to the ADA. See Americans with Disabilities Act of 1990, 104 Stat. 327, sec. 204, Pub. L. No. 101-336 (codified as amended at 42 U.S.C. § 12134) (requiring the Attorney General to create regulations for public entities). The Americans with Disabilities Act Accessibility Guidelines (ADAAG) were published in 1991 and updated substantially in 2010 with the Standards for Accessible Design (SAD). ADA Accessibility Guidelines for Buildings and Facilities, 28 C.F.R. pt. 36 app. A (1994) (containing the version of the ADA Accessibility Guidelines published in 1991); 2010 ADA STANDARDS, *supra* note 9, at 1 (updating earlier accessibility standards). The SAD guide included the construction and alteration of facilities covered by the ADA, such as places of public accommodation, commercial facilities, and state and local government facilities. 2010 ADA STANDARDS, *supra* note 9, at 1. In 2011, when the SAD was

evidence and experience with available digital technology to achieve effective communication, and thus enable independent wayfinding and internal orientation.<sup>15</sup> The digital technology involves the use of an evolving variety of Bluetooth or similar electronic beacons, QR codes, acoustics, visible light, RFID, geomagnetic, and other systems, to enable individuals to navigate their environment, even in close indoor surroundings.<sup>16</sup> An individual will typically use their smartphone to interact with those types of technological systems deployed within their space.<sup>17</sup>

It is now well established that the scope of effective auxiliary communications mechanisms is broad enough to include independent wayfinding; various communication mechanisms (i.e., Bluetooth and other technologies) facilitate unassisted wayfinding and constitute effective auxiliary communication.<sup>18</sup> In many situations these may be the best and most effective means of communication.<sup>19</sup>

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adopted, interactive Bluetooth and similar methodologies, through which unassisted wayfinding is possible, did not exist.

<sup>15</sup> For a survey, see Jayakanth Kunhoth, AbdelGhani Karkar, Somaya Al-Madeed & Abdulla Al-Ali, *Indoor Positioning and Wayfinding Systems: A Survey*, 10 HUM.-CENTRIC COMPUTING & INFO. SCIS., May 2020, at 1.

<sup>16</sup> *Id.* at 3-4.

<sup>17</sup> *Id.*

<sup>18</sup> See, e.g., Vishnu Nair, Christina Tsangouri, Bowen Xiao, Greg Olmschenk, Zhigang Zhu & William H. Seiple, *A Hybrid Indoor Positioning System for the Blind and Visually Impaired Using Bluetooth and Google Tango*, 6 J. ON TECH. & PERS. WITH DISABILITIES, 62, 63 (2018) (describing the use of vibrotactile devices to provide additional information to a user about their surroundings); Hang Wu, Ziliang Mo, Jiajie Tan, Suining He & S.-H. Gary Chan, *Efficient Indoor Localization Based on Geomagnetism*, ACM TRANSACTIONS ON SENSOR NETWORKS, Nov. 2019, at 1, 2-3 (proposing a tool for indoor localization that utilizes magnetic fields); Seyed Ali Cheraghi, *Beacon-Based Wayfinding for People with Disabilities 2* (2019) (Ph.D. dissertation, Wichita State University) (designing a wayfinding system that allows visually impaired people to interact with Bluetooth-based beacons for navigation); Yeo-Jang Chang & Tsen-Yung Wang, *Comparing Picture and Video Prompting in Autonomous Indoor Wayfinding for Individuals with Cognitive Impairments*, 14 PERS. & UBIQUITOUS COMPUTING 737, 738 (2010) (proposing a personal guidance system based on Bluetooth for individuals with cognitive impairments); Seyed Ali Cheraghi, Vinod Manboodiri & Laura Walker, *GuideBeacon: Beacon-Based Indoor Wayfinding for the Blind, Visually Impaired, and Disoriented*, 2017 IEEE INT'L CONF. ON PERVASIVE COMPUTING & COMM'NS, 121, 121 (noting how beacon-based wayfinding can be used "for navigation in large indoor spaces independently and effectively").

<sup>19</sup> The ADA requires "effective communication." A public accommodation can choose among various alternatives as long as the result is effective communication. 28 C.F.R. § 36.303(c). What constitutes "effective communication" is a fact-intensive determination. *E.g.*, *Silva v. Baptist Health S. Fla., Inc.*, 856 F.3d 824, 836 (11th Cir. 2017); *Vargas v. Quest Diagnostics Clinical Lab'ys, Inc.*, No. 19-8108, 2021 WL 5989961, at \*5 (C.D. Cal. Oct. 15, 2021). However, it is clear that "effective" means more than simply enabling basic information transfer:

For an effective-communication claim brought under the ADA and RA, we do not require a plaintiff to show actual deficient treatment or to recount exactly what the plaintiff did not understand. Nor is it a sufficient defense for a defendant merely to show that a plaintiff could participate in the most basic elements of a doctor–patient

“The purpose of the effective communication rules is to ensure that the person with a vision, hearing, or speech disability can communicate with, receive information from, and convey information to, the covered entity.”<sup>20</sup> A public accommodation must communicate “effectively” with the individual. What does this mean in the context of independent wayfinding? Consider someone who is blind who walks into an unfamiliar bank. If the bank had a wayfinding system installed, the person would immediately be directed—without bank employee assistance—to various locations such as the teller area, the officers at desks, the safe deposit vault, or restrooms. Wayfinding systems in a supermarket could guide someone with low vision directly to the butter, or hamburgers, or paper towels, an operation that is impossible using only overhead aisle labels that are invisible to the person. A theatergoer or stadium visitor could find their section and seat without assistance. With a smartphone app and an earbud, a person with a disability can benefit from the public accommodation’s investment in independent wayfinding mechanisms. More effective communication is thus facilitated.

## II. THE LEGAL CONTEXT

The ADA is intended to provide “a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities” and to set forth “clear, strong, consistent, enforceable standards.”<sup>21</sup> Congress recognized that people with disabilities face persisting discrimination “in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.”<sup>22</sup> Among other things, Congress found that “the Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.”<sup>23</sup>

Title III of the ADA prohibits discrimination against persons with disabilities by places of public accommodation and services operated by

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exchange. Rather, the relevant inquiry is whether the hospitals’ failure to offer an appropriate auxiliary aid impaired the patient’s ability to exchange medically relevant information with hospital staff.

*Silva*, 856 F.3d at 829.

<sup>20</sup> U.S. DEPT. OF JUST., C.R. DIV., DISABILITY RTS. SECTION, EFFECTIVE COMMUNICATION 1 (2014), <https://www.ada.gov/effective-comm.pdf> [<https://perma.cc/7YLF-L82Y>]. The rules apply to communicating with the person who is receiving the covered entity’s goods or services as well as with that person’s parent, spouse, or companion. *Id.* at 2.

<sup>21</sup> 42 U.S.C. § 12101(b)(1), (b)(2).

<sup>22</sup> *Id.* § 12101(a)(3).

<sup>23</sup> *Id.* § 12101(a)(7).

private entities, including retail establishments.<sup>24</sup> The “[g]eneral rule” is that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”<sup>25</sup> Title III also includes both general and specific prohibitions. The general prohibition against discrimination, as most directly applicable to this Essay is that it is discriminatory to grant or deny disabled persons “the opportunity . . . to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity” because of their disability.<sup>26</sup> The general provisions of Title III also require a public accommodation to offer “[g]oods, services, facilities, privileges, advantages, and accommodations . . . in the most integrated setting appropriate to the needs of the individual.”<sup>27</sup> It follows that having Bluetooth-operated systems, for example, would be useful to all persons—disabled or not—and would help to integrate people with disabilities into certain settings by enabling them to wayfind independently.<sup>28</sup>

The law goes further in its specific prohibitions and obligates each public accommodation to take action by making changes in business as usual, to address the needs of people with disabilities.<sup>29</sup> Discrimination thus includes such things as “a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities”<sup>30</sup> and “a failure to take such steps as may be necessary to

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<sup>24</sup> *Id.* §§ 12181–89. The ADA identifies twelve categories of “places of public accommodation.” *Id.* § 12181(7). “Public accommodations” include virtually all establishments and places where people may gather, do daily business, or enjoy the world outside their homes. For example, public accommodations include places of lodging, establishments serving food or drink, places of exhibition or entertainment (such as theaters, concert halls, and stadiums), places of public gathering (such as auditoriums and convention centers), sales establishments (such as grocery and clothing stores, and shopping centers), service establishments (such as banks, professional offices, and hospitals), places of public display or collection (such as museums and libraries), places of recreation (such as parks, zoos, and amusement parks), places of education, social service centers, and places of exercise or recreation (such as gyms, spas, and golf courses). *Id.*

<sup>25</sup> *Id.* § 12182(a).

<sup>26</sup> *Id.* § 12182(b)(1)(A)(i).

<sup>27</sup> *Id.* § 12182(b)(1)(B).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* § 12182(b)(2).

<sup>30</sup> *Id.* § 12182(b)(2)(A)(ii). The implementing regulation restates the statute:

A public accommodation shall make reasonable modifications in policies, practices, or procedures, when the modifications are necessary to afford goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the public accommodation can demonstrate that making the modifications would

ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services.”<sup>31</sup>

Remedies for violation of Title III include injunctive relief and awards for attorneys’ fees.<sup>32</sup> Compensatory damages may not be awarded.<sup>33</sup> Injunctive relief can be awarded “to any person who is being subjected to discrimination on the basis of disability in violation” of Title III.<sup>34</sup>

Providing wayfinding assistance to individuals with disabilities facilitates communication with those individuals, whether in writing, orally, by signage, or other means. The ADA addresses this need by means of establishing specific communication obligations for public accommodations.

### III. COMMUNICATION OBLIGATIONS UNDER THE ADA<sup>35</sup>

The regulations adopted under the ADA recognize the obvious: people with disabilities must be provided with auxiliary aids and services in public accommodations when necessary to achieve effective communication.<sup>36</sup> Such aids and services reasonably include those which facilitate independent wayfinding. Federal governmental reports have recognized the benefits of wayfinding technology<sup>37</sup> and have described the harms suffered by people with disabilities in the absence of such aid.<sup>38</sup> If the absence of independent

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fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations.

28 C.F.R. § 36.302(a).

<sup>31</sup> 42 U.S.C. § 12182(b)(2)(A)(iii). These prohibitions do not apply when an action would “fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.” *Id.*

<sup>32</sup> 42 U.S.C. § 12188(a)(2) (injunctive relief); 42 U.S.C. § 12205 (attorneys’ fees).

<sup>33</sup> See Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377, 378 (2000) (noting that the legislative compromise resulting in ADA Title III resulted in limiting remedies to injunctive relief only, and not monetary damages such as compensatory damages).

<sup>34</sup> 42 U.S.C. § 12188(a)(1), (2).

<sup>35</sup> This Essay does not address communication obligations in areas apart from those implicated in wayfinding, such as captioning in stadiums or video, interpreters in medical or other settings, website accessibility, gift cards, gas station kiosks, or video games. Nor does this Essay address wayfinding requirements in the public transit sphere.

<sup>36</sup> 28 C.F.R. § 36.303.

<sup>37</sup> See, e.g., FED. TRANSIT ADMIN., FTA Rep. No. 0159, ANNUAL REPORT ON PUBLIC TRANSPORTATION INNOVATION, RESEARCH PROJECTS FOR FY 2019 36 (2020) (“The benefits of the wayfinding and navigation technologies are increased access to transit, especially access of target populations such as people with disabilities and older adults. The benefits meet the goal of [the agency] by improving access to transportation, thus increasing access to opportunities.”).

<sup>38</sup> U.S. GOV’T. ACCOUNTABILITY OFF., GAO-21-354, PASSENGERS WITH DISABILITIES: AIRPORT ACCESSIBILITY BARRIERS AND PRACTICES AND DOT’S OVERSIGHT OF AIRLINES’ DISABILITY-RELATED TRAINING 6-7, 17 (2021) (footnotes omitted):

wayfinding technology would cause harm, it is reasonable for public accommodations to require such technologies.

There has not yet been case law recognizing that, to achieve effective communication with people with disabilities, a public accommodation must facilitate independent wayfinding in certain circumstances—nor has there been case law to the contrary.<sup>39</sup> Certainly, I suggest, the statute and regulations provide ample room for, and perhaps compel, such judicial

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Passengers with different types of disabilities may encounter different obstacles when accessing services and navigating through an airport. For example, passengers with blindness and low vision may have difficulty using the information systems—known as wayfinding—that guide people through the airport, those with mobility impairments may have difficulty walking long distances, and those with cognitive disabilities may have difficulty navigating through unfamiliar airport facilities that may be complex and overwhelming. . . .

. . . .

Representatives of a few disability advocacy organizations (four) and airports (two) told us that information essential to traveling through an airport is not always available in a manner accessible to all passengers including those who are deaf, blind, or have cognitive or mobility disabilities. Key information can include flight and boarding status, emergency response instructions, and how to navigate from point to point in the airport (i.e., wayfinding). While airlines are required to provide accessible information to passengers who are blind or deaf, representatives of one advocacy organization we met with noted that some methods for providing information can pose a barrier. For example, representatives from two disability advocacy organizations told us that a person with hearing loss may miss crucial information provided over a loudspeaker, and according to ACRP, a person with cognitive disabilities or low vision may find it difficult to decipher signage that is cluttered, unintuitive, or includes lettering with low contrast. Passengers who use wheelchairs may also find overhead signage difficult to see or read, depending on the installation height and lighting conditions, according to a representative of one airport. Also, important information, such as flight status and gate changes, are communicated to passengers on screens throughout airport terminals and at gates. According to a disability advocacy organization's representative, providing only visual information can make it difficult for passengers who are blind or have low vision to become aware of boarding times or gate changes, for example. Passengers in this situation may need to depend upon other others to help them, a situation that can be frustrating, or they may miss their flight.

<sup>39</sup> Except for static directional or identifying signage, wayfinding has been absent from the ADA lexicon. Litigation regarding public accommodations' communication obligations under the ADA has generally arisen in other areas such as building design, access to print and websites, and provision of sign language interpreters. *E.g.*, *George v. Bay Area Rapid Transit*, 577 F.3d 1005 (9th Cir. 2009) (wayfinding in design of rapid transit facility); *McGann v. Cinemark USA, Inc.*, 873 F.3d 218 (3d Cir. 2017) (tactile interpreter at movie theater); *Meyer v. Walthall*, 528 F. Supp. 3d 928 (S.D. Ind. 2021) (print communications and website accessibility of state public benefits agency); *Eckert v. Donahue Schriber Co.*, No. Civ. S-02-1684, 2003 U.S. Dist. LEXIS 27011 (E.D. Cal. Aug. 6, 2003) (braille signage requirement for buildings); *Emerick v. Kahala L & L, Inc.*, No. 97-01174, 2000 U.S. Dist. LEXIS 7374 (D. Haw. May 16, 2000) (entrance threshold and directional signage); *Paulone v. City of Frederick*, 787 F. Supp. 2d 360 (D. Md. 2011) (sufficiency of written notes for communication with deaf arrestee); *Sw. Fair Hous. Council v. WG Scottsdale LLC*, No. 19-00180, 2021 U.S. Dist. LEXIS 43115 (D. Ariz. Mar. 8, 2021) (need for sign language interpreter in housing access).

recognition. The minimal costs of wayfinding technology would in almost all situations ensure that supplying wayfinding would not be an undue burden to the business.<sup>40</sup>

The regulation provides a map to its requirements, using examples that illustrate its breadth and depth.<sup>41</sup> The regulation first tells us the “how”—the means of making the communication occur; it lists four non-exclusive “examples” of “auxiliary aids and services.”<sup>42</sup> The first examples are those which mainly benefit individuals who are deaf or hard of hearing. The second “examples” include aids or services that mainly benefit individuals who are blind or have low vision, including “accessible electronic and information technology; or other effective methods of making visually delivered materials available.”<sup>43</sup> The third and fourth examples are expandable catch-alls: “Acquisition or modification of equipment or devices” and “[o]ther similar services and actions.”<sup>44</sup>

These catch-alls are not *pro forma*. They have substance, as the Department of Justice emphasizes in its regulatory commentary. The auxiliary aids or services provision applies “to a wide range of services and devices for ensuring effective communication.”<sup>45</sup> The Department of Justice noted in Appendix C that the rule “requires that appropriate auxiliary aids and services be furnished to ensure that communication with persons with disabilities is as effective as communication with others.” As for examples, the Department refrained from providing “an exhaustive list,” because that “would omit new [auxiliary] devices that will become available with emerging technology.”<sup>46</sup>

Next, the regulation specifies that the required “result” is “effective communication.”<sup>47</sup> Note that this is a “shall furnish” affirmative obligation of the public accommodation.<sup>48</sup> The obligation also applies to companions who

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<sup>40</sup> The cost of adding wayfinding is marginal and may lead to economic returns in the long run. The public accommodation mounts Bluetooth sensors, the cost of which is minimal, and, usually through a contractor, installs centralized hardware-software which is programmed to provide the entity’s location information. The implementation of independent wayfinding technologies raises the likelihood of increased revenue (for a business), or increased attendance or participation in events (for non-profits). Also, the government provides relevant tax benefits. Eligible small businesses qualify for a tax credit of up to about \$5000 that helps offset the cost involved in becoming ADA compliant. 26 U.S.C. § 44(a). All businesses can deduct up to \$15,000 for the removal of architectural and transportation barriers in compliance with the ADA. 26 U.S.C. § 190(a)(1)(c).

<sup>41</sup> The regulation, 36 C.F.R. § 36.303, is reprinted in full in the Appendix.

<sup>42</sup> 28 C.F.R. § 36.303(b).

<sup>43</sup> *Id.* § 36.303(b)(1), (2).

<sup>44</sup> *Id.* § 36.303(b)(3), (4).

<sup>45</sup> 28 C.F.R. pt. 36 app. C, analysis of § 36.303.

<sup>46</sup> *Id.* The Department’s analysis emphasizes the need for effective communication: “Use of the most advanced technology is not required so long as effective communication is ensured.” *Id.*

<sup>47</sup> 28 C.F.R. § 36.303(c)(1)(ii).

<sup>48</sup> *Id.* § 36.303(c)(1) (“A public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities.”).

are individuals with disabilities. However, a flexible approach is taken with regard to the type of auxiliary aid or service; these may vary depending on the individual's method of communication, as well as the nature and context of the communication.<sup>49</sup>

Finally, the regulation provides that the "ultimate decision as to what measures to take rests with the public accommodation."<sup>50</sup> Unfortunately, placing the ultimate decision with the public accommodation itself—the very entity which is obligated to provide effective communication—undermines that mandate. What is effective communication is, by definition, dependent on the capacity and needs of the person entitled to the communication. That weakness in the regulation, however, is mitigated by the standard that is ultimately established. Regardless of what measures are implemented, the auxiliary aid must result in "effective communication."<sup>51</sup>

#### IV. INDEPENDENT WAYFINDING FACILITATES EFFECTIVE COMMUNICATION

Imagine the blind traveler who needs to get to the right gate in the right terminal in the airport in a hurry; or the grocery shopper with cognitive impairments that make it difficult or impossible to sort through directional signage; or the person with developmental disabilities who cannot read and is confronted at a stadium or a theater with the task of matching a ticket's designation of section, row, and seat to myriad possible pathways to the reserved seat.

Each of these individuals has a right to receive effective communication from an establishment. Given the limitations of static signage, and the expense of human guides, the most effective communication system (and the least costly to an establishment) will often be independent wayfinding because of the flexibility of use and locational precision the technology offers. The person's device will guide the person: "Turn right to enter Terminal B," "you arrived at Gate 23," "go straight for the aisle for band-aids," "the next right turn will take you to your stadium section and you are in the second row, third seat," "push this Customer Service button for more help." However, whether independent wayfinding meets the legal test of what

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<sup>49</sup> *Id.* § 36.303(c)(1)(ii).

<sup>50</sup> *Id.*; see *Burkhart v. Wash. Metro. Area Transit Auth.*, 112 F.3d 1207, 1213 (D.C. Cir. 1997) ("Nothing in the ADA itself or its implementing regulations dictates that a disabled person *must* be provided with the type of auxiliary aid or service he requests . . .").

<sup>51</sup> The regulation states that "[a] public accommodation should consult with individuals with disabilities whenever possible to determine what type of auxiliary aid is needed to ensure effective communication, but the ultimate decision as to what measures to take rests with the public accommodation, provided that the method chosen results in effective communication." 28 C.F.R. § 36.303(c)(1)(ii).

courts would consider “effective communication” is a question of fact to be resolved in litigation.”<sup>52</sup>

There is some case law that supports a requirement that a public accommodation must do more than simply facilitate a disabled person getting in the door. According to the Ninth Circuit in *Baughman v. Walt Disney World Co.*, “[t]he ADA guarantees the disabled more than mere access to public facilities; it guarantees them ‘full and equal enjoyment.’”<sup>53</sup> As a result, the court instructed Disney to “start by considering how their facilities are used by non-disabled guests and then take reasonable steps to provide disabled guests with a like experience.”<sup>54</sup> Similarly, in *Antoninetti v. Chipotle Mexican Grill, Inc.*, the court found that the use of a wall separating customers from the restaurant’s meal preparation area violated the ADA by denying a wheelchair-using customer the “Chipotle experience.”<sup>55</sup>

The ADA requires public accommodations to achieve the result of “effective communication” with individuals with disabilities. The regulation’s text, together with the Department of Justice’s guidance that the ADA’s “auxiliary aids and services” requirement demands attention to technological developments when that technology is necessary for effective communication, support the conclusion that, in appropriate circumstances, independent wayfinding is essential to satisfy the public accommodation’s obligation to provide effective wayfinding. The catch-all examples cited above,

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<sup>52</sup> *Alexander v. Kujok*, 158 F. Supp. 3d 1012, 1020 (E.D. Cal. 2016) (“Case law provides no definition of what constitutes effective communication. To the contrary, any such determination is a question of fact which cannot be resolved [early in litigation].”).

<sup>53</sup> 685 F.3d 1131, 1135 (9th Cir. 2012) (quoting 42 U.S.C. § 12182(a)).

<sup>54</sup> *Id.*

<sup>55</sup> 643 F.3d 1165, 1177 (9th Cir. 2010). Some wisdom may be extracted from the restaurant-machine cases. In *West v. Five Guys Enterprises, LLC*, a restaurant customer paid for a soda from a Coca Cola “Freestyle” machine but was not given assistance to use the machine to choose and dispense the soda. No. 15-2845, 2016 U.S. Dist. LEXIS 14714, at \*1 (S.D.N.Y. Feb. 5, 2016). The court held that “[a]lthough the ADA does not necessarily require Five Guys to use technology that allows Plaintiffs to operate the machine independently, Five Guys must effectively communicate with Plaintiffs such that they can enjoy the Freestyle machine.” *Id.* at \*3. The court further stated that, absent the technology, the restaurant must provide the assistance of a qualified employee, citing 28 C.F.R. § 36.303(c) on effective communication and auxiliary aids and services. *Id.*; see also *DiCarlo v. Walgreens Boot All., Inc.*, No. 15-2919, 2016 U.S. Dist. LEXIS 14812, at \*2-5 (S.D.N.Y. Feb. 5, 2016) (same); cf. *West v. Moe’s Franchisor, LLC*, No. 15-2846, 2015 U.S. Dist. LEXIS 165070, at \*9-10 (S.D.N.Y. Dec. 9, 2015) (holding that, because disabled patrons could seek assistance from Moe’s employees in using the Freestyle dispensers, the ADA was not violated, reasoning that the auxiliary aids standard permits restaurants “to use qualified readers to assist visually-impaired patrons with menu selections,” and stating that “[n]othing in the ADA or its implementing regulations supports Plaintiffs’ argument that Moe’s must alter its Freestyle machines in a way that allows blind individuals to retrieve beverages without assistance”). Although these restaurant-machine cases do not require that technology be utilized to support effective communication, they do not exclude that possibility. Also, because wayfinding was not at issue, the cases do not preclude holdings in other cases that wayfinding is required.

§ 36.303(b)(3) and (4), are particularly powerful; they point public accommodations and courts toward acquiring and modifying devices, and to utilizing “[o]ther similar services and devices.”<sup>56</sup> Appropriate mechanisms for effective communication were not frozen as of the 1990 enactment of the ADA.

#### CONCLUSION

The Americans with Disabilities Act guarantees people with disabilities access to public accommodations. Getting in the door is not enough. Posted signs pointing to bathrooms or exits are not enough. Public accommodations must provide “effective communication” including the menu, variety, and identity of services and products available at the location, along with their location. Assistance in getting from Points A to Points B, as independently as possible, is required. The evolution in communication technology anticipated by and encompassed in ADA regulations has come to provide independent wayfinding as a simple and reasonable mechanism for providing pinpoint and convenient assistance in the built environment.<sup>57</sup>

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<sup>56</sup> 28 C.F.R. § 36.303(b)(4).

<sup>57</sup> I note that the benefits of unassisted wayfinding, like those mandated by the ADA in public accommodations generally, also benefit individuals who do not have disabilities. Such crossover benefits are beyond the scope of this Essay.

## APPENDIX

## 36 C.F.R. § 36.303

Part 36 Nondiscrimination on the Basis of Disability in Public Accommodations and Commercial Facilities, as amended by the final rules published on August 11, 2016, and December 2, 2016.

**§ 36.303 Auxiliary aids and services.**

(a) *General.* A public accommodation shall take those steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the public accommodation can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden, *i.e.*, significant difficulty or expense.

(b) *Examples.* The term “auxiliary aids and services” includes—

- (1) Qualified interpreters on-site or through video remote interpreting (VRI) services; notetakers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing;
- (2) Qualified readers; taped texts; audio recordings; Brailled materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs (SAP); large print materials; accessible electronic and information technology; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision;
- (3) Acquisition or modification of equipment or devices; and
- (4) Other similar services and actions.

(c) *Effective communication.*

- (1) A public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with

individuals with disabilities. This includes an obligation to provide effective communication to companions who are individuals with disabilities.

(i) For purposes of this section, “companion” means a family member, friend, or associate of an individual seeking access to, or participating in, the goods, services, facilities, privileges, advantages, or accommodations of a public accommodation, who, along with such individual, is an appropriate person with whom the public accommodation should communicate.

(ii) The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. A public accommodation should consult with individuals with disabilities whenever possible to determine what type of auxiliary aid is needed to ensure effective communication, but the ultimate decision as to what measures to take rests with the public accommodation, provided that the method chosen results in effective communication. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.