

DIGITAL DANGER FOR PEOPLE WITH VISUAL DISABILITIES: ONLINE ADHESION CONTRACTS AND THE LACK OF WEB ACCESSIBILITY STANDARDS

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Since Title III of the American with Disabilities Act was enacted, the landscape of where people with disabilities may experience discrimination has grown even larger. With the digital world expanding rapidly, people with visual disabilities face unique dangers presented by inaccessible websites and the lack of federal web accessibility standards. While courts across the nation scatter to find balance in protecting the rights of people with disabilities without overburdening businesses, Congress's failure to legislate web accessibility standards, and the Department of Justice's ineffective enforcement mechanisms propel misunderstanding and confusion among those affected by this legal gap. Specifically, the growing presence of online contracts, with boilerplate provisions, presented to blind and visually impaired consumers browsing websites of such businesses jeopardizes the opportunity for these consumers to know what rights they may be waiving. This Note criticizes Congress's inaction to legislate web accessibility standards that require private, online businesses to conform with Web Content Accessibility Guidelines, particularly widely used Level A and AA standards, as evidenced in the European Union's 2019 Directive. This Note continues to urge state legislatures to enact statutes that encompass the need for compliance with such standards to help create a safer digital world for individuals with visual disabilities who want to purchase or use online goods and services that are conditioned on assenting to an online contract first.

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INTRODUCTION

Title III of the American with Disabilities Act (ADA) prohibits discrimination against people with disabilities in places of public accommodation, such as business establishments offering goods or services to the public.¹ This definition includes places of lodging, places offering exhibition or entertainment, places of public gathering, retail

¹ See 42 U.S.C. §§ 12181–12182.

stores of any kind, places offering any type of services, or places of exercise or recreation, but does not include religious organizations.² While Americans predominantly relied on these places to access goods and services prior to the creation of the internet, today, many turn to the internet to satisfy consumer needs. However, Title III does not provide express guidance on whether websites, mobile apps, or any other web-accessible technology fall under the definition of a “place of public accommodation,” nor has Congress amended the ADA to expand its reach to digital spaces.³

People with various disabilities deal with the lack of accessibility features on electronic information technologies (EITs), particularly websites, mobile applications, and electronic self-service machines.⁴ The greatest risk of unequal access to digital information rests upon those with visual disabilities who require the use of assistive technologies like screen readers.⁵

To address this question, in March 2022, the Department of Justice (DOJ) published guidance clarifying that Title III applies to the websites of businesses that would require adherence to Title III (“2022 Web Accessibility Guidance”) and offered suggestions to businesses seeking to maintain accessible websites.⁶ Yet the 2022 Web Accessibility Guidance fails to explicitly define the extent to which an online-only business may constitute a “place of public accommodation” under Title III and does not set forth specific web accessibility standards for such businesses.⁷ The DOJ’s attempt at enforcement fails to dispel ongoing confusion regarding the requirements of web accessibility adherence in the legal landscape.

A looming issue is the use of boilerplate provisions in online adhesion contracts embedded within inaccessible websites. Businesses frequently include non-negotiated, standard form contracts presented on a take-it-or-leave-it basis to consumers who intend on purchasing goods or services on their websites.⁸ These provisions often require that consumers agree to arbitrate claims, or litigate in the stronger party’s selected forum, and waive their right to file class action lawsuits.⁹ Some

² See 28 C.F.R. § 36.104 (2025).

³ See 42 U.S.C. §§ 12181–12182.

⁴ See *infra* Section I.A.

⁵ See *infra* Section I.B.

⁶ U.S. DEP’T. OF JUST., C.R. DIV., GUIDANCE ON WEB ACCESSIBILITY AND THE ADA (2022), <https://www.ada.gov/resources/web-guidance> [<https://perma.cc/B2Y9-NXPP>].

⁷ See *id.*

⁸ See 1 RAYMOND T. NIMMER & HOLLY K. TOWLE, *THE LAW OF ELECTRONIC COMMERCIAL TRANSACTIONS* § 5.03(4)(b) (2d ed. 2024).

⁹ See *id.*

consumers have challenged these provisions as unconscionable for failing to provide sufficient notice of the rights the consumer is waiving.¹⁰

People with visual disabilities presented with adhesion contracts on inaccessible business websites experience a greater danger of unknowingly giving away their rights, further highlighting the urgent need for web accessibility law.¹¹ Congress must consider the dangers that inaccessible websites pose to those with visual disabilities. As the digital world continues to expand its reach, it is increasingly evident that the current ADA protections do not sufficiently safeguard people with visual disabilities from the dangers they may encounter when navigating online spaces.

Part I of this Note will first draw attention to certain EITs and the particular accessibility concerns for people with visual disabilities. This Note will then discuss the approaches taken by both the DOJ and the courts to address the lack of web accessibility standards in Title III and the application of this provision to online-only businesses. Part I will then examine the European Union's expansive website accessibility laws to demonstrate the legislative lag and insufficient protection in the United States, particularly the need to follow suit in mandating Web Content Accessibility Guidelines (WCAG) compliance for Title III entities. Finally, Part I will introduce adhesion contracts, their growing presence online, and problems boilerplate provisions present to consumers in digital spaces.

In Part II, this Note will analyze the spike in web accessibility litigation due to the increasing frustrations of consumers with visual disabilities, as well as confusion among businesses operating e-commerce websites. Part II will discuss the pressure on state legislatures and courts to act in response to the federal legislature's silence in the face of web accessibility concerns. Part II will analogize the existing dangers of boilerplate provisions in physical adhesion contracts for people with visual disabilities with the likely future dangers of such provisions in digital spaces. Lastly, Part II will identify the need for federally mandated web accessibility compliance to further protect people with visual

¹⁰ See, e.g., *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359 (E.D.N.Y. 2015) (finding the forum selection and arbitration clauses unenforceable in a provider's sign-in wrap agreement because consumers were not given adequate notice); *In re Zappos.com, Inc., Customer Data Sec. Breach Litig.*, 893 F. Supp. 2d 1058 (D. Nev. 2012) (holding the arbitration clause in a website's Terms of Use unenforceable because the hyperlink to it was inconspicuous and failed to provide users with adequate notice); *Van Tassell v. United Mktg. Grp., LLC*, 795 F. Supp. 2d 770 (N.D. Ill. 2011) (determining that the lack of conspicuous notice of the terms and conditions in the provider's website rendered the arbitration clause unenforceable).

¹¹ See generally NIMMER & TOWLE, *supra* note 8 § 5.03(1) (discussing the standard for sufficient notice of terms in online consumer contracts to constitute mutual assent).

disabilities from inadvertently assenting to boilerplate provisions on inaccessible websites.

To conclude, Part III of this Note will consider federally introduced bills and regulations and address the inconsistencies and instability of how they may effectuate change in web accessibility law. Part III will also discuss the different state approaches to remedy web accessibility issues and the necessity for state legislatures to enact laws that require compliance with web accessibility standards for private, and online-only, businesses.

I. BACKGROUND

A. *The Rise of Electronic Information Technology*

With the world becoming increasingly reliant on receiving information via digital means, businesses have taken to offering information, goods, and services to customers through EITs such as websites, mobile applications, and electronic self-service machines.¹² EIT comprises of “any equipment or interconnected system or subsystem of equipment, that is used in the creation, conversion, or duplication of data or information.”¹³ Commonly used EIT includes, but is not limited to, telecommunications products, information kiosks and transaction machines, websites, mobile applications, and multimedia.¹⁴ EIT provides customers with a way to search and purchase goods or services, register for loyalty programs, communicate with customer service, and view store locations.¹⁵ However, EIT has also grown in physical spaces where businesses install and use electronic self-service machines such as self-checkout registers, iPads, and point-of-sale systems like Clover or Square.¹⁶

While digital means of relaying information and the purchase of goods and services may ease use for most consumers, people with visual disabilities have a drastically different experience. Businesses frequently

¹² See Minh N. Vu & Julia N. Sarnoff, *Websites, Kiosks, and Other Self-Service Equipment in Franchising: Legal Pitfalls Posed by Title III of the Americans with Disabilities Act*, 36 FRANCHISE L.J. 443, 443 (2017).

¹³ See U.S. DEP'T OF ENERGY, GUIDANCE ON ELECTRONIC AND INFORMATION TECHNOLOGY (EIT) ACCESSIBILITY—SECTION 508, at 3 (2005), https://www.energy.gov/sites/prod/files/39.2_Guidance_on_Electronic_and_Information_Technology_Accessibility.pdf [<https://perma.cc/9AVD-WH7E>].

¹⁴ See *id.*; Vu & Sarnoff, *supra* note 12, at 443–44.

¹⁵ Vu & Sarnoff, *supra* note 12, at 444.

¹⁶ See *id.*; e.g., CLOVER, <https://www.clover.com> [<https://perma.cc/FRH4-U8Z8>]; SQUARE, <https://squareup.com/us/en/about> [<https://perma.cc/TT4M-4Q6V>].

create barriers for people with visual disabilities by failing to consider accessibility when designing websites, mobile applications, or electronic self-service machines.¹⁷ Business owners use web development software or employ developers to create websites, but unless specifically offered or asked for, accessibility features are rarely built into the design.¹⁸ And while iOS and Android-based devices have built-in settings for accessibility needs, developers rarely consider that EIT must be designed to work in tandem with accessibility software.¹⁹

Assistance from employees can be useful to provide help with inaccessible EIT, but this defeats the dual purpose of creating efficiency and providing consumers greater autonomy when navigating the business's online goods and services.²⁰ Installation of EIT-like electronic self-service machines also removes customer-facing interactions and eliminates opportunities for people with visual disabilities to communicate accessibility concerns to employees.²¹ For example, some businesses, like banks and fast-food restaurants, use electronic self-service machines as the sole way of offering customer service after in-store hours.²² However, people with visual disabilities require accessibility features to use ATM touchscreens and view or read menu items.²³ Accessibility barriers, such as visual screens and small braille size, force the many people with visual disabilities who would prefer using electronic self-service machines to ask employees for assistance instead.²⁴

There is no doubt that EIT, particularly websites and electronic self-service machines, will become both more popular and more complex over time. To guarantee autonomous use of EIT for all people, businesses should begin incorporating design modifications that accommodate different accessibility needs.

B. *The Web Accessibility Needs of People with Visual Disabilities*

Although the lack of web accessibility denies equal access for various types of disabilities, those with visual disabilities are especially at risk.

¹⁷ See Vu & Sarnoff, *supra* note 12, at 444.

¹⁸ See *id.*; see *infra* Section I.B for a discussion of digital accessibility features for people with visual disabilities.

¹⁹ See Vu & Sarnoff, *supra* note 12, at 444.

²⁰ See *id.* at 463.

²¹ See Dana Boucher et al., Undergraduate Coursework Paper, *Challenges Faced by Persons with Disabilities Using Self-Service Technologies*, 3 PURDUE U. E-PUBS 23–24 (Bradley S. Duerstock ed., 2021), <https://docs.lib.purdue.edu/ugcw/3> [<https://perma.cc/9MDL-EMKZ>].

²² See *id.* at 12–13.

²³ See *id.* at 13.

²⁴ See *id.* at 36–37.

Visual disabilities present in different forms, including complete and total loss of vision, colorblindness, and varying degrees of visual impairments causing low vision.²⁵ People with visual disabilities often require the use of assistive technology, such as screen readers, voice recognition, magnification tools, tactile assistance, and optical character recognition to help them navigate EIT.²⁶

A commonly used assistive technology is screen-reader software, which translates on-screen text into audio.²⁷ However, developers must design EIT to be compatible with screen-reader software or people with visual disabilities will not be able to use the EIT.²⁸ Even if compatible with assistive technology, there can be additional issues with specific use.²⁹ For example, users with visual disabilities may have to listen as entire webpages are read to them, including advertisements, in order to reach their desired content.³⁰ Electronic self-service machines and kiosks primarily use visual displays which, if not equipped with options for assistive technology, create a higher degree of difficulty for people with visual impairments to use their features.³¹ Given the visual nature of navigating EIT, the call for federal legislative bodies to establish web accessibility requirements that offer equal opportunities for people with visual disabilities continues to grow.

²⁵ See W3C, Accessibility Requirements for People with Low Vision § 2.2 (Mar. 28, 2023) (Working Draft), <https://w3c.github.io/low-vision-a11y-tf/requirements.html> [<https://perma.cc/3J4R-MM2Z>] (“In a fact sheet on visual impairment and blindness [WHO-VI] the World Health Organization (WHO) estimates that of the 285 million people worldwide who are visually impaired, 39 million are blind and 246 have low vision, that is, 14% are blind and 86% have low vision.”).

²⁶ See Jonar Sabilano, *Empowering Independence: Enhancing Web Accessibility for the Blind*, USERWAY, <https://userway.org/blog/web-accessibility-for-blind-users> [<https://perma.cc/FJC8-VU7A>].

²⁷ See Vu & Sarnoff, *supra* note 12, at 444.

²⁸ *Id.* See *infra* Section II.A.1 for a discussion of claims of EIT’s incompatibility with accessibility software.

²⁹ See Vu & Sarnoff, *supra* note 12, at 444.

³⁰ See Antonia Baumgartner, Tobias Rohrbach & Philomen Schönhagen, ‘If the Phone Were Broken, I’d Be Screwed’: Media Use of People with Disabilities in the Digital Era, 38 DISABILITY & SOC’Y 73, 86 (2023).

³¹ See Vu & Sarnoff, *supra* note 12, at 444; see also Fernando H.F. Botelho, *Accessibility to Digital Technology: Virtual Barriers, Real Opportunities*, 33 ASSISTIVE TECH. S27, S31 (2021).

C. *The Department of Justice's Approach to the Lack of Web Accessibility Standards in the ADA*

The DOJ is responsible for enforcing laws and protecting citizens' civil rights.³² It issues regulations under Title II and Title III of the ADA to further define the rights of people with disabilities and legal obligations of covered entities therein.³³ While Title III focuses on private entities, Title II prohibits discrimination against people with disabilities in the services, programs, or activities of public entities, including state and local governments; any department, agency, special purpose district, or other instrumentality of a state or local government; and any commuter authority under the statute.³⁴ Although Congress amended the ADA in 2008 to expand the definition of "disability," it did not address the web accessibility needs of people with disabilities in the rapidly advancing digital world.³⁵

A glimmer of hope appeared in 2017 when a federal rule, the Information and Communication Technology (ICT) Standards and Guidelines, was issued to require federal websites and content to conform to the World Wide Web Consortium's (W3C) WCAG 2.0, Level AA by January 2018.³⁶ The W3C is a public interest nonprofit organization that uses a member-oriented approach to develop open web standards with the mission of improving accessibility for all.³⁷ The W3C publishes the WCAG as recommendations for making web content more accessible to people with disabilities, particularly those with communication disabilities who encounter challenges using web content.³⁸ Following the issuance of the ICT Standards and Guidelines, many people anticipated that Congress would enact legislation on web accessibility standards for

³² See *About DOJ*, U.S. DEP'T OF JUST., <https://www.justice.gov/about> [<https://perma.cc/7ZE6-G258>].

³³ *Regulations*, ADA.GOV, <https://www.ada.gov/law-and-regs/regulations> [<https://perma.cc/GU6T-SWMM>].

³⁴ See 42 U.S.C. §§ 12181–12182.

³⁵ ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 29 and 42 U.S.C.). Importantly, the 2008 amendment to the ADA broadened the definition of "major life activities" to include "the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." *Id.*

³⁶ See *Information and Communication Technology (ICT) Standards and Guidelines*, 36 C.F.R. pt. 1194 (2017).

³⁷ See *History*, W3C, <https://www.w3.org/about/history> [<https://perma.cc/NR8E-YKGB>]; *Our Mission*, W3C, <https://www.w3.org/mission> [<https://perma.cc/FX8Y-33XR>].

³⁸ See *Web Content Accessibility Guidelines (WCAG) 2.1*, W3C (Dec. 12, 2024), <https://www.w3.org/TR/WCAG21/#wcag-2-1-supporting-documents> [<https://perma.cc/KQ6M-CQMY>].

both Title II and Title III entities, but that did not happen.³⁹ Thus, it remains unclear whether online-only businesses are places of “public accommodation” and must therefore comply with WCAG standards.

In its 2022 Web Accessibility Guidance, the DOJ tried to ease confusion from businesses and people with disabilities by supporting the application of the ADA to web content.⁴⁰ The DOJ considers “all the goods, services, privileges, or activities offered by public accommodations, including those offered on the web” as Title III entities.⁴¹ Yet the 2022 Web Accessibility Guidance ultimately fails to fulfill its purpose of offering direction and easing confusion. It describes web accessibility as important because the barriers to web content mirror the myriad of ways that people with disabilities are prevented from entering physical spaces.⁴² This analogy does little to acknowledge the extent to which people with visual disabilities face dangers to their livelihoods due to inaccessible EIT. Even with the necessary accommodations to access the physical locations of Title III businesses, the growing number of online-only businesses and lack of web accessibility creates more difficulties for people with visual disabilities to experience equality in the digital world.⁴³

Instead, the 2022 Web Accessibility Guidance focuses on businesses with existing physical spaces like brick-and-mortar stores, hotels, and restaurants.⁴⁴ The DOJ mainly considers the restrictions to people with disabilities from accessing physical spaces offered through websites.⁴⁵ Though it recognizes that inaccessible web features limit the ability of people with disabilities to access a business’s goods and services available through its website, the DOJ does not expressly acknowledge that some of these businesses may operate only on the web.⁴⁶ Online-only businesses may thus ignore the 2022 Web Accessibility Guidance’s recommendations of web accessibility compliance by presuming that it applies only to businesses offering entry into an associated physical location.

In addition, the 2022 Web Accessibility Guidance uses relatively vague language to explain how Title II and Title III entities should comply with the ADA’s requirements of ensuring nondiscrimination and

³⁹ See *infra* Section III.A.

⁴⁰ See U.S. DEP’T OF JUST., *supra* note 6.

⁴¹ *Id.*

⁴² *Id.*

⁴³ See *id.*; see *supra* Section I.A.

⁴⁴ See U.S. DEP’T OF JUST., *supra* note 6.

⁴⁵ See *id.*

⁴⁶ See *id.*

effective communication online.⁴⁷ For example, it states that “[b]usinesses and state and local governments can currently choose how they will ensure that the programs, services, and goods they provide online are accessible to people with disabilities.”⁴⁸ The 2022 Web Accessibility Guidance offers the WCAG and Section 508 standards as helpful resources to which businesses can refer when seeking implementation of accessible features on their websites.⁴⁹ Section 508 of the Rehabilitation Act was enacted to enforce federal agencies to provide equal access to information and communication technology offered by or through federally funded programs and activities.⁵⁰ While Section 508 aligns with the values of the WCAG, it is principally designed to meet the objectives of compliance for federal agencies.⁵¹ Referring to the WCAG is preferable for Title III entities since it can be applied to a wide range of content types and formats, yet the DOJ does not explicitly state what specific accessibility features should be satisfied.⁵²

Though the 2022 Web Accessibility Guidance does not expressly set forth any specific requirements, it presents sample cases where the DOJ had relied on its “enforcement authority” to compel Title II and Title III entities, some of which are indeed online-only, to apply accessible features to web content.⁵³ Still, businesses are unlikely to be motivated to maintain accessible websites where there are no legal requirements to do

⁴⁷ See *id.*

⁴⁸ *Id.*

⁴⁹ See *id.*

⁵⁰ See Rehabilitation Act of 1973, Pub. L. No. 93-112, § 508, 87 Stat. 355 (codified as amended at 29 U.S.C. § 794(d)); see also H.R. 4021, 99th Cong. (1986); 36 C.F.R. pt. 1194 (2025); *Information and Communication Technology*, U.S. ACCESS BD., <https://www.access-board.gov/ict.html> [<https://perma.cc/6ZDQ-9Z3L>].

⁵¹ See *Mapping of WCAG 2.0 to Functional Performance Criteria*, GSA: SECTION508.GOV (Nov. 2020), <https://www.section508.gov/content/mapping-wcag-to-fpc> [<https://perma.cc/E3F6-DZMN>]. The operating systems, software, or hardware used by federal agencies may differ from what consumers have access to in their homes when browsing and making purchases from online-only business websites.

⁵² See *Comparison Table of WCAG 2.0 to Original 508 Standards*, U.S. ACCESS BD., <https://www.access-board.gov/ict/wcag2ict.html> [<https://perma.cc/S8N9-F94C>].

⁵³ U.S. DEP’T OF JUST., *supra* note 6; see, e.g., *Lopez v. Peapod, LLC*, No. 19-cv-9906, 2021 WL 1108559, at *6 (S.D.N.Y. Mar. 23, 2021); Press Release, Settlement Agreement Under the Americans with Disabilities Act Between the United States of America and Rite Aid Corporation (Nov. 1, 2021), https://archive.ada.gov/rite_aid_sa.pdf [<https://perma.cc/TBY7-GGY9>]; Settlement Agreement Between the United States of America and Teachers Test Prep Under the Americans with Disabilities Act, DJ# 202-11-346, https://archive.ada.gov/ttp_sa.html [<https://perma.cc/F96D-2XDK>]; Consent Decree, *Nat’l Fed’n of the Blind v. HRB Digital LLC*, No. 13-cv-10799 (D. Mass. Mar. 25, 2014), <https://archive.ada.gov/hrb-cd.htm> [<https://perma.cc/3EPJ-76UQ>].

so,⁵⁴ The 2022 Web Accessibility Guidance does not address how many entities, particularly online-only businesses, are likely to face consequences for noncompliance with web accessibility guidelines.⁵⁵

The 2022 Web Accessibility Guidance appears to be the DOJ's attempt at assuaging the growing concerns of people with disabilities and disability rights advocates and addressing the uptick in litigation over inaccessible digital spaces.⁵⁶ Without federal legislation expressly expanding the definition of Title III entities in the online world and defining specific web accessibility requirements for compliance, it is unclear to what extent the DOJ can effectively protect the rights of people with visual disabilities who face digital barriers.

D. *The Courts' Approaches to the Lack of Web Accessibility Standards in the ADA*

1. The Circuit Split

Courts have used different approaches in addressing whether to apply Title III to websites and mobile apps.⁵⁷ To establish a discrimination claim under Title III, a plaintiff must show that (1) the plaintiff is disabled within the meaning of the ADA; (2) the defendant is a private entity that owns, leases, or operates a place of public accommodation; and (3) the plaintiff was denied public accommodations by the defendant due to their disability.⁵⁸ Courts must address whether websites can be considered places of public accommodation within the meaning of Title III, how liberally they may construe the statute, and what equitable remedies are available to plaintiffs.⁵⁹

Some circuit courts only apply Title III to business websites linked to a physical space, while others strictly hold that Title III applies only to

⁵⁴ Costs of implementing and maintaining website accessibility features can present high or unclear expenses for businesses, especially smaller ones, which could dissuade them from incorporating such features at all. See Danielle Schelble, Note, *Applying Title III of the Americans with Disabilities Act to Websites: Using Current Exemptions to Create an Adaptable Solution That Does Not Overly Burden Business*, 63 JURIMETRICS J. 385 (2023).

⁵⁵ U.S. DEP'T OF JUST., *supra* note 6.

⁵⁶ See USABLENET, ADA DIGITAL ACCESSIBILITY LAWSUITS: WEBSITES, MOBILE, AND VIDEO (2023), <https://info.usablenet.com/2023-midyear-digital-accessibility-lawsuit-report-download-page> (input requested information and select "download") [<https://perma.cc/J5FJ-5Q2W>].

⁵⁷ See APRIL J. ANDERSON, CONG. RSCH. SERV., LSB10844, THE AMERICANS WITH DISABILITIES ACT IN CYBERSPACE: ADA APPLICABILITY TO WEBSITES 4 (2022).

⁵⁸ See 42 U.S.C. § 12182.

⁵⁹ See ANDERSON, *supra* note 57, at 4.

physical spaces, not websites.⁶⁰ The Ninth Circuit interprets Title III as applicable to websites, but only those that have a “nexus” between the website and a physical place of public accommodation.⁶¹ In *Robles v. Domino’s Pizza, LLC*, the Ninth Circuit reasoned that the statute applies to online services given by a place of public accommodation, and not only services occurring within the physical space of the place.⁶² Following this precedent, the U.S. District Court for the Northern District of California held that Facebook is a website only operating in the digital world and is not a place of public accommodation, and therefore found a disabled plaintiff’s Title III claim ineligible for relief.⁶³ The Eleventh Circuit’s stance, though similar, is more vague in that it has declined to expressly adopt the nexus standard and find that websites are not places of public accommodation under the plain meaning of Title III.⁶⁴ The Third Circuit last addressed the scope of “public accommodations” under the ADA in 2010, holding that the term is limited to physical spaces.⁶⁵

The First Circuit has construed Title III expansively in holding that “places of ‘public accommodation’” are not “limited to actual physical structures.”⁶⁶ The First Circuit’s reasoning touched on the issue that excluding online-only businesses when digital consumerism is on the rise, would contradict Congress’s intent for the ADA to ensure people

⁶⁰ Compare *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114–15 (9th Cir. 2000), with *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1115 (N.D. Cal. 2011). See generally ANDERSON, *supra* note 57.

⁶¹ See *Weyer*, 198 F.3d at 1115.

⁶² See 913 F.3d 898, 905–06 (9th Cir. 2019) (“[T]he ADA applies to Domino’s website and app, which connect customers to the goods and services of Domino’s physical restaurants.”); see generally ANDERSON, *supra* note 57.

⁶³ See *Young*, 790 F. Supp. 2d at 1114–16, 1119. *Young* involved a plaintiff with bipolar disorder who challenged Facebook for discrimination under Title III after losing access to her account and experiencing issues with customer service. *Id.*

⁶⁴ See *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 6 F.4th 1247, 1256 n.12 (11th Cir. 2021) (“We have not determined if non-physical spaces, like websites, qualify as places of public accommodation under Title II. However, in *Gil v. Winn-Dixie Stores, Inc.*, 993 F.3d 1266, 1277 (11th Cir. 2021), we held that websites are not places of public accommodation under Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12182.”).

⁶⁵ See *Peoples v. Discover Fin. Servs.*, 387 F. App’x 179 (3d Cir. 2010) (determining that the application of Title III is limited to physical accommodations). Some district courts within the Third Circuit have interpreted this ruling liberally and adopted the nexus standard. See *Tawam v. APCI Fed. Credit Union*, No. 18-cv-122, 2018 WL 3723367, at *8 (E.D. Pa. Aug. 6, 2018) (finding that the defendant’s website had a sufficient nexus to a physical location and was therefore a place of public accommodation under the ADA).

⁶⁶ *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n of N. Eng., Inc.*, 37 F.3d 12, 19 (1st Cir. 1994); see also *Nat’l Ass’n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 200 (D. Mass. 2012) (holding that the ADA applies to web-based businesses because it is considered a “place of public accommodation” under the Act).

with disabilities have equal access to all goods and services.⁶⁷ And while the Second Circuit has not definitively ruled on this issue, some district courts within the circuit also rely on the legislative purpose of the ADA to protect people with disabilities when applying Title III to online-only business websites.⁶⁸ The Seventh Circuit has implied that a “public accommodation” under Title III may not require a physical space, prompting the question of whether it will apply such reasoning to claims against online-only business websites.⁶⁹

Though some courts, like the First Circuit, understand the need for a wider application of Title III to businesses operating solely in digital spaces, the split among the circuits perpetuates confusion and unfairness for both businesses and consumers.

2. Incorporation of the Web Content Accessibility Guidelines

Although the first version of the WCAG standards was originally published in 1999, consideration of such standards in judicial decision-making and legislative action only began in recent years.⁷⁰ The WCAG encourages websites to prioritize four main principles: perceivability, operability, understandability, and robustness.⁷¹ The WCAG is internationally recognized with three levels of conformance in order of lowest to highest: Level A, Level AA, and Level AAA.⁷² To comply with its standards, the WCAG requires that the content meets at least one of its conformance levels, usually Level AA.⁷³

Level A criteria focuses on basic web accessibility needs, such as text alternatives to nontext content and noncolor means of identification.⁷⁴

⁶⁷ See *Nat’l Ass’n of the Deaf*, 869 F. Supp. 2d at 200–01.

⁶⁸ See *Guerrero v. Ogawa USA Inc.*, No. 22-cv-2583, 2023 WL 4187561, at *7 (S.D.N.Y. June 26, 2023) (“The text of the statute alone supports the conclusion that is consistent with the evident purpose of the ADA—to eliminate barriers to full participation by people with disabilities in public, social and economic life, which increasingly occurs online.”).

⁶⁹ See *Morgan v. Joint Admin. Bd. Ret. Plan of Pillsbury Co.*, 268 F.3d 456, 459 (7th Cir. 2001) (refusing to interpret “public accommodation” literally or only apply it to physical sites).

⁷⁰ See *Web Content Accessibility Guidelines (WCAG) 2.1*, *supra* note 38; see also *infra* Section II.A.2.

⁷¹ See *Introduction to Understanding WCAG 2.0*, W3C, <https://www.w3.org/TR/UNDERSTANDING-WCAG20/intro.html> [<https://perma.cc/HC9L-WQHQ>].

⁷² See *Web Content Accessibility Guidelines (WCAG) 2 Level AA Conformance*, W3C, <https://www.w3.org/WAI/WCAG2AA-Conformance> [<https://perma.cc/CSJ5-P94Y>].

⁷³ *Id.*

⁷⁴ See *What’s the Difference Between WCAG Level A, Level AA, and Level AAA?*, BUREAU OF INTERNET ACCESSIBILITY (Dec. 17, 2021), <https://www.boia.org/blog/whats-the-difference-between-wcag-level-a-level-aa-and-level-aaa> [<https://perma.cc/STA2-JX96>]; *Web Content Accessibility Guidelines (WCAG) 2.1*, *supra* note 38.

Level AA includes the elements of Level A but provides greater access to people with disabilities exploring the web.⁷⁵ Level AA includes additional criteria like maintaining color to text contrast and orientation adjustment.⁷⁶ Level AA generally requires that the changes are incorporated completely and fully on all parts of the website, that the coding language allows for accessibility changes, and that technology without accessibility support does not prevent a user's ability to access the remaining content.⁷⁷ Level AAA is the highest level of conformance and encompasses all requirements of Level A and AA.⁷⁸ Conforming with Level AAA requires businesses to satisfy all standards within Level A and AA, in addition to items such as providing sign language interpretation for all prerecorded audio, which may be difficult for smaller businesses with less resources.⁷⁹

Courts generally do not rely on the WCAG to determine whether businesses are liable for operating an inaccessible website, but many have referred to it when assessing web accessibility requirements and equitable remedies.⁸⁰ The Ninth Circuit has held that district courts can require businesses to comply with the standards set forth by the WCAG "as an equitable remedy if . . . the website [or] app fail[s] to satisfy the ADA."⁸¹ Accordingly, some district courts have supported consent decrees requiring conformance with WCAG 2.1 Level AA standards as a remedy for plaintiffs affected by the failure of business websites to offer an equal opportunity for people with visual disabilities to benefit from and enjoy the goods and services offered.⁸² While such consent decrees may cure the resulting impact of the lack of federal web accessibility standards on consumers with visual disabilities, they do not necessarily prevent the magnitude of business websites that fail to conform with the WCAG from the outset.

⁷⁵ *What's the Difference Between WCAG Level A, Level AA, and Level AAA?*, *supra* note 74.

⁷⁶ *Id.*

⁷⁷ See *Understanding Conformance*, W3C, <https://www.w3.org/TR/2008/WD-UNDERSTANDING-WCAG20-20080430/conformance.html> [<https://perma.cc/T4NP-6HGB>].

⁷⁸ See *What's the Difference Between WCAG Level A, Level AA, and Level AAA?*, *supra* note 74.

⁷⁹ See Jonar Sabilano, *WCAG Levels A, AA & AAA: Navigating Web Accessibility Standards*, USERWAY, <https://userway.org/blog/what-are-wcag-2-0-a-aa-and-aaa> [<https://perma.cc/NA8B-4XAQ>].

⁸⁰ See ANDERSON, *supra* note 57, at 4.

⁸¹ *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 907 (9th Cir. 2019).

⁸² See, e.g., *Jaquez v. Smoky Mountain Knife Works, Inc.*, No. 21-cv-1446, 2021 WL 2452124, at *2–3 (S.D.N.Y. June 16, 2021); *Miller v. Generation Love LLC*, No. 22-cv-845, 2022 WL 1086615, at *2–3 (S.D.N.Y. Apr. 11, 2022). These cases show courts approving consent decrees requiring a defendant business to use reasonable efforts and conform its inaccessible website to WCAG Level A and AA standards.

E. *The European Union's Expansive Approach to Web Accessibility Needs*

By contrast, the European Union (EU) has made steady progress advancing web accessibility concerns. In 2016, the EU Council enacted the 2016/2102 Directive to address web accessibility for people with disabilities, though it focused only on public sector bodies.⁸³ Three years later, understanding the need to expand protections for people with disabilities in the private sector as well, the EU Commission introduced legislation setting web accessibility standards for businesses offering products and services.⁸⁴ The 2019/882 EU Directive (“2019 Directive”) relies on the United Nations Convention on the Rights of Persons with Disabilities definition of “persons with disabilities” as those with “long-term physical, mental, intellectual or sensory impairments” that create barriers to their “full and effective participation in society”.⁸⁵

The 2019 Directive also addresses the barriers people with disabilities face when interacting with private businesses via digital and electronic means.⁸⁶ It urges businesses to promote research and development, and use and implement available assistive technologies that benefit people with disabilities who face these barriers.⁸⁷ Unlike the 2022 Web Accessibility Guidance, the 2019 Directive discusses the need for specific web accessibility requirements that impose legal obligations upon economic actors in the public and private markets.⁸⁸ These requirements also suggest there should be some flexibility to encourage innovative ideas.⁸⁹

While the 2022 Web Accessibility Guidance still leaves a lot open to interpretation on what specific elements businesses should implement to ensure web accessibility, the 2019 Directive points to the need for an extensive description of what type of technologies should be covered under its requirements.⁹⁰ It serves as a complement to the EU’s previous directive in 2018, which established the European Electronic Communications Code (EECC).⁹¹ The EECC harmonizes accessibility feature requirements for electronic communications and internet access

⁸³ Council Directive 2016/2102, 2016 O.J. (L 327) 1 (EU).

⁸⁴ Council Directive 2019/882, 2019 O.J. (L 151) 70 (EU).

⁸⁵ *Id.* para. 3 (citing United Nations Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3).

⁸⁶ *Id.* paras. 6–14.

⁸⁷ *Id.* para. 14.

⁸⁸ *Id.* para. 23.

⁸⁹ *See id.*

⁹⁰ *Id.* paras. 26–30.

⁹¹ *Id.* paras. 28–29 (citing Council Directive 2018/1972, 2018 O.J. (L 321) 36 (EU)).

to consumers with disabilities.⁹² Importantly, the 2019 Directive expressly requires compliance with its requirements for the online sale of products and services, regardless of whether it is a public or private business, and e-commerce services provided through digital means.⁹³ It “defines e-commerce services as a service provided at a distance, through websites and mobile device-based services, by electronic means and at the individual request of a consumer, with a view to concluding a consumer contract.”⁹⁴

The 2019 Directive essentially implements the WCAG by emphasizing that the Directive’s accessibility standards fulfill the WCAG’s same principles: (1) perceivability (that information and web-based technologies are presented to users in a way that is not invisible to all of their senses), (2) operability (that the information and technologies cannot require interactions that users cannot perform), (3) understandability (that the information and technologies cannot extend beyond user understanding), and (4) robustness (that the content of such information and technologies must be robust enough to allow for interpretation by a wide variety of users and should remain accessible as users and technologies advance and evolve).⁹⁵

In contrast to the 2022 Web Accessibility Guidance’s general considerations of web accessibility requirements potentially imposing an undue burden on businesses,⁹⁶ the 2019 Directive presents a more robust disproportionate burden analysis to weigh the addition of excessive organizational or financial burdens on economic actors against the resulting benefit of incorporating web accessibility requirements for people with disabilities.⁹⁷ In circumstances where complying with web accessibility requirements will burden businesses, the 2019 Directive evaluates businesses’ concerns on a case-by-case basis and, at minimum, requires compliance to the extent that it is strictly necessary for people with disabilities to interact with the product or service offered.⁹⁸

The 2019 Directive explains that only “legitimate reasons” should be considered in the disproportionate burden analysis when assessing the extent of a business’s failure to meet accessibility requirements.⁹⁹ It proscribes lack of priority, time, or knowledge as “legitimate reasons” and employs a set of criteria, defined in Annex VI, that must be utilized for

⁹² *Id.* para. 29 (citing Council Directive 2018/1972, 2018 O.J. (L 321) 36 (EU)).

⁹³ *Id.* para. 26.

⁹⁴ *Id.* para. 42.

⁹⁵ *Id.* para. 47; see also *Introduction to Understanding WCAG 2.0*, *supra* note 71.

⁹⁶ See U.S. DEP’T OF JUST., *supra* note 6.

⁹⁷ See Council Directive 2019/882, *supra* note 84, para. 66.

⁹⁸ *Id.*

⁹⁹ *Id.*

the analysis.¹⁰⁰ The criteria for assessing whether a business faces disproportionate burden includes: (1) the ratio of costs to comply with the accessibility requirements to the overall costs of manufacturing, distributing, or importing the product or providing the service; (2) the estimated costs and benefits for the business in relation to the estimated benefit for persons with disabilities, considering the amount and frequency of using the specific product or service offered; and (3) the ratio of net costs to comply with the accessibility requirements to the net turnover of the business.¹⁰¹ The 2019 Directive also includes elements to help assess the net costs of compliance with web accessibility requirements, such as criteria related to one-off organizational costs and ongoing production and development costs.¹⁰² One-off organizational costs include those related to human resources with accessibility expertise, training human resources on accessibility, developing new processes for including accessibility in product development or services provision and guidance material, and understanding accessibility legislation.¹⁰³ Ongoing production and development costs include those related to the design and testing of accessibility for a product or service, related to establishing documentation, and incurred in the manufacturing processes.¹⁰⁴

Though the EU may call for its further improvement, the 2019 Directive's more detailed provisions of web accessibility requirements and the disproportionate burden analysis should motivate Congress to either amend the ADA or enact legislation defining web accessibility requirements.¹⁰⁵

F. *The Problem with Boilerplate Provisions in Online Adhesion Contracts*

A concern underlying the inattention to web accessibility is the danger it poses for consumers presented with online contracts, containing boilerplate provisions that require assent prior to actions such as purchase, enrollment, or continued use of business goods and services.

¹⁰⁰ *Id.* paras. 66–67.

¹⁰¹ See Council Directive 2019/882, *supra* note 84, annex VI, at 115.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See generally Council Directive 2019/882, *supra* note 84.

There are different forms of online adhesion contracts: clickwrap, browsewrap, scrollwrap, and sign-in wrap.¹⁰⁶ Clickwrap contracts present a user with a message that includes a service agreement and indicates that unless the user assents to the terms of the agreement by clicking on an icon, then the good or service cannot be purchased or used.¹⁰⁷ Browsewrap contracts occur when a website simply has a notice within that includes language binding the user to its terms.¹⁰⁸ Scrollwrap contracts prompt users to scroll through an agreement and assent by clicking on a button indicating agreement of the terms.¹⁰⁹ Sign-in wrap contracts compel assent to a website's terms of agreement by requiring a user to sign up for use of its goods or services.¹¹⁰ Boilerplate provisions often lay within such contracts as the "Terms of Service" or "Terms of Use" and contain standardized language determining what rights the parties have regarding the agreement.¹¹¹ Since online adhesion contracts are usually non-negotiable terms presented by the stronger party, they raise an issue of whether consumers have adequately expressed assent prior to agreement.¹¹²

Courts have generally held that to be enforceable, "[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential."¹¹³ Courts apply a two-part framework to determine the enforceability of clauses, like forum selection and arbitration provisions, in online contracts, assessing (1) whether the terms were "reasonably communicated" to the plaintiff and (2) whether it is clear that those terms were "accepted and, if so, the manner of acceptance."¹¹⁴ However, in the context of inaccessible websites, it is uncertain how courts will determine what constitutes unambiguous consent for people with visual disabilities.

Many courts have been averse to upholding online adhesion contracts against consumers where it is not evident that the consumer

¹⁰⁶ See MONIQUE C.M. LEAHY, 150 AM. JUR. *Trials* 383 § 2, Westlaw (database updated Apr. 2025).

¹⁰⁷ *Id.* § 4.

¹⁰⁸ *Id.* § 5.

¹⁰⁹ *Id.* § 6.

¹¹⁰ *Id.* § 7.

¹¹¹ See *id.* §§ 8, 11; see also *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 391 (E.D.N.Y. 2015).

¹¹² See NIMMER & TOWLE, *supra* note 8, § 5.03(1).

¹¹³ See, e.g., *Ajemian v. Yahoo!, Inc.*, 987 N.E.2d 604, 611–13 (Mass. App. Ct. 2013) (quoting *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 35 (2d Cir. 2002)), *aff'd*, 84 N.E.3d 766 (Mass. 2017).

¹¹⁴ *Id.* at 612–13.

had constructive notice of the terms prior to assenting.¹¹⁵ Without constructive notice, a user is unaware of the provisions contained within a website's terms and conditions.¹¹⁶ However, many businesses use online adhesion contracts, adjusted depending on the type of goods or services offered, as an easy method of requiring users to comply with favorable provisions.

In *Nguyen v. Barnes & Noble Inc.*, the Ninth Circuit held that a website's failure to prompt users to take affirmative action to assent to its terms and conditions, even though the website presented a conspicuous hyperlink to view them, constituted insufficient constructive notice.¹¹⁷ Website owners bear the burden of notifying users of any binding terms and conditions, regardless of whether users read them or not.¹¹⁸ The court rejected the argument that a user's familiarity with other websites presenting terms and conditions via similar online methods gives rise to an inference of constructive notice.¹¹⁹

Today, many business websites employ "hybridwrap" agreements, that is, webpages that provide a hyperlink the user can click in order to view the terms and conditions rather than placing the terms themselves on the page.¹²⁰ District courts find hybridwrap agreements effective only if the button requiring assent appears beside the hyperlink to the terms, such that clicking the button is itself evidence the user has notice of those terms.¹²¹

Some courts require more contextual evidence of notice. For example, the U.S. District Court for the District of New Hampshire

¹¹⁵ See, e.g., *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171 (9th Cir. 2014) (invalidating an arbitration provision where the plaintiff was found to have no actual notice of the terms of use prior to completing his online purchase); *Long v. Provide Com., Inc.*, 200 Cal. Rptr. 3d 117 (Cal. Ct. App. 2016) (holding that the consumer was not bound by the website's terms of use because the browsewrap agreement was not conspicuous enough to put them on notice of such terms); *In re Zappos.com, Inc., Customer Data Sec. Breach Litig.*, 893 F. Supp. 2d 1058, 1066 (D. Nev. 2012) (invalidating the arbitration provision in the defendant's website's terms of use because the "highly inconspicuous" hyperlink was not sufficient to give the user constructive notice).

¹¹⁶ See generally *Nguyen*, 763 F.3d 1171; *Long*, 200 Cal. Rptr. 3d 117; *In re Zappos.com, Inc.*, 893 F. Supp. 2d 1058.

¹¹⁷ 763 F.3d at 1178–79.

¹¹⁸ *Id.* at 1179 ("[T]he onus must be on website owners to put users on notice of the terms to which they wish to bind consumers.").

¹¹⁹ *Id.*

¹²⁰ See BRENT A. OLSON, CAL. BUS. L. DESKBOOK § 43:72(c), Westlaw (database updated Dec. 2024); see also *Gaker v. Citizens Disability, LLC*, 654 F. Supp. 3d 66, 73 (D. Mass. 2023) (discussing what constitutes a "hybridwrap" agreement as interpreted by federal courts).

¹²¹ See, e.g., *Gaker*, 654 F. Supp. 3d at 73; *Nicosia v. Amazon.com, Inc.*, 384 F. Supp. 3d 254, 266 (E.D.N.Y. 2019) ("Courts will give effect to hybridwrap terms where the button required to perform the action manifesting assent (e.g., signing up for an account or executing a purchase) is located directly next to a hyperlink to the terms and a notice informing the user that, by clicking the button, the user is agreeing to those terms.").

looked to a website's appearance and functionality to determine whether Plaintiff agreed to be contacted by the defendant and was bound by the terms contained in a boilerplate arbitration clause.¹²² The website allegedly presented the disclosures and hyperlinks in the form in small, gray, underlined font at the bottom of the page.¹²³ At the end of the form, on the fifteenth page, the website presented a large green button with the words "See my results!," above a notice indicating that clicking the button constituted assent.¹²⁴ The court refused to enforce the provision, finding that the text was "almost indecipherable to the naked eye" and—especially for a user accessing the website on an iPad—the font was likely to be "smaller and even more difficult to read."¹²⁵

While courts may be keen to protect consumers from insufficient notice of boilerplate provisions in online adhesion contracts, the main issue is that, at the outset, the lack of web accessibility standards deprives consumers with visual disabilities from even having the opportunity to digest content on websites presenting such contracts.

II. ANALYSIS

A. *The Growing Frustration with the Lack of Web Accessibility Standards*

In both federal and state courts in New York or California, the number of web accessibility lawsuits has grown from 2,314 in 2018 to an estimated 4,220 by the end of 2023, with most claims alleging problems navigating commercial desktop websites.¹²⁶ Eighty-four percent of these claims are filed because of issues with inaccessible e-commerce websites.¹²⁷ Promptly addressing web accessibility standards for Title III entities could help diffuse the increasing number of claims brought by people with disabilities, address online business owners' concerns, and lessen the burden on courts.

¹²² Daschbach v. Rocket Mortg., LLC, No. 22-cv-346, 2023 WL 2599955, at *7 (D.N.H. Mar. 22, 2023).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at *9.

¹²⁶ USABLENET, *supra* note 56 ("95% of cases claim accessibility issues on desktop websites.").

¹²⁷ *Id.*

1. The Legislature's Inaction Forces Courts to Improvise

Plaintiffs with visual disabilities persist in bringing claims against online-only businesses, even though some of these businesses may simply be unclear on whether web accessibility features are legally required. In *Chalas v. Pork King Good*, for example, a visually impaired plaintiff claimed that accessibility barriers on the defendant's website, particularly its incompatibility with screen-reader software, prevented her from purchasing the defendant's products on four separate occasions.¹²⁸ Similarly, in *Guerrero v. Ogawa USA Inc.*, the plaintiff attempted to purchase a massage chair on the defendant's website but could not due to the website's incompatibility with screen-reader software.¹²⁹ The plaintiff could not add items to her cart or learn more about the defendant's products like other sighted consumers could.¹³⁰

In similar cases brought in the U.S. District Court for the Southern District of New York, legally blind and visually impaired plaintiffs sought relief under theories of disparate treatment or disparate impact for similar accessibility issues on defendant e-commerce websites.¹³¹ Allegations often concern issues of website incompatibility with screen-reader software, lack of highlighted links or alt-text for image descriptions, and failure to indicate current focus on webpages.¹³² Under Title III, available remedies for private actions include equitable relief and reasonable attorneys' fees if the private party prevails.¹³³ As discussed in Section I.D, the continuing rise of such claims combined with the lack of legislative direction has left courts with the responsibility of addressing public interest concerns over web accessibility issues and determining what forms of equitable relief are available.¹³⁴

In *Toro v. Framed & Fancy, Inc.*, the U.S. District Court for the Southern District of New York found that a consent decree, requiring the defendant to alter its website to conform with WCAG 2.1, Level AA standards within a year, was a reasonable resolution under Title III.¹³⁵

¹²⁸ 673 F. Supp. 3d 339, 341 (S.D.N.Y. 2023).

¹²⁹ No. 22-cv-2583, 2023 WL 4187561, at *1 (S.D.N.Y. June 26, 2023).

¹³⁰ *Id.*

¹³¹ See, e.g., *Guerrero v. Ellusionist.com, Inc.*, No. 22-cv-2465, 2023 WL 3847402 (S.D.N.Y. June 6, 2023); *Maddy v. Life Time, Inc.*, No. 22-cv-5007, 2023 WL 4364488 (S.D.N.Y. July 5, 2023); *Davis v. Wild Friends Foods, Inc.*, No. 22-cv-4244, 2023 WL 4364465 (S.D.N.Y. July 5, 2023); *Donet v. Isamax Snacks, Inc.*, No. 23-cv-1286, 2023 WL 6065626 (S.D.N.Y. Aug. 14, 2023).

¹³² See *supra* Section I.B.

¹³³ See 42 U.S.C. § 12188(a)(1); 42 U.S.C. § 2000a-3(a)–(b).

¹³⁴ See *supra* Section I.D.

¹³⁵ No. 22-cv-7255, 2023 WL 395230, at *3 (S.D.N.Y. Jan. 24, 2023). In *Toro*, the plaintiff alleged that the defendant's website was inaccessible for people with disabilities. *Id.* Both parties agreed to a consent decree, ending any further litigation. *Id.*

Though other web accessibility claims have settled with consent decrees,¹³⁶ the court in *Toro* noted that a consent decree does not necessarily constitute an admission of the defendant's liability.¹³⁷ To help cure the inequality that plaintiffs with visual disabilities face due to inaccessible EIT, courts may use judicial discretion to determine whether consent decrees are appropriate to overcome the lack of web accessibility law.

2. The Pressure on State Legislatures to Control Rising Web Accessibility Litigation

The uptick in web accessibility lawsuits and discourse among courts due to the absence of federal web accessibility standards has also led to frustration among some state legislatures. In an attempt to control the onslaught of web accessibility lawsuits, Kansas and California legislatures have put forth laws addressing “abusive” filings of such claims.¹³⁸ On April 20, 2023, the Kansas legislature passed the “Act Against Abusive Website Access Litigation” to restrict using the ADA for the purpose of filing multiple web accessibility lawsuits to obtain attorneys’ fees awards for plaintiffs.¹³⁹ The bill is specifically concerned with the deleterious effects of web accessibility litigation on small businesses in the state.¹⁴⁰ Indeed, the Kansas legislature expressly stated that the bill was prompted by the DOJ’s failure to issue Title III web accessibility standards.¹⁴¹ The bill states that businesses are not given a reasonable opportunity to cure alleged access violations because they are often not notified of the alleged violation prior to legal filings.¹⁴² To help prevent abuse of its judicial system, the Kansas legislature emphasized that prior notification demonstrates a good faith effort to resolve the issue pre-litigation and set forth factors of assessment for what constitutes abusive litigation including the number of similar actions brought by the same plaintiff,

¹³⁶ See, e.g., *Jaquez v. Smoky Mountain Knife Works, Inc.*, No. 21-cv-1446, 2021 WL 2452124 (S.D.N.Y. June 16, 2021); Consent Decree, *Cromitie v. Wayfair LLC*, No. 23-cv-5149 (S.D.N.Y. Sept. 14, 2023); *Cromitie v. Kane & McHenry Enters., LLC*, No. 23-cv-5639, 2023 WL 8308682 (S.D.N.Y. Dec. 1, 2023).

¹³⁷ *Toro*, 2023 WL 395230, at *1.

¹³⁸ See KAN. STAT. ANN. § 60-5005 (West 2023); CAL. CIV. CODE § 55.32 (West 2025).

¹³⁹ KAN. STAT. ANN. § 60-5005(a)(1)–(2) (West 2023).

¹⁴⁰ *Id.* § 60-5005(a)(2).

¹⁴¹ *Id.*

¹⁴² *Id.*

lawyer, or law firm, and resources available to the defendant to engage in the litigation or to correct the alleged violation.¹⁴³

Though still in discussion, California's bill similarly attempts to monitor and prevent abusive litigation of web accessibility claims.¹⁴⁴ On March 2, 2023, California's legislature introduced Assembly Bill 1757 to clarify what constitutes an inaccessible website for the purposes of filing web accessibility claims.¹⁴⁵ It requires Title III entities to comply with WCAG 2.1, Level AA standards, or any subsequently published web accessibility standards replacing the WCAG, and proposes liability for those who bring frivolous web accessibility claims.¹⁴⁶ It seems California's legislature hopes the bill will advance equal access and information for people with disabilities while also addressing business owners' concerns of facing lawsuits for inaccessible websites.¹⁴⁷

As evidenced by these bills, Congress's inaction on web accessibility standards is causing chaos among courts and state legislatures. The chaos manifests in the continued conflicting applications of Title III by courts and inconsistent solutions proposed by state legislatures across the nation, whereas businesses operating using EIT continue to worry about facing an overhaul of web accessibility claims.¹⁴⁸ The absence of federal web accessibility standards undoubtedly places people with visual disabilities in an unfair position where they cannot exercise their rights to equal access and information in digital spaces or adjudicate legitimate claims with the expectation there will be prospective change.

¹⁴³ *Id.* § 60-5005(b)(2) (stating that the relevant factors for determining abusive litigation are: "(A) The number of substantially similar actions filed by the same plaintiff, lawyer or law firm or the history of such plaintiff, lawyer or law firm in bringing frivolous litigation or other litigation declared by a court to be abusive litigation in the past 10 years; (B) the number of full-time employees employed by the defendant and the resources available to the defendant to engage in the litigation; (C) the resources available to the defendant to correct the alleged website access violation; (D) whether the jurisdiction or venue where the action is brought is a substantial obstacle to defending against the litigation; (E) whether the filing party or lawyer filing the litigation is a resident of this state or is licensed to practice law in this state; (F) the nature of settlement discussions and the reasonableness of settlement offers and refusals to settle. . . . ; and (G) whether any factors under K.S.A. 60-211(b), and amendments thereto, exist in the litigation and whether sanctions are appropriate under K.S.A. 60-211(c), and amendments thereto.").

¹⁴⁴ See Assemb. B. 1757, 2023-2024 Reg. Sess. (Cal. 2023).

¹⁴⁵ See *id.*

¹⁴⁶ See *id.*

¹⁴⁷ See *id.*

¹⁴⁸ See *supra* Sections I.D.1, II.A.

B. *The Underlying Link Between Online Adhesion Contracts and Web Accessibility*

Even without the added concern of compliance with web accessibility, online adhesion contracts containing boilerplate provisions pose significant risks for all people.¹⁴⁹ Businesses use adhesion contracts to equip themselves with a legal advantage by cornering consumers to assent to terms in order to purchase goods, use services, or enroll in loyalty programs.¹⁵⁰ The growth of EIT and lack of legal requirements for web accessibility conformance amplifies the dangers that online adhesion contracts present to the rights of people with disabilities.

Businesses operating in physical spaces have steadily begun incorporating web-based systems or applications on electronic self-service machines and use digital screens to present information, including adhesion contracts, to consumers.¹⁵¹ Some recurring EIT accessibility concerns include: failure to conform with screen-reader software, difficulty of reading text due to inability to adjust text size or insufficient contrast between text and background, and failure of websites to permit navigation using keyboards only.¹⁵² The lack of a technical, statutory standard for what methods of presenting EIT are considered “accessible” disposes this responsibility upon courts, which, as discussed in Section I.D, take very different approaches to analyzing individual plaintiff claims of digital accessibility.¹⁵³

While there are not many cases to date on the lack of digital accessibility to view adhesion contracts on electronic self-service machines situated in physical spaces, the First Circuit faced the difficulty of figuring out an approach to such claims in *National Federation of the Blind v. Container Store, Inc.*¹⁵⁴ The plaintiffs, including blind and visually impaired individuals, brought suit against the defendant company, alleging discrimination under Title II of the ADA and state laws due to its store’s inaccessible point-of-sale devices.¹⁵⁵ The plaintiffs alleged that the defendant’s in-store point-of-sale devices used a visual, touch-screen keyboard that prevented blind or visually impaired customers from entering their personal identification numbers to make

¹⁴⁹ See *supra* Section I.F.

¹⁵⁰ See *supra* Section I.F.

¹⁵¹ See Vu & Sarnoff, *supra* note 12, at 443–44.

¹⁵² See *id.* at 444.

¹⁵³ See *id.* at 446–47; see also *supra* Section I.D.1.

¹⁵⁴ 904 F.3d 70 (1st Cir. 2018).

¹⁵⁵ *Id.* at 74–77.

debit or credit card purchases, enroll in the loyalty program, or register each purchase made to the loyalty program.¹⁵⁶

The plaintiffs also alleged that blind and visually impaired consumers could not partake in such actions without verbally disclosing their personal information to the store clerk, running the risk of people nearby overhearing.¹⁵⁷ Furthermore, the plaintiffs alleged that, prior to enrollment in the defendant's loyalty program, a consumer had to read and agree to terms and conditions which included a mandatory arbitration provision, however this was impossible to do without accessible machines or software.¹⁵⁸ Like other courts faced with issues of online adhesion contracts binding unsuspecting claimants to problematic provisions,¹⁵⁹ the First Circuit focused its analysis on whether the terms of the clause were so conspicuous to give the plaintiffs constructive notice that the arbitration provision existed.¹⁶⁰

The First Circuit determined that there was no evidence that the plaintiffs had any knowledge, actual or constructive, that the arbitration provision applied to their enrollment in the defendant's loyalty program, and thus no agreement existed.¹⁶¹ Though the court did not focus exclusively on the accessibility issues, this case demonstrates the underlying concerns that people with visual disabilities will unknowingly assent to boilerplate provisions on inaccessible EIT. It also illustrates how the lack of specific web accessibility requirements creates more stress for people with visual disabilities and indirectly allows businesses to act indifferent to the implementation of accessibility features.

In *Duarte v. Mission Federal Credit Union*, the U.S. District Court for the Southern District of California addressed a deaf and visually impaired plaintiff's challenge to the defendant's arbitration provision as unconscionable.¹⁶² The defendant, a financial institution, had added an arbitration provision to its terms and conditions and mailed the plaintiff notices requiring her signed assent to the updated clause.¹⁶³ The plaintiff argued that she did not adequately manifest assent to the arbitration provision because her deteriorating ocular condition prevented her from reading anything smaller than a 16-point font size.¹⁶⁴ Though the court

¹⁵⁶ *Id.* at 77.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 83.

¹⁵⁹ See, e.g., *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171 (9th Cir. 2014); *Daschbach v. Rocket Mortg., LLC*, No. 22-cv-346, 2023 WL 2599955, at *1 (D.N.H. Mar. 22, 2023).

¹⁶⁰ See *Nat'l Fed'n of the Blind*, 904 F.3d at 83.

¹⁶¹ *Id.* at 84.

¹⁶² No. 19-cv-1441, 2020 WL 4732058, at *2 (S.D. Cal. Aug. 14, 2020).

¹⁶³ *Id.* at *1.

¹⁶⁴ *Id.* at *1, 3.

refused to find the arbitration provision procedurally or substantively unconscionable, it invalidated the provision for a specific factual reason.¹⁶⁵ The court determined that, because the plaintiff testified that she could previously only read sixteen-point font and the defendant failed to show the notices met that minimum size, the plaintiff was physically unable to read the arbitration provision, rendering it invalid.¹⁶⁶

Duarte shows a rather uncommon approach of judicial decision-making, and it is unclear whether the court reached its conclusion with the intent to protect the plaintiff from losing the right to litigate her claim in court.¹⁶⁷ The court's decision raises the question of how far courts will go in using judicial discretion to offer relief for people with visual disabilities unfairly bound by boilerplate provisions. However, the factual circumstances and reasoning in *Duarte* seem too narrow to consider its application to similarly situated plaintiffs, particularly in digital spaces.¹⁶⁸ Federally mandated web accessibility standards and procedures may help prevent courts from having to take one-off, creative approaches to remedy plaintiffs with visual disabilities who entered into boilerplate provisions in adhesion contracts on inaccessible EIT.

III. PROPOSAL

Legislatures in the United States are constantly debating what proposed laws or regulations must include to address web accessibility concerns. Yet recent proposals seem to simply be a panicked response to the rising web accessibility claims and uncertainty regarding how courts will address such claims.¹⁶⁹ People with visual disabilities have been navigating an inaccessible digital world for decades, and the failure to amend or enact separate regulations requiring conformance with web accessibility standards propagates this inequality.¹⁷⁰

¹⁶⁵ *Id.* at *4–5 (finding there was no procedural unconscionability because plaintiff was not pressured to decide a certain way and no substantive unconscionability because the provision was not overly harsh or burdensome).

¹⁶⁶ *Id.* at *3.

¹⁶⁷ See generally *id.*

¹⁶⁸ *Id.*

¹⁶⁹ See *infra* Section III.A.

¹⁷⁰ See *supra* Part I.

A. *Requiring Private Businesses to Comply with Web Accessibility Standards*

On September 28, 2022, the Websites and Software Applications Accessibility Act (“#A11yAct”) was introduced in Congress to require employers, public entities, and public accommodations, even if online-only, to maintain accessible websites.¹⁷¹ Unlike the Online Accessibility Act of 2021 that was never passed,¹⁷² the #A11yAct does not include specific web accessibility standards for compliance.¹⁷³ It instead places the responsibility of issuing such standards on the DOJ, which means more time will pass before businesses actually implement web accessibility changes.¹⁷⁴ The DOJ would probably incorporate Section 508 or the current WCAG due to referencing such standards in litigation matters and its 2022 Web Accessibility Guidance.¹⁷⁵ If this is the case, it is unclear why the #A11yAct itself cannot expressly require compliance for the most current WCAG Level A and widely applied Level AA standards for private businesses.¹⁷⁶ Legislators should focus on adopting such formal web accessibility standards in the bill itself to minimize ambiguity among businesses and allow the DOJ to focus its efforts on enforcing compliance.

In 2010, the DOJ issued an Advance Notice of Proposed Rulemaking (ANPRM) to address considerations to revise regulations implementing Title II and III of the ADA and expand them to include web accessibility standards.¹⁷⁷ Though the DOJ discussed the need for web accessibility standards in its 2010 ANPRM, it withdrew its proposed rules in 2017 to evaluate whether specific web accessibility standards are “necessary and appropriate” to ensure compliance with the ADA.¹⁷⁸ On August 4, 2023, the DOJ announced a new Notice of Proposed Rulemaking (NPRM) suggesting the addition of specific requirements for web and mobile app accessibility for Title II entities.¹⁷⁹ The NPRM attempts to catch up with

¹⁷¹ S. 4998, 117th Cong. (2022).

¹⁷² H.R. 1100, 117th Cong. (2021).

¹⁷³ See S. 4998.

¹⁷⁴ See *id.*

¹⁷⁵ See *supra* Section I.C.

¹⁷⁶ Cf. Council Directive 2019/882, *supra* note 84 (referencing and incorporating the WCAG to advance web accessibility). See generally *supra* Section I.E.

¹⁷⁷ See Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460 (proposed July 26, 2010) (withdrawn); see also Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions, 82 Fed. Reg. 60932 (proposed Dec. 26, 2017).

¹⁷⁸ See 75 Fed. Reg. 43460, 43463–64; 82 Fed. Reg. 60932.

¹⁷⁹ See Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities, 88 Fed. Reg. 51948 (proposed Aug. 4, 2023).

the EU's 2019 Directive by adopting the WCAG 2.1, Level AA guidelines as technical standards to which such entities must comply.¹⁸⁰ However, unlike the EU's 2019 Directive, the legislature and DOJ continue to ignore the importance of urgently setting forth standards for private businesses as well.¹⁸¹

Smaller public entities are concerned with how the costs of complying with web accessibility requirements will impact their ability to implement such changes.¹⁸² The Office of Advocacy for the United States Small Business Administration issued comments on the DOJ's 2023 NPRM, explaining there should be more flexibility for smaller public entities and further clarification on what must be proven to establish an undue burden defense.¹⁸³ The comments also call for DOJ to issue more materials to help small public entities comply with the WCAG requirements.¹⁸⁴

Smaller private businesses will require additional clarity on the limitations to exceptions and defenses available to them.¹⁸⁵ Congress and the DOJ should evaluate what specific guidance to offer small private businesses because people with visual disabilities must also understand the extent of what claims they may bring against such entities. Thus, requiring and enforcing compliance with most current WCAG Level A, or widely used Level AA, standards is a step in the right direction to ensure people with visual disabilities can use assistive technologies and accessibility features for important actions on EIT, like reading contracts. Effectuating this solution resolves the constant back-and-forth, gaps in reasoning, and inconsistencies among proposed laws and regulations that only contributes to the restlessness of people with visual disabilities frustrated by web accessibility issues.

¹⁸⁰ *Id.* at 51949.

¹⁸¹ *Id.*

¹⁸² See U.S. Small Bus. Admin., Comment Letter on Proposed Rule for Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities (Oct. 17, 2023), <https://advocacy.sba.gov/wp-content/uploads/2023/10/Advocacy-Comments-on-Nondiscrimination-on-the-Basis-of-Disability-Accessibility-of-Web-Information-and-Services-of-State-and-Local-Government-Entities.pdf> [<https://perma.cc/D7W5-Y26C>].

¹⁸³ *Id.* at 8.

¹⁸⁴ *Id.* at 7, 12.

¹⁸⁵ *Id.* at 12.

B. *Urging State Legislatures to Establish Web Accessibility Standards*

The more plausible, albeit less uniform, solution to the unclear and constant delays to federal web accessibility standards for Title III entities is for state legislatures to enact their own web accessibility laws.¹⁸⁶ Some states have already begun brainstorming ways to advance web accessibility and create standards with differing degrees of conformance with web accessibility needs.¹⁸⁷ Though the Kansas and California legislatures are taking more direct solutions to web accessibility issues and spiked litigation, other states are attempting to alleviate web accessibility concerns using other methods.¹⁸⁸

On July 26, 2023, the Massachusetts governor signed an executive order creating the Digital Accessibility and Equity Governance Board to advance digital accessibility and make its government more equitable for people with disabilities.¹⁸⁹ The focus on public entities is helpful for paving a more accessible digital world, but people with visual disabilities rely on the goods and services of private businesses daily. In the absence of progress on federal web accessibility legislation for such businesses, state legislatures should feel a responsibility to set similar standards for these businesses to propagate a more expansive, inclusive digital landscape.

In February 2023, Colorado announced its intention to offer a free web accessibility app that pairs visually impaired and blind users with an agent to help them navigate inaccessible software or devices.¹⁹⁰ While commendable, this solution does not address how the agents would remedy the issues of an EIT system's incompatibility with the use of assistive technologies. It also does not help create a digital world where people with visual disabilities are autonomous in their actions. State

¹⁸⁶ See *supra* Section II.A.2.

¹⁸⁷ See Keely Quinlan, *The ADA Needs an Update for the Digital Era, but Some States Are Ahead of the Curve*, STATESCOOP (Apr. 4, 2023), <https://statescoop.com/digital-accessibility-mandates-state-government> [<https://perma.cc/6U7T-TQGD>].

¹⁸⁸ *Id.*

¹⁸⁹ See Mass. Exec. Order No. 614 (July 26, 2023), <https://www.mass.gov/executive-orders/no-614-establishing-the-digital-accessibility-and-equity-governance-board> [<https://web.archive.org/web/20250401003129/https://www.mass.gov/executive-orders/no-614-establishing-the-digital-accessibility-and-equity-governance-board>]; Caitlin Reardon, *Gov. Maura Healey Signs Executive Order to Increase Online Accessibility to State Resources*, CONN. PUB. (July 26, 2023, 5:22 PM), <https://www.ctpublic.org/2023-07-26/gov-maura-healey-signs-executive-order-to-increase-online-accessibility-to-state-resources> [<https://perma.cc/WVF8-59ZQ>].

¹⁹⁰ See Press Release, Colo. Governor's Off. of Info. Tech., Lt. Governor Primavera Announces New Tool to Assist Blind and Low-Vision Coloradans Navigate State Locations and Digital Services (Feb. 23, 2023), <https://oit.colorado.gov/press-release/lt-governor-primavera-announces-new-tool-to-assist-blind-and-low-vision-coloradans> [<https://perma.cc/T3ZS-45RK>]; Keely Quinlan, *supra* note 187.

legislatures should instead direct their efforts to proposing and enacting statutes that create compliance measures with accessibility features for private businesses, so individuals with visual disabilities can use EIT on their own.

The urgency with which legislatures must act to protect the rights of people with visual disabilities is at its peak. While unique approaches may be helpful to loosen the barriers of web inaccessibility, state legislatures should craft statutory language that requires compliance with web accessibility requirements of the WCAG, particularly Levels A and AA. With new technologies developing quickly, the digital landscape changes often and the ongoing lack of web accessibility standards keeps people with visual disabilities in an extremely vulnerable position.

CONCLUSION

The world has been reliant on EIT ever since the internet began dominating households through devices like phones, tablets, and computers. The lag of legislating web accessibility standards in the United States continues, while people with visual disabilities are prevented from utilizing the total potential of electronic machines. The scope of what constitutes a Title III entity in digital spaces and what requirements businesses should implement to avoid web accessibility lawsuits is still unclear.

While the EU has made substantial changes in recent years, the United States cannot catch up fast enough.¹⁹¹ There is a pressing need for Congress to establish a clear direction of web accessibility compliance for businesses while deeply considering the specific accessibility requirements of compliance that address the concerns of people with visual disabilities. Yet the lack of web accessibility regulations continues to cause ongoing confusion among all affected parties and contributes to the rise of litigation. The pressure has fallen on state legislatures to enact statutes, and courts to create legal framework as an effort to provide some clarity of web accessibility law.¹⁹²

There is even more urgency to legislate federal web accessibility requirements due to the dangers of online adhesion contracts, with boilerplate provisions stripping the rights of people with visual disabilities. The increasing number of businesses requiring assent to contractual terms through EIT further demonstrates why mandating web

¹⁹¹ See *supra* Section I.E.

¹⁹² See *supra* Section II.A.

accessibility requirements is necessary to protect people with visual disabilities in the digital world.

While current proposed laws and regulations have flaws, enacting some sort of web accessibility law could greatly benefit the issues people with visual disabilities face. However, it is hard to stay optimistic when many introduced bills and regulations have been revoked, altered, or abandoned before reaching effect. People with visual disabilities are still hanging onto the hope that the federal legislature will act promptly to protect their rights. Even so, urging state legislatures to enact their own statutes addressing web accessibility issues seems like the more reliable way of seeing progress until Congress acts to legislate express web accessibility requirements for private and online-only businesses.