3-26-2018

Writing the Access Code: Enforcing Commercial Web Accessibility Without Regulations Under Title III of the Americans with Disabilities Act

Daniel Sorger
Boston College Law School, daniel.sorger@bc.edu

Follow this and additional works at: http://lawdigitalcommons.bc.edu/bclr

Part of the Communications Law Commons, Computer Law Commons, Disability Law Commons, and the Internet Law Commons

Recommended Citation

This Notes is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact nick.zydowski@bc.edu.
WRITING THE ACCESS CODE: ENFORCING COMMERCIAL WEB ACCESSIBILITY WITHOUT REGULATIONS UNDER TITLE III OF THE AMERICANS WITH DISABILITIES ACT

Abstract: A growing number of private lawsuits allege that businesses are violating Title III of the Americans with Disabilities Act because their websites are inaccessible to disabled individuals. Courts remain divided, however, on the extent to which commercial websites are covered under Title III. Additionally, the Department of Justice has not promulgated commercial web accessibility regulations—adding further uncertainty to the private enforcement regime. This Note argues that Title III broadly covers commercial websites, but that private enforcement is not positioned to spur lasting, broad-based Title III compliance. It proposes that large-scale litigation, state attorney general action, and state laws should be used to usher in commercial web accessibility according to globally accepted standards.

INTRODUCTION

In 2015, Heidi Viens (“Viens”), who lost her vision as an adult, was busy singlehandedly raising a daughter and running a small courthouse café.¹ Due to her disability, Viens had braille lettering on the kitchen microwave, thermometers that read meat temperatures aloud, and carefully sorted food containers throughout the café.² Although Viens’ physical environment was adequately modified to accommodate her, her virtual environment was not.³ Specifically, Viens could not read children’s books to her daughter on the Scribd online library platform because it was not compatible with screen readers or other assistive technologies.⁴ This led Viens and the National Federation of the Blind to sue

² Levitt, supra note 1.
³ Ekstrand, supra note 1.
Scribd under the Americans with Disabilities Act (ADA), claiming that it was required to make its platform accessible to the blind.5

Like Viens, millions of Americans with physical, cognitive, auditory, visual, and other disabilities are regularly excluded from the online economy due to inaccessible websites and mobile applications.6 For example, without basic coding changes and other modifications, blind individuals cannot use screen readers or speech recognition software.7 Similarly, without closed captioning, video content is inaccessible to the deaf and hard of hearing.8 For these millions of Americans, Viens’ case presented a crucial question: whether public-facing web-based businesses were covered as “places of public accommodation” under Title III of the ADA.9

In National Federation of the Blind v. Scribd Inc., the U.S. District Court for the District of Vermont recognized that Congress did not account for the rise in the online economy when it passed the ADA in 1990.10 Still, courts such as the U.S. District Court for the District of Massachusetts recognized a broad web accessibility right under the ADA based on its remedial purposes.11 Other federal district courts, however, construed the Title more narrowly based on

---


7 2016 Proposed Title II Website Rule, supra note 6, at 28,660.

8 Id.

9 Scribd, 97 F. Supp. 3d at 571; see 42 U.S.C. §§ 12181–12189 (setting forth Title III of the ADA, which generally requires that private entities offering a range of mainstream goods and services to the public must make reasonable accommodations when necessary to guarantee equal access to disabled individuals).


11 See Scribd, 97 F. Supp. 3d at 571 (discussing the approach to the question of website accessibility taken by the U.S. District Court for the District of Massachusetts based on controlling precedent); Nat’l Ass’n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 200–02 (D. Mass. 2012) (holding that the web-based video subscription provider Netflix was a place of public accommodation under Title III of the ADA).
statutory canons and early implementing regulations, limiting it to cover only those websites that served as gateways to physical, “brick and mortar” businesses. Notably, even this narrow approach extends Title III to commercial websites nationwide.

The U.S. District Court for the District of Vermont followed the District of Massachusetts’ approach, concluding that Scribd’s website and mobile applications were covered under the ADA. Eight months later, the parties entered into a publicized settlement that required Scribd to comply with Web Content Accessibility Guidelines (“WCAG”)—a set of technical standards for making websites accessible to disabled individuals. Although Scribd generated a workable compliance standard for many commercial websites, some fear that it has helped set the stage for a “litigation tsunami,” uncertainty, and excessive costs for businesses. Their concerns are underscored by the fact that Title III regulations do not provide any guidance as to how to make websites accessible. Notwithstanding this lack of clarity, private firms have sent hundreds of demand letters and have repeatedly sued businesses alleging Title III website violations since 2015.

---

12 See Nat’l Fed’n of the Blind v. Scribd Inc., 97 F. Supp. 3d 565, 569 (D. Vt. 2015) (discussing how a physical nexus requirement was applied to exclude web-based businesses from coverage under Title III); see also Cullen v. Netflix, Inc., 880 F. Supp. 2d 1017, 1023–24 (N.D. Cal. 2012) (applying Ninth Circuit precedent and holding that Netflix was not a place of public accommodation under Title III because it was not connected to a physical place). “Brick and mortar” is used to refer to businesses with a physical building, as opposed to those that are exclusively online. Matthew Hudson, Learn About Brick and Mortar Stores, THE BALANCE (Jan. 23, 2018), https://www.thebalance.com/what-are-brick-and-mortar-stores-2890173 [https://perma.cc/X2RS-TL8A].

13 See Nat’l Fed’n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 956 (N.D. Cal. 2006) (holding that the website of the national retailer Target may violate Title III “to the extent that . . . the inaccessibility of Target.com impedes the full and equal enjoyment of goods and services offered in Target stores”).


17 See 2016 Proposed Title II Website Rule, supra note 6, at 28,659 (noting that the Department of Justice (DOJ) abandoned its 2010 plan to regulate web accessibility under Titles II and III simultaneously and decided to move forward with a Title II rule first).

18 Id.; Sara Randazzo, Companies Face Lawsuits Over Website Accessibility for Blind Users, WALL ST. J. (Nov. 1, 2016, 10:54 AM), https://www.wsj.com/articles/companies-face-lawsuits-over-
Part I of this Note traces the current private enforcement regime to courts’ conflicting website accessibility decisions.\(^{19}\) Part II identifies a consensus between federal agencies and Congress on the need for universal technical standards governing how to make websites accessible to disabled individuals.\(^{20}\) Part II then examines the Department of Justice’s (DOJ) efforts to codify Title III web accessibility regulations.\(^{21}\) Part III discusses how consensus WCAG 2.0 standards have enabled a second wave of small-scale web accessibility settlements to proliferate.\(^{22}\) It also details more structured approaches to enforcement through large-scale litigation as well as state law.\(^{23}\) Part IV then argues that courts should reject anachronistic constructions of Title III that exclude web-based businesses.\(^{24}\) Part IV concludes that cause lawyering, state-level enforcement, and state law should be utilized as superior enforcement mechanisms.\(^{25}\)

I. RECOGNIZING RIGHTS WITHOUT STANDARDS: WEB ACCESSIBILITY UNDER TITLE III OF THE ADA

This Part presents a tension in conflicting court decisions regarding web accessibility, which is due to the fact that Title III’s purposes extend beyond the physical world to which its standards refer.\(^{26}\) The potential rigidity of Title III’s specific physical access standards was first exemplified by courts that cast the Title as limited to physical structures when presented with off-site discrimination claims.\(^{27}\) Those early decisions recognized a physical nexus requirement that has since created divisions among courts on whether Title III covers all commercial websites, or only those websites connected to physical stores.\(^{28}\) Section A of this Part details the tension between general rights and specific standards in Title III that has led to divisions among the courts.\(^{29}\) Section B

---

\(^{19}\) See infra notes 31–88 and accompanying text.

\(^{20}\) See infra notes 95–116 and accompanying text.

\(^{21}\) See infra notes 117–126 and accompanying text.

\(^{22}\) See infra notes 139–155 and accompanying text.

\(^{23}\) See infra notes 132–138, 156–167 and accompanying text.

\(^{24}\) See infra notes 174–185 and accompanying text.

\(^{25}\) See infra notes 189–217 and accompanying text.

\(^{26}\) See 42 U.S.C. §§ 12181(7), 12182(a)–(b) (2012) (setting forth broad prohibitions against discrimination designed to provide equal access to disabled individuals without expressly defining “public accommodations” as physical entities); Carparts Distribution Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New England, Inc., 37 F.3d 12, 19 (1st Cir. 1994) (noting that Title III is ambiguous as to whether “public accommodations” refers exclusively to physical structures); infra notes 31–52 and accompanying text. But see Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1014 (6th Cir. 1997) (concluding that “public accommodations” in Title III refers exclusively to physical places).

\(^{27}\) See infra notes 63–67 and accompanying text.

\(^{28}\) See infra notes 74–83 and accompanying text.

\(^{29}\) See infra notes 31–52 and accompanying text.
then explains how courts began to guarantee equal access rights to products and services offered by mail, phone, and internet.\footnote{30 See infra notes 56–88 and accompanying text.}

A. General Civil Rights and Specific Accommodation

Standards in Title III of the ADA

In passing the ADA, Congress extended an unprecedented amalgam of federal civil rights protections to the disabled.\footnote{31 42 U.S.C. §§ 12101–12213 (2012); see Matthew Diller, Judicial Backlash, the ADA, and the Civil Rights Model, 21 BERKELEY J. EMP. & LAB. L. 19, 32 (2000) (discussing early unsuccessful legislative efforts to weaken the ADA, which later gave way to an accepted understanding of it according to a traditional American civil rights paradigm that garnered immense support).} It also imposed an affirmative duty of reasonable accommodation on employers, state and local governments, and private commercial entities.\footnote{32 42 U.S.C. § 12112 (covering employment provisions of the ADA under Title I); id. § 12131 (setting forth provisions governing state and local entities under Title II); id. § 12181 (covering provisions governing public-facing private entities referred to as public accommodations under Title III). The ADA was designed to reach all aspects of societal discrimination against disabled individuals. Michael Waterstone, The Untold Story of the Rest of the Americans with Disabilities Act, 58 VAND. L. REV. 1807, 1808–09 (2005). The ADA has been described as a civil rights “all-star team” because it draws on decades of legislative experience by selectively borrowing frameworks including Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, and the Fair Housing Act, 42 U.S.C. § 3601. Id. at 1808–09.} Keeping with a traditional civil rights framework, the ADA targets biases against a historically disadvantaged minority to promote equal treatment.\footnote{33 42 U.S.C. § 12101(a); see Diller, supra note 31, at 40 (noting that the vision of equality expressed in the ADA is both affirmative and individualized, because it demands unique treatment on a person-to-person basis through tailored accommodations).} Many of its requirements for implementing civil rights in the physical world, however, are highly specific and technical.\footnote{34 See, e.g., 28 C.F.R. § 36.304 (2017) (laying out barrier removal regulations).} This contrast between generalized rights and specific standards reveals a larger tension in the ADA.\footnote{35 See Diller, supra note 31, at 40 (discussing the tension between the ADA’s non-discrimination mandate, which is rooted in a vision of equal treatment, and the differential treatment that is required by its accommodation mandate).} The ADA’s ends speak in terms of broad rights to non-discrimination and equal treatment.\footnote{36 See id.} The means necessary to achieve those ends, however, require private expenditure and differential treatment.\footnote{37 See 42 U.S.C. § 12182(b)(2)(A) (requiring various forms of accommodation that involve affirmative conduct and private expenditure); Michael Waterstone, A New Vision of Public Enforcement, 92 MINN. L. REV. 434, 474 (2007) (noting that, unlike racial discrimination, disability discrimination is often embedded in built environments, meaning that a physical access barrier can have the same discriminatory effect as a policy that discriminates against a racial minority).} For example, the ADA does more than just prohibit the local bus company from relegating disabled in-
dividuals to the back of its busses—it requires the company to replace its busses with new, accessible models.\textsuperscript{38}

Congress intended the ADA to fight against disability discrimination by providing accommodation standards governing the removal of access barriers in the physical environment, such as stairs and narrow doorways.\textsuperscript{39} Congress believed that the ADA would thereby benefit both disabled and non-disabled Americans.\textsuperscript{40} Specifically, the ADA was aimed at reducing welfare spending on disabled individuals in the long term because it would allow them to better participate in the economy.\textsuperscript{41}

In line with its purpose, Title III of the ADA prohibits private entities that are open to the public—"places of public accommodation"—from denying disabled persons the "full and equal enjoyment" of their commercial offerings.\textsuperscript{42} These entities are grouped separately in an exhaustive list of twelve categories.\textsuperscript{43} Each category is illustrated with reference to a non-exhaustive sample of specific representative entities.\textsuperscript{44} To promote the ADA's broad remedial purpose, the list of general categories is intentionally expansive, ranging from dining establishments to private educational institutions and social service centers.\textsuperscript{45}

The private entities covered by Title III must all follow specific prohibitions on discrimination, which create affirmative compliance duties to ensure

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{38} 42 U.S.C. § 12184(a)–(b) (2012).
\item \textsuperscript{39} \textit{Id.} § 12101(b); Waterstone, \textit{supra} note 37, at 474.
\item \textsuperscript{40} 42 U.S.C. § 12101(a)(8).
\item \textsuperscript{41} \textit{See id.} (finding that discrimination against the disabled rendered a large segment of the population unnecessarily reliant on the government and unable to fully participate in the economy, which in turn "cost the United States billions of dollars").
\item \textsuperscript{42} \textit{Id.} § 12182(a). The U.S. Supreme Court construed Title III’s general prohibition on discrimination broadly to capture any denial of “equal access” to a disabled person by someone with ownership or control of a covered entity. PGA Tour, Inc. v. Martin, 532 U.S. 661, 676–77 (2001) (quoting H.R. REP. NO. 101-485, pt. 2, at 100 (1990)). The commercial offerings covered by Title III are also broadly defined to include “goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.” 42 U.S.C. § 12812(a). Those subject to liability under Title III include “any person who owns, leases (or leases to), or operates a place of public accommodation.” \textit{Id.} In keeping with the findings and purposes of the ADA, the terms “full and equal enjoyment” in Title III create a mandate to establish complete equality of opportunity for the disabled—as opposed to equality of outcomes. H.R. REP. NO. 101-485, pt. 2, at 101.
\item \textsuperscript{43} 42 U.S.C. § 12181(7); \textit{see} H.R. REP. NO. 101-485, pt. 2, at 100 (noting that the list of public accommodation categories in Title III is exhaustive). Some of the categories include: “a restaurant, bar, or other establishment serving food or drink,” 42 U.S.C. § 12181(7)(B), “a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment,” 42 U.S.C. § 12181(7)(C), and “a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment,” 42 U.S.C. § 12181(7)(E).
\item \textsuperscript{44} 42 U.S.C. § 12181(7).
\item \textsuperscript{45} \textit{See id.}; Ali Abrar & Kerry J. Dingle, \textit{From Madness to Method: The Americans with Disabilities Act Meets the Internet}, 44 HARV. C.R.-C.L. L. REV. 133, 137–38 (2009) (noting that, although the framework of Title III was borrowed from Title II of the Civil Rights Act, its protections were meant to extend much more broadly in order to address the pervasiveness of discrimination against disabled persons).
\end{itemize}
\end{footnotesize}
that those entities accommodate disabled individuals. These accommodation provisions require a private entity to change its policies, practices, or procedures when necessary to make itself accessible to a disabled person. Title III also imposes two more specific anti-discrimination requirements on public accommodations. These two provisions require covered entities to comply with detailed standards contained in the ADA regulations and the physical design standards in the ADA Accessibility Guidelines.

In delineating specific types of required modifications, Congress guaranteed rights to physical accommodations. This level of specificity, however, is a “double-edged sword” because it prevents Title III from being interpreted in a more expansive manner such that it would provide more protection to the disabled. In instances where required modifications are not specified but Title III may still apply, the law only provides that modifications must be reasonable and financially modest.
B. Defining Standardless Rights: Applying Title III Beyond Physical Places

The judiciary has often limited the reach of Title III in the context of claims asserting rights to accommodation that are not governed by specific standards contained in the ADA or its implementing regulations.\(^{53}\) Specifically, in early Title III decisions, U.S. Courts of Appeals divided on the extent to which the Title reached past brick-and-mortar insurance offices to cover the contents of insurance and benefits policies and the non-public-facing businesses that offered them.\(^{54}\) Some of those early off-site discrimination decisions construed Title III to contain a physical nexus requirement that, as this Section details, has since split district courts on whether the Title covers web-based commercial entities.\(^{55}\)

1. Federal Courts of Appeals Address Off-Site Discrimination Under Title III

In 1994, the U.S. Court of Appeals for the First Circuit provided a broad doctrinal basis for web accessibility in *Carparts Distribution Center, Inc. v. Automotive Wholesaler’s Ass’n of New England, Inc.*\(^{56}\) There, the court held that Title III could require an insurance provider to alter disability-based caps in insurance plans.\(^{57}\) The First Circuit thereby reversed the district court’s determination that the defendant insurance company was not covered under Title III because it operated out of a corporate office and did not offer services to the public at a physical place.\(^{58}\) The First Circuit determined that, even if the term “public accommodation” was ambiguous, Congress did not intend that the ADA be limited to physical places such that the disabled would be excluded from major parts of the commercial economy.\(^{59}\)

In *Doe v. Mutual of Omaha Insurance Co.*, the U.S. Court of Appeals for the Seventh Circuit agreed with *Carparts* that Title III regulated access to non-

\(^{53}\) See infra notes 63–67 and accompanying text.

\(^{54}\) See infra notes 63–67 and accompanying text.

\(^{55}\) See infra notes 74–83 and accompanying text.

\(^{56}\) *Carparts Distribution Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New England, Inc.*, 37 F.3d 12, 18–19 (1st Cir. 1994).

\(^{57}\) *Id.*: see Nat’l Ass’n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 200 (D. Mass. 2012) (relying on *Carparts* in support of the proposition that Title III extends to websites, and holding that web-based video provider was therefore covered as a public accommodation); see also Nat’l Fed’n of the Blind v. Scribd Inc., 97 F. Supp. 3d 565, 576 (D. Vt. 2015) (relying on *Carparts* and *Netflix* in support of the conclusion that a web-based library service was covered under Title III in a jurisdiction where no physical/non-physical entity distinction had been drawn).

\(^{58}\) *Carparts*, 37 F.3d at 18–19. The *Carparts* plaintiff had taken part in a medical reimbursement plan for over a decade before he learned that the plan administrator had capped coverage at $25,000 for illnesses related to Acquired Immune Deficiency Syndrome (AIDS). *Id.* at 14. This limitation in coverage directly affected the plaintiff because he suffered from AIDS and was receiving coverage for AIDS-related illnesses for roughly two years before the cap was imposed. *Id.* The plaintiff—who died before his case was heard on appeal—was eligible for up to one million dollars in lifetime coverage under the reimbursement plan before the administrator imposed the cap. *Id.*

\(^{59}\) *Id.* at 19–20.
physical entities, including websites. 60 Like the Carparts plaintiff, the Mutual of Omaha plaintiff asserted that his insurance company discriminated against him because it capped coverage for individuals suffering from AIDS. 61 Nonetheless, the court held that the plaintiff failed to state a claim against the insurance provider on the grounds that Title III did not cover the contents of the plans. 62

Unlike the First and Seventh Circuits, the U.S. Courts of Appeals for the Sixth, Third, and Ninth Circuits held that Title III only guaranteed equal access to insurance providers that offered plans at physical locations open to the general public. 63 The Sixth Circuit paved the way for this approach in Parker v. Metropolitan Life Insurance Co. 64 There, the court held that a third-party provider’s long-term employee disability plan was not subject to Title III. 65 The court reasoned that there was not a public commercial “nexus” between the defendant provider and the plaintiff employee because there was no physical location where the general public could walk in and purchase the plan. 66 The Third and Ninth Circuits relied on Parker in holding that Title III claims against benefits providers likewise required some nexus between the provider, public customers, and a physical place. 67

In its 2002 decision in Rendon v. Valleycrest Productions, Ltd., the Eleventh Circuit expanded the definition of Title III discrimination past the prototypical storefront. 68 There, the court held that a call-in television game show show discriminated against mobility and hearing-impaired individuals by failing to provide an accessible telephone hotline service. 69 Relying on Title III’s plain language, the

60 Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557, 559, 561 (7th Cir. 1999); Carparts, 37 F.3d at 19.
61 Mutual of Omaha, 179 F.3d at 559.
62 Carparts, 37 F.3d at 19; see Morgan v. Joint Admin. Bd., 268 F.3d 456, 459 (7th Cir. 2001) (noting that Title III is not limited to physical places); Mutual of Omaha, 179 F.3d at 559, 561 (citing approvingly to Carparts for the proposition that the location “in physical or in electronic space” of a provider of goods or services is irrelevant to Title III and that its plain language covers websites, but concluding that the Title does not regulate the contents of insurance policies).
63 Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1115 (9th Cir. 2000); Ford v. Schering-Plough Corp., 145 F.3d 601, 614 (3d Cir. 1998); Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 10142 (6th Cir. 1997).
64 Parker, 121 F.3d at 1012. The Sixth Circuit’s decision in Parker relied on the definition of public accommodation set forth in Stoutenborough v. National Football League, Inc., which held that a television broadcast offered by a third party was not a service of a public accommodation because it was not provided in connection with a football stadium owned by the defendant National Football League. Parker, 121 F.3d at 1011; Stoutenborough v. Nat’l Football League, Inc., 59 F.3d 580, 583 (6th Cir. 1995).
65 Parker, 121 F.3d at 1014.
66 Id. at 1010.
67 Weyer, 198 F.3d at 1115; Ford, 145 F.3d at 614.
68 Rendon v. Valleycrest Prods., 294 F.3d 1279, 1280 (11th Cir. 2002).
69 Id. Hearing impaired individuals requested that the game show provide “Telecommunications Devices for the Deaf services” (“TDD”), which would allow them to participate using TDD machines. Id. at 1281 n.1. The requested TDD machines would have allowed the hearing-impaired plaintiffs to
court reasoned that places of public accommodation were required to remove both physical and non-physical barriers to participation. The court further reasoned that Parker and its progeny did not bear on the claim at hand because the television station offered services directly to the public. Finally, the court acknowledged in dicta that the television show had a physical nexus to the public because the show was taped on a set that was open to public audience members.

2. Divisions Among District Courts on Commercial Website Accessibility

District courts across four circuits are divided over the extent to which commercial websites are covered by Title III and, specifically, whether a website must have a nexus to a physical store to be covered. A court first applied the physical nexus requirement to a website in Access Now, Inc. v. Southwest Airlines, Co., where the U.S. District Court for the Southern District of Florida dismissed the claim of a blind individual who could not shop for plane tickets on Southwest Airlines’ website. The court based its dismissal on the fact that the plaintiff had not alleged a barrier to a physical place. The court relied on Parker and the DOJ regulations that defined public accommodations with reference to physical facilities. The court then defined access to a website as a separate

receive audio instructions as text on a screen before responding through a touch tone telephone. Id. The court noted that the ADA required telecommunications carriers to offer TDD services, which also allowed deaf and hearing-impaired individuals to communicate by telephone with hearing individuals by sending typed messages to an operator who would then read them aloud. Id.; see 47 U.S.C. § 225(a)(2)–(3)(d) (2012). Other plaintiffs with upper body mobility disabilities asserted that they could not participate by phone in the game show because they were unable to rapidly move their fingers as required by the show’s “fast finger process” of recording contestant responses to trivia questions. Rendon, 294 F.3d at 1280–81.

70 Rendon, 294 F.3d at 1283–84.

71 Id. at 1284 n.8. Unlike the Rendon plaintiffs, who sought to directly participate in the defendant’s game show, the plaintiffs in Parker, Weyer, and Ford alleged discrimination on the basis of disability arising out of terms contained in the benefits plans of third party providers with whom their employers had contracted. Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1115 (9th Cir. 2000); Ford v. Schering-Plough Corp., 145 F.3d 601, 614 (3d Cir. 1998); Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1012 (6th Cir. 1997).

72 See Rendon, 294 F.3d at 1284 n.8 (noting a physical nexus requirement but not adopting it).


74 Access Now, 227 F. Supp. 2d at 1312.

75 Id. at 1321. Access Now was dismissed in the Eleventh Circuit on grounds that it presented a theory on appeal that had not been briefed or argued in the district court. See Access Now, Inc. v. Sw. Airlines, Co., 385 F.3d 1324, 1328–29 (11th Cir. 2004) (noting that the fact that plaintiffs sought to categorize the defendant airline as a “travel service” with a nexus to a physical location was not established in the record).

right not covered by the specific provisions of Title III, which Congress only intended to cover physical places accessible to the public. Notably, the court further reasoned that Title III did not provide an access right to commercial websites offering services to the general public because there are not any statutory website accessibility standards to govern the right.

The physical nexus requirement was applied to produce the opposite result in *National Federation of the Blind v. Target Corp.* There, the U.S. District Court for the Northern District of California refused to dismiss a Title III class action claim, which led to a settlement. The court found that Target could have denied the vision impaired plaintiffs access to its physical stores through its website—an off-site “gateway” to its brick-and-mortar locations that the court likened to the telephone hotline through which disabled individuals were denied access to a game show in *Rendon*. The court followed the Ninth Circuit’s physical nexus requirement in holding that Target’s services could be covered by Title III because its operations were anchored to a physical location. In keeping with the limits of *Target*, other district courts in the Ninth Circuit have dismissed

---

77 See *Access Now*, 227 F. Supp. 2d at 1318. As an added basis for its conclusion with regard to Congress’s clear intent for Title III to apply only in claims alleging denial of access to a physical place, the court relied on a decision involving access barriers on a cruise ship. Stevens v. Premier Cruises, Inc., 215 F.3d 1237, 1241 (11th Cir. 2000); *Access Now*, 227 F. Supp. 2d at 1318. In that decision, the Eleventh Circuit noted Title III’s comprehensiveness and the intended breadth of the ADA as bases for its conclusion that, although cruise ships were not covered by the terms of Title III, otherwise covered entities operating on cruise ships were covered. Stevens, 215 F.3d 1237, 1241. Accordingly, although the appellate court had noted that Title III’s intended comprehensiveness operated to the inclusion of entities operating in a different manner than those listed in the Title, the *Access Now* court relied on its decision for the proposition that Title III’s comprehensiveness operated to the exclusion of non-physical entities. *Access Now*, 227 F. Supp. 2d at 1318.


80 Id.

81 *Rendon* v. Valleycrest Prods., 294 F.3d 1279, 1283–84 (11th Cir. 2002); *Target*, 452 F. Supp. 2d at 955. In *Rendon*, the game show producer defendant did not dispute that the location where its contest took place was a place of public accommodation under Title III. 294 F.3d at 1283–84; see 42 U.S.C. § 12181(7)(C) (2012). Nor did the defendant contest that the hotline dial-in system tended to exclude disabled individuals who could not hear audio instructions or type rapidly enough to participate in its show. *Rendon*, 294 F.3d at 1283; see 42 U.S.C. § 12182(b)(2)(A)(i). Rather, the game show producers argued that the court’s inquiry should have been confined to the question of whether the telephone hotline—existing independently from the game show—was a place of public accommodation under Title III. *Rendon*, 294 F.3d at 1283. Rejecting this argument, the court concluded that the defendant was covered under Title III because the game show—held in a physical space—was a place of public accommodation, and the disabled plaintiffs had properly alleged that a discriminatory denial of access occurred off site because an inaccessible “fast finger” hotline system had prevented them from participating in the show. Id. at 1286.

82 *Weyer* v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1115 (9th Cir. 2000); *Target*, 452 F. Supp. 2d at 952, 955.
claims against web-only businesses that fail to allege denials of access to physical places open to the public.83

In 2012, the U.S. District Court for the Northern District of California dismissed a claim alleging that Netflix provided inaccessible web-based video services.84 The same year, however, the U.S. District Court for the District of Massachusetts allowed a similar claim against Netflix to proceed—leading to a settlement.85 In *National Association of the Deaf v. Netflix, Inc.*, a group of deaf and hard of hearing individuals from Massachusetts alleged that they were denied equal access to Netflix’s video content because it did not include a captioning option.86 Rejecting an invitation to generally limit Title III to public facing, non-home-based entities specifically listed, the court noted that the Title covered services of public accommodations; it was not limited to services offered at public facing locations.87 The court further reasoned that Congress intended for the ADA adapt to changing technology when feasible, and that Title III’s categories of public accommodations be construed with broad inclusivity.88

83 See, e.g., Young v. Facebook, Inc., 790 F. Supp. 2d 1110, 1115–16 (N.D. Cal. 2011) (dismissing a Title III claim against a social media website on grounds that no nexus existed between the defendant website and a physical place of public accommodation); Ouellette v. Viacom, No. CV 10-133-M-DWM-JCL, 2011 WL 1882780, at *5 (D. Mont. Mar. 31, 2011) (holding that plaintiff alleging a denial of access to Google, YouTube, and Myspace had failed to state a Title III claim because the websites were not physical places of public accommodation or gateways thereto).


86 Netflix, 869 F. Supp. 2d at 198. Although Netflix offered closed captioning for some titles available through its “watch instantly” feature, many others were not captioned. Id. at 199. Additionally, Netflix did not separately categorize titles with closed captioning on its website. Id. As a result, when the website generated suggestions of films for disabled customers based on their prior selections, it suggested films without closed captioning even if they had previously self-selected films with closed captioning. Id. Per the terms of a consent decree entered into in 2012, Netflix agreed to provide closed captioning for all of its on-demand video content within two years. Consent Decree § 3, Nat’l Ass’n of the Deaf v. Netflix, Inc., No. 11-30168-MAP (W.D. Mass. Oct. 9, 2012) [hereinafter 2012 Netflix Consent Decree]. The consent decree further provided that, within four years, Netflix would add closed captions to video content within one week of its being made available on the website. Id. § 4. In 2016, Netflix went a step further towards making its website completely accessible when it entered into a settlement agreement with a non-profit disability rights group representing blind and visually impaired individuals. Press Release, Disability Rights Advocates, Netflix Settlement (Apr. 14, 2016), http://dralegal.org/case/netflix-settlement [https://perma.cc/V993-39SW]. Per the settlement agreement, Netflix agreed to add audio descriptions—real time spoken narration of visual events occurring onscreen—for a portion of the most popular videos that it offers online. Netflix Settlement Agreement and Release at 2.2, 4.1, 4.2, Apr. 27, 2016, https://www.adatitleiii.com/wp-content/uploads/sites/121/2016/04/Settlement_Agreement_FOR_WEBSITEv2.pdf [https://perma.cc/2ALH-9HGA] [hereinafter Netflix Settlement]. Netflix also agreed to make its website and mobile applications WCAG 2.0 AA compliant and compatible with screen-readers. Id. at 2.1, 3.2.

87 Netflix, 869 F. Supp. 2d at 201.

88 Id. at 200–01.
II. PUTTING THE CART BEFORE THE HORSE: CONSENSUS WEB ACCESSIBILITY STANDARDS EMERGE BEFORE TITLE III RULES

Although courts remain divided on the question of web accessibility under Title III, the federal government has made strides towards developing national web accessibility standards.\(^{89}\) Specifically, federal agencies promulgated industry-specific regulations and attempted to create broader Title III web accessibility rules.\(^{90}\) Additionally, the DOJ once defined the contours of a national commercial web accessibility standard in proposed rules.\(^{91}\)

A. The Federal Government and Major Industries Adopt Consensus Web Accessibility Standards

Congress and federal agencies have long recognized that disabled individuals face a digital divide.\(^{92}\) They have addressed this problem by incrementally regulating the public and private sectors—increasingly under the consensus WCAG 2.0 AA standards.\(^{93}\) This Section explains the WCAG 2.0 AA standards and how they have been adapted to regulate the federal government as well as the communications, airline, and healthcare industries over the last two decades.\(^{94}\)

1. The WCAG 2.0 AA Web Accessibility Standards

Since 1994, the World Wide Web Consortium has endeavored to make the web widely accessible.\(^{95}\) In 2008, it published WCAG 2.0 guidelines that are now broadly recognized.\(^{96}\) The WCAG 2.0 identify four “principles” for developers, under which web content must be “perceivable,” “operable,” “understandable,” and “robust.”\(^{97}\) To help developers follow these principles, the WCAG 2.0 identify specific ways to make websites more accessible, such as providing “text alternatives”—written tags that make images “perceivable” to vision and hearing impaired individuals.\(^{98}\) Within each of the twelve guidelines, the WCAG 2.0 contains testable “success criteria” through which websites can be measured accord-

\(^{89}\) See infra notes 101–126 and accompanying text.
\(^{90}\) See infra notes 101–126 and accompanying text.
\(^{91}\) See infra notes 117–126 and accompanying text.
\(^{92}\) See infra notes 101–116 and accompanying text.
\(^{93}\) See infra notes 101–116 and accompanying text.
\(^{94}\) See infra notes 95–116 and accompanying text.
\(^{95}\) WCAG 2.0, supra note 15, at Introduction.
\(^{96}\) 2016 Proposed Title II Website Rule, supra note 6, at 28,662–63. See generally WCAG 2.0, supra note 15.
\(^{97}\) WCAG 2.0, supra note 15, at Introduction. The WCAG are “technology neutral” because they apply across various platforms used on computers and mobile devices. 2016 Proposed Title II Website Rule, supra note 6, at 28,663–64; WCAG 2.0, supra note 15, at Introduction.
\(^{98}\) WCAG 2.0, supra note 15, at Guideline 1.1.
ing to A, AA, or AAA conformance levels. Because WCAG 2.0 AA is a widely accepted consensus standard, the DOJ considered requiring that commercial websites adopt WCAG 2.0 AA under Title III regulations.

2. Section 508 Confronts the Digital Divide in the Federal Government and Adopts WCAG 2.0 AA Standards

The Rehabilitation Act of 1973 prohibits federally funded entities from discriminating against individuals with disabilities. In 1998, Section 508 of the Rehabilitation Act was amended to create enforceable digital accessibility requirements for federal departments and agencies. One year after the Section 508 standards were enacted, Congress continued to press for stronger web accessibility legislation.

After nearly two decades, the ADA still lacks an analogue to Section 508. With Section 508, however, Congress has addressed the growing digital divide with a major governmental response to website inaccessibility that serves as a guide for the private sector. Furthermore, Section 508 illustrates Congress’s considered approach to addressing digital access barriers.

---

99 Id. at Introduction. As an example of different WCAG 2.0 conformance standards, level A requires closed captioning on pre-recorded video content, whereas the cumulative level AA standard requires captioning on live and pre-recorded video content. Id. at Guideline 1.2.

100 2016 Proposed Title II Website Rule, supra note 6, at 28,663.


102 See 29 U.S.C. § 794d (Section 508 of the Rehabilitation Act of 1973 as amended); 143 CONG. REC. 4660 (1997) (statement of Sen. Dodd introducing proposed § 508 amendments in the Senate) (“Barriers to information and technology must be broken down . . . . Let the Federal Government provide a good example to the private sector in its efforts.”).

103 See 148 CONG. REC. 1125-03 (2002) (statement of Rep. James Langevin) (noting accomplishments in the private sector) (“The time has come for us to make our websites accessible to our growing e-citizenry. The progress has begun in the federal agencies, and now Congress needs to follow suit.”).


105 See Electronic and Information Technology Accessibility Standards, 65 Fed. Reg. 80,500, 80,522 (Dec. 21, 2000) (to be codified at 36 C.F.R. pt. 1194) (promulgating regulations regarding web accessibility standards and noting possible “spillover” effect in the private sector); Yukins, supra note 101, at 680 (noting the potential for Section 508 to spur general adoption of web accessibility standards). But see Abrar & Dingle, supra note 45, at 151 (noting that the Section 508 amendment did not spur a major shift toward accessibility in the private sector in the first decade of its existence due in part to the lack of clarity of the requirements and defenses).

The U.S. Access Board, which sets the standards for both Section 508 and ADA regulations, aligned Section 508 with WCAG 2.0 AA standards for websites and mobile applications in 2017.\textsuperscript{107} As the federal government—the largest information technology purchaser in the world—continues with its plan to implement WCAG 2.0 AA standards, it is joining healthcare providers, state and local governments, commercial airlines, and many companies.\textsuperscript{108}

3. Regulating Digital Accessibility in the Communications, Airline, and Healthcare Industries

Congress began to broadly regulate digital accessibility in the communications industry when it passed the Twenty-First Century Communications and Video Accessibility Act of 2010 ("CVAA") in 2010.\textsuperscript{109} The passage of the CVAA marked a shift in federal policy to address digital accessibility in the private sector, after which digital accessibility regulations governing the airline and healthcare sectors were promulgated.\textsuperscript{110} The CVAA aimed to increase access to modern communications for individuals with disabilities by directing the Federal Communications Commission to promulgate accessibility rules governing communication technology and services.\textsuperscript{111} The statute was structured to promote a shift towards accessibility in communications in part through a multi-stakeholder

\textsuperscript{107}See 42 U.S.C. § 12204 (2012) (providing that the Access Board issues implementing regulations under the ADA); 2017 Final Rule on Section 508, supra note 106, at 5791 (incorporating WCAG 2.0 web accessibility standards by reference in order to “increase harmonization with international standards”); Yukins, supra note 101, at 671, 673–75 (discussing amendments to Section 508 designed to adapt to technological changes and increase adoption by adding an enforcement mechanism).

\textsuperscript{108}2017 Final Rule on Section 508, supra note 106, at 5791; see 42 U.S.C. § 18116 (mandating nondiscrimination by entities that receive federal funds through the Patient Protection and Affordable Care Act); Nondiscrimination on the Basis of Disability in Air Travel: Accessibility of Web Sites and Automated Kiosks at U.S. Airports and Accessibility of Aircraft and Stowage of Wheelchairs, 78 Fed. Reg. 67,882, 67,882 (Nov. 12, 2013) (to be codified at 14 C.F.R. pts. 382, 399, 49 C.F.R. pt. 27) [hereinafter 2013 Air Carrier Web Accessibility Rule] (setting forth commercial airline web accessibility standards); NICHOLAS HENRY, PUBLIC ADMINISTRATION & PUBLIC AFFAIRS 157 (12th ed. 2015) (discussing the history of the federal government’s information technology procurement programs and noting that the federal government hosts over 24,000 websites); see, e.g., MINN. STAT. § 16E.03 (2017) (requiring state agencies to comply with WCAG 2.0); 27 ADMIN. CODE OF N.Y.C. § 23-802 (2016) (adopting WCAG 2.0 AA).

\textsuperscript{109}47 U.S.C. §§ 615c, 616–620.

\textsuperscript{110}Id.; see 2013 Air Carrier Web Accessibility Rule, supra note 108, at 67,882 (setting forth web accessibility regulations for the commercial airline industry); 45 C.F.R. § 92.204 (2017) (requiring healthcare programs that receive federal to maintain accessible websites).

regulatory process involving groups comprised of technical experts, industry representatives, and disability rights advocates.\textsuperscript{112}

In 2013, the Department of Transportation (DOT) set forth the first website accessibility regulation directed squarely at the private sector when it promulgated a rule requiring commercial air carriers to implement WCAG 2.0 AA.\textsuperscript{113} The DOT adopted a “tiered” approach to implementation, under which carriers were required to take steps towards becoming fully accessible over the course of two years.\textsuperscript{114} Following the DOT’s lead, the Department of Health and Human Services (HHS) issued a rule requiring implementation of WCAG 2.0 AA on Medicaid managed care provider websites in 2016.\textsuperscript{115} HHS then indicated that all federally funded healthcare providers offering online services should adopt WCAG 2.0 AA or the then existing Section 508 standards.\textsuperscript{116}

\textbf{B. The DOJ’s Protracted Path Towards Regulating Web Accessibility Under Title III}

Although the DOJ has not successfully promulgated Title III website regulations, it maintains the position that Title III requires public accommodations to make internet communications accessible.\textsuperscript{117} The DOJ has filed briefs and statements in support of this position in a variety of private actions seeking rea-

\textsuperscript{112} See 47 U.S.C. § 615c(b)–(c) (detailing the composition of an advisory committee tasked with generating a report on emergency and video programming accessibility). The CVAA’s “clearinghouse” provision extends the statute’s reach by requiring that the Access Board and other public and private accessibility stakeholders disseminate information regarding accessible communication products and services to the public. See id. § 618(d)–(e). Although public accommodations may be covered by both Title III and the CVAA, at least one court held that they likely complemented each other. See Nat’l Ass’n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 204–05 (D. Mass. 2012).

\textsuperscript{113} 2013 Air Carrier Web Accessibility Rule, supra note 108, at 67,882; see 42 U.S.C. § 12181(1) (2012) (exempting air carriers from Title III requirements); 49 U.S.C. § 41705 (setting forth provisions of the Air Carrier Access Act of 1986 (“ACAA”)); see also Boswell v. Skywest Airlines, Inc., 361 F.3d 1263, 1269 (10th Cir. 2004) (holding that the ACAA does not contain an implied private right of action but rather relies on administrative enforcement). In adopting the rule, the DOT rejected the airline industry position that carriers should not be a “test case” for uniform implementation of WCAG 2.0 and calls for the agency to delay its rules pending Title III web regulations given the similarity between commercial carriers and many public accommodations. 2013 Air Carrier Web Accessibility Rule, supra note 108, at 67,887–88. A group representing fifty Internet industry leaders supported the uniform adoption of WCAG 2.0 on grounds that it was “the most current and complete standard for web accessibility” and would harmonize with commercial standards. Id. Disability rights groups also supported WCAG 2.0. Id.

\textsuperscript{114} 2013 Air Carrier Web Accessibility Rule, supra note 108, at 67,887, 67,889–90.

\textsuperscript{115} See 42 C.F.R. § 438.10 (2017) (defining “readily accessible” in the context of services provided by Medicaid managed care programs as compliant with WCAG 2.0 AA and successor versions as well as Section 508).


\textsuperscript{117} Letter from Deval L. Patrick, Assistant Att’y Gen., Civil Rights Div., to Tom Harkin, U.S. Senator (Sept. 9, 1996).
sonable accommodations from web-based companies. The DOJ has also entered into agreements that enforce web accessibility under Title III, such as a 2014 agreement with a major online grocery store that required the store to comply with WCAG 2.0 AA success criteria on its website and mobile applications.

In the last decade, the DOJ’s Title II and III rulemaking activities have kept pace with its litigation activity in following the trend toward widespread adoption of WCAG 2.0 AA. In 2010, the DOJ issued an Advanced Notice of Proposed Rulemaking (“ANPRM”) for Title II and III website regulations following a congressional hearing that urged the DOJ to take action. In issuing the ANPRM, the DOJ noted the need for regulations based on findings that commercial internet companies were not sufficiently regulating themselves, courts lacked clarity regarding the breadth of Title III, and businesses were unsure of what standards to apply. In response, the DOJ proposed adopting the WCAG 2.0 AA criteria or the then-existing Section 508 guidelines that, at the time, did not harmonize with WCAG 2.0 AA.

In 2016, the DOJ issued an updated Title II web accessibility Supplemental Advanced Notice of Proposed Rulemaking (“SANPRM”) that again proposed the WCAG 2.0 AA standard that was considered in the 2010 ANPRM. Although the 2016 SANPRM did not directly regulate the private sector, private industry groups weighed in during the comment period, demonstrating readiness to adopt WCAG 2.0 guidelines as well as offering more refined comments re-

---

120 Achieving the Promises of the Americans with Disabilities Act in the Digital Age—Current Issues, Challenges, and Opportunities: Hearing Before the Subcomm. on the Constitution, Civil Rights and Civil Liberties of the H. Comm. on the Judiciary, 111th Cong. 80, 2 (2010) [hereinafter 2010 Hearing] (statement of Rep. Nadler); ADA Titles II and III 2010 ANPRM, supra note 104, at 43,460. Title III’s application to commercial websites was treated as a foregone conclusion, and focus shifted to the implementation of website accessibility regulations. 2010 Hearing, supra, at 16.
121 ADA Titles II and III 2010 ANPRM, supra note 104, at 43,464.
122 Id. at 43,465.
123 WCAG 2.0, supra note 15, at Conformance. Compare 2016 Proposed Title II Website Rule, supra note 6, at 28,663 (stating that “the [DOJ] is considering proposing [WCAG 2.0 AA] as the technical standard . . . because it includes criteria that provide more comprehensive Web accessibility to individuals with disabilities . . . [and] Level AA conformance is widely used, indicating that it is generally feasible for Web developers to implement”), with ADA Titles II and III 2010 ANPRM, supra note 104, at 43,465 (detailing the WCAG 2.0 as “recognized . . . international guidelines for Web accessibility” and soliciting comments as to whether the DOJ should “adopt the [WCAG 2.0 AA] as its standard for Web site accessibility for entities covered by [ADA] titles II and III”).
regarding the difficulties of implementation. This back and forth regarding standards proceeded on a separate track from the contemporaneous wave of Title III settlements. Nonetheless, the DOJ was working through many enforcement and implementation questions addressed in individual suits.

III. PRIVATE ENFORCEMENT OF WEB ACCESSIBILITY UNDER TITLE III AND STATE-LEVEL REGULATORY ALTERNATIVES

Prior to 2015, Title III web accessibility enforcement occurred at a measured pace through settlement agreements between influential industry defendants and advocacy groups or state attorneys general. More recently, profit-seeking firms have initiated a second wave of enforcement. As demonstrated by state-level web accessibility law and a comprehensive web accessibility law enacted in a Canadian province, however, there is a middle ground between scattershot private enforcement and complete national regulation under Title III. This Part discusses how private enforcement of web accessibility under Title III evolved from selective, high-impact lawsuits to widespread, profit-driven settlement. It then examines public enforcement mechanisms based in state and provincial laws.

124 IBM, Comment Letter on 2016 Web Accessibility SANPRM for Title II of the ADA, at Question 1 (Oct. 7, 2016); Information Technology Industry Council (ITI), Comment Letter on 2016 Web Accessibility SANPRM for Title II of the ADA, at Question 2 (Oct. 7, 2016) [hereinafter 2016 ITI Comment]; Internet Association, Comment Letter on 2016 Web Accessibility SANPRM for Title II of the ADA, at 2 (Oct. 7, 2016) [hereinafter 2016 Internet Association Comment]. Among other suggestions, commenters proposed extended compliance timelines—such as a two-year deadline for WCAG 2.0 A followed by a three-year deadline for 2.0 AA—as well as a uniform automated compliance testing tool, and a carve out for mobile applications. See, e.g., 2016 Internet Association Comment, supra, at 4A, 5B, 6.

125 See infra notes 139–142 and accompanying text.

126 Compare 2016 Internet Association Comment, supra note 124, at 4A (discussing the need for training and institutionalization of web accessibility), with Scribd-NFB Agreement, supra note 15, at 5 (providing for in-house web accessibility policies and training programs).


128 See infra notes 139–155 and accompanying text.

129 See infra notes 157–167 and accompanying text.

130 See infra notes 132–155 and accompanying text.

131 See infra notes 157–167 and accompanying text.
A. Impact Actions by Disability Cause Lawyers and State Attorneys General

Disability cause lawyers use litigation—or the threat of litigation—against industry stakeholders to increase recognition of disability rights.132 In the Title III commercial website context, cause lawyers seek to compel businesses to institutionalize web accessibility policies according to sophisticated, public settlement agreements.133 For example, a 2016 settlement agreement required ETrade Financial to adopt the WCAG 2.0 AA guidelines and implement them on its website and mobile applications according to a detailed schedule.134 It also required institutionalization through policies and in-house training.135

Like cause lawyers, state attorneys general have achieved agreements implementing sophisticated web accessibility compliance practices with a high degree of accountability on an industry-specific basis.136 For instance, attorneys general in Massachusetts and New York have launched public ADA investigations, spurring web accessibility compliance among industry leaders.137 Subject

---


133 Waterstone et al., supra note 132, at 1316. In order to generate long-term, replicable compliance models, cause lawyers have framed accessibility for disabled individuals as an extension of companies’ pre-existing cultures while negotiating with them. Id. The two web accessibility agreements reached with Netflix in 2012 and 2016 demonstrate that collaborative implementation and positive publicity can lead to future adoption by an industry leader. See Dara Kerr, Netflix and Deaf-Rights Group Settle Suit Over Video Captions, CNET (Oct. 11, 2012, 6:21 PM), https://www.cnet.com/news/netflix-and-deaf-rights-group-settle-suit-over-video-captions [https://perma.cc/4B5Y-T7TL] (quoting Netflix’s Chief Product Officer, who stated after the 2012 agreement that Netflix was “the industry leader” in providing accessible content and expressed the company’s desire to set a benchmark).


to public scrutiny and the possibility of costly enforcement, one corporation targeted by the New York attorney general began championing the web accessibility cause, paying investigation expenses, and donating to disability rights organizations.  

B. Second-Wave Web Accessibility Enforcement: Scattershot Settlements

As the consensus regarding the WCAG 2.0 standard has grown, there has been a spike in private web accessibility suits and demand letters. These private enforcement actions benefited from the earlier institutional settlements because they created effective templates for WCAG 2.0 enforcement agreements. In fact, many of these private enforcement agreements specifically reference the terms of major DOJ and advocacy group settlement agreements as articulating universal compliance standards under WCAG 2.0 AA. Although the spread of small scale web accessibility settlements stands to increase accessibility, it exhibits characteristics of a fee-driven, “serial” enforcement pattern that repeat-player firms use to seek a high volume of duplicative settlements.
In general, Title III enforcement actions can only be brought by disabled individuals who are directly discriminated against, and the incentives for bringing these suits are low.\(^{143}\) Under Title III, remedies are limited to injunctive relief and attorneys’ fees.\(^{144}\) Only a small minority of states provide money damages for violations of Title III or state disability laws.\(^{145}\) Furthermore, the Supreme Court interpreted the ADA’s fee-shifting provision to foreclose awards of attorneys’ fees when ADA compliance is achieved before a judicial decision or enforceable settlement agreement is reached.\(^{146}\) Consequently, there is a low prospect of compensation associated with litigation.\(^{147}\)

The relatively small price-tag associated with a Title III violation and the unlikelihood of suit may make it rational for defendants to take a “wait and settle” approach.\(^{148}\) Furthermore, Title III’s limited remedies have led to the proliferation of low-value “serial” litigation practices, where firms seek numerous settlements with minimal deterrent effect.\(^{149}\) Serial litigation has succeeded as a method for repeat-player plaintiffs’ firms to make Title III litigation profitable by...
amassing scores of low-cost settlements with businesses that want to avoid paying those firms’ attorneys’ fees.150 Because defendants can avoid paying attorneys’ fees by taking steps to comply with the ADA, serial litigators race to surprise defendants before they are aware of—or before they have begun to remedy—ADA non-compliance.151

Serial litigation accounts for many of the Title III claims over the last decade, including more recent claims regarding website accessibility.152 Serial filing is an attractive tactic for website accessibility claims because of widespread non-compliance, lack of clear regulatory obligations, and the ease of using automated diagnostic tools to spot accessibility flaws.153 Although serial filing may bring about compliance gains, it has been heavily criticized for enabling repeat players to force defendants to pay for minor violations.154 In response, Congress and the judiciary have endeavored to impose Title III notice requirements that would protect defendants from surprise suits.155

150 Id. at 251–52; see Michael Ashley Stein et al., Cause Lawyering for People with Disabilities Law and the Contradictions of the Disability Rights Movement, 123 HARV. L. REV. 1658, 1681 n.72 (2010) (noting common practices of serial litigators that include seeking quick settlements and pursuing Title III claims in jurisdictions that have state law analogues providing for awards of compensatory damages).

151 Bagenstos, supra note 144, at 14–15.

152 Randazzo, supra note 18; see Vu et al., supra note 139 (reporting a 63% rise in ADA Title III filings between 2015 and 2016, and an average of over 4,500 Title III suits filed annually in 2014 and 2015).

153 Omaha Steaks Complaint, supra note 141, at 2–3; Harbor Freight Complaint, supra note 142, at 1–3; Randazzo, supra note 18. A demand letter sent by a group representing disabled individuals to a Nebraska restaurant in 2017 underscores the potential for an increase in small-scale, confidential web accessibility settlements. See Omaha Steaks Complaint, supra note 141, at 2–3. The group explained that it filed eighteen web accessibility suits and proposed a confidential settlement under which the restaurant would pay the group’s expected attorney’s fees. Id. Although the suit was filed in a jurisdiction where there was no district or circuit precedent regarding website accessibility under Title III, the restaurant noted that the WCAG “are recognized as setting the baseline requirements for website accessibility.” Id. at 4.


155 See Molski v. Mandarin Touch Rest., 347 F. Supp. 2d 860, 861 n.2, 867–68 (C.D. Cal. 2004) (finding that a disabled plaintiff was a “vexatious litigant” after he had filed roughly 400 ADA actions across California); Bagenstos, supra note 144, at 16–17 (noting legislative and judicial responses to mass filings). A 2015 congressional bill proposed a lengthy pre-suit notice requirement on Title III actions. See H.R. 3765, 114th Cong. (2015). The bill would have required a disabled individual to notify a public accommodation in writing of specific access barriers they faced and then file suit only if the public accommodation failed to respond with a plan for remediation within 60 days or failed to “make substantial progress” towards remediation within 120 days of having sent a plan. Id. § 4. Additionally, the bill would have imposed criminal fines for sending demand letters alleging non-specific Title III violations. Id. § 3.
C. Alternative State-Level and International Web Accessibility Enforcement Regimes

State laws have historically increased civil rights protections beyond federal baselines. Following this tradition, web accessibility legislation was proposed in Maryland in 2012. Also, in the Canadian province of Ontario, web accessibility legislation regulating the private sector was passed in 2005 and is currently on an implementation schedule ends in 2025.

The proposed bill in Maryland would have required commercial websites to become accessible to the blind and visually impaired. In order to ensure the feasibility of implementation, the bill fully exempted businesses generating less than one million dollars in annual revenue from coverage. By directing complaints to a disability commission, the bill created the possibility for the consolidation of multiple claims against individual websites. It also provided for pre-suit mediation procedures to reduce litigation costs.

Supported by substantial regulations and infrastructure, the 2005 Accessibility for Ontarians with Disabilities Act (“AODA”) requires large private commercial websites to meet WCAG 2.0 AA web accessibility standards by 2025.
The legislation creates a tiered implementation timeline that proceeds from the government to the public sector and then to large and small private sector entities. Although the AODA gives a government agency the ability to audit businesses and assess heavy fines, it allows regulated entities to self-report compliance as a first step in enforcement. In order to clarify the steps that specific entities must take to meet WCAG 2.0 standards, the government of Ontario provides resources for self-assessment, and information on multi-prong approaches to web accessibility that include models for policies, training, awareness, and infrastructure.

IV. STRUCTURING WEB ACCESSIBILITY ENFORCEMENT

The combination of consensus web accessibility standards, large-scale litigation efforts, and a receptive judiciary have spurred individual Title III web accessibility suits—even in the absence of regulations. Accordingly, the cur-
rent enforcement regime is highly unstructured. This Part argues that, without DOJ regulations, the private enforcement regime is inefficient and generates backlash. In order to re-route web accessibility under Title III, this Part argues for increased litigation by cause lawyers and state attorneys general, and for state-level web accessibility legislation. Section A of this Part concludes that the judiciary is likely to further entrench website accessibility under Title III rather than limit it according to an anachronistic physical nexus requirement. Section B argues for a more efficient and broad-based website accessibility implementation under Title III through existing templates of disability cause lawyering, actions by state attorneys general, and state-level legislation.

A. Commercial Websites as Title III Public Accommodations

For two decades, litigation has revealed the negative practical and doctrinal consequences of applying Parker’s anachronistic interpretation of Title III to include only those commercial websites with a nexus to physical places. This supports the DOJ’s conclusion that further litigation will tend to yield broad application of Title III online. When Parker and its progeny construed Title III to exclude benefits plans, they asserted a “physical place open to public access” as a condition triggering Title III protections. The physical place standard, how-

---

169 See 2013 Air Carrier Web Accessibility Rule, supra note 108, at 67,883 (requiring the websites of commercial airlines to comply with WCAG 2.0 AA); 2016 Proposed Title II Website Rule, supra note 6, at 26,663–64 (noting the DOJ’s intention to implement a web accessibility rule for state and local entities using the same WCAG 2.0 AA standard).
170 See infra notes 189–198 and accompanying text.
171 See infra notes 199–217 and accompanying text.
172 See infra notes 174–185 and accompanying text.
173 See infra notes 189–217 and accompanying text.
175 See 2010 Hearing, supra note 120, at 17 (noting DOJ’s position that courts would increasingly recognize websites as covered under Title III).
176 Parker, 121 F. 3d at 1012, 1014. Although private markets and contents of insurance plans appeared far outside the ambit of a public accommodations law that covered “ramps and elevators,” the Title’s broad mandate contained no obvious public/private or access/content distinctions, and it expressly covered “insurance offices.” Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114–15
ever, no longer serves as a proxy for public-facing commercial entities. Today, that standard excludes access to everyday business-to-consumer activity that *Parker* defined as protected by Title III. This absurd result has led courts to further investigate the purpose and legislative intent behind Title III, which strongly indicate broad inclusivity and adaptation to changes in technology—as recognized in the *Netflix* and *Scribd* decisions. Against Title III’s otherwise broad coverage, the exclusion of online businesses that bear essential indicia of public accommodations imposes an arbitrary limitation on the law.

The absence of codified web accessibility standards has also raised concerns regarding implementation costs, and the ability of courts to consistently apply Title III to commercial websites without standards. The widespread adoption of consensus standards demonstrates, however, that those concerns are largely unfounded. Federal web accessibility regulations employ the same

(9th Cir. 2000). Grappling with a mandate that did not expressly exclude expansive rights to accessible content or private markets, the *Parker* line of cases relied on *noscitur a sociis* to generalize a specific list of commercial entities and used Title III’s text to circumscribe it according to a then existing prototype of a public-facing commercial entity. *Weyer*, 198 F.3d at 1114; *Ford* v. Schering-Plough Corp., 145 F.3d 601, 613 (3d Cir. 1998); *Parker*, 121 F.3d at 1012.

177 *Parker*, 121 F.3d at 1012, 1014.

178 *Id.* at 1014; *Scribd*, 97 F. Supp. 3d at 575–76.


180 *Scribd*, 97 F. Supp. 3d at 575–76; *Netflix*, 869 F. Supp. 2d at 200; see ADA Titles II and III 2010 ANPRM, *supra* note 104, at 43,461–62 (discussing the increasing need for websites to be regulated as public accommodations in order to fulfill the purposes of Title III).

181 Access Now, Inc. v. Sw. Airlines, Co., 227 F. Supp. 2d 1312, 1321 n.13 (S.D. Fla. 2002); *The Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 106th Cong. 51–52 (2000) (statement of Walter Olson, Fellow, Manhattan Institute) (noting early practical and legal concerns with the application of Title III to the internet in a congressional hearing held in 2000). The district court in *Access Now* relied on *Rendon v. Valleycrest Productions, Ltd.* for the proposition that “the Eleventh Circuit has recognized Congress’ clear intent that Title III of the ADA governs solely access to physical, concrete places of public accommodation.” *Id.* at 1318 (citing *Rendon* v. Valleycrest Prods., 294 F.3d 1279, 1283–84 (11th Cir. 2002)). On the referenced pages, the *Rendon* court concluded that Title III’s plain language covered discrimination against the plaintiffs in their homes because they faced communication barriers to a show that was held in a concrete place. *Rendon*, 294 F.3d at 1283–84. Because Title III’s plain language resolved the issue in *Rendon*, the court did not rely on—or mention—congressional intent, and it did not reach any conclusion as to whether the ADA encompassed only physical places. *Id.* The *Rendon* court’s most direct assertion in this regard was in a footnote acknowledging that its holding was consistent with a physical nexus requirement. *Id.* at 1284 n.8.

182 2016 Proposed Title II Website Rule, *supra* note 6, at 26,663–64; 2016 Title II Extension Notice, Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities; Supplemental Advance Notice of Proposed Rulemaking;
consensus WCAG 2.0 AA standard. The healthcare and airline industries are also bound to that standard through their antidiscrimination mandates. The feasibility of applying Title III to commercial websites is further apparent in light of the primacy of WCAG 2.0 AA in Title II and III rulemaking processes, and the application of that standard in industry settlements.

B. Using Large-Scale Web Accessibility Enforcement Models: Cause Lawyering, State Attorney General Actions, and State-Level Laws

Homogenous Title III lawsuits are not positioned to efficiently increase commercial web accessibility because adoption by businesses is time-consuming, complicated, and must be tailored to their unique operations. Two currently absent factors are needed to bring about widespread compliance: (1) adoption incentives, and (2) gradual implementation requirements. This Part argues that, to bring about efficient and sustainable adoption, web accessibility enforcement should occur through large-scale litigation brought by cause lawyers and attorneys general, and through state-level legislation built on models from Maryland and Ontario.
1. Adoption and Implementation Gaps in Web Accessibility Enforcement

A second wave of small-scale web accessibility actions are being brought against large and small entities across the private sector.\(^{189}\) This creates the potential for popular backlash, and may undermine the progress of traditional large-scale enforcement efforts that have helped to create industry standards.\(^{190}\) With regard to adoption incentives, the lack of codified web accessibility regulations creates uncertainty as to whether the provisions of one small-scale action are replicable for similarly situated businesses.\(^{191}\) Compounding this problem, small-scale settlements do not stand to spread awareness of more widely applicable compliance practices because they are often confidential.\(^{192}\) Additionally, even if there is an overall increase in small scale web accessibility settlements, such settlements may not discourage businesses from taking a passive “wait and settle” approach to Title III because of the low probability and cost of suit.\(^{193}\) To increase the incentives for businesses to make their websites accessible, enforcement should be expanded and should promote best practices because this would likely lessen litigation over time while increasing the aggregate cost of widespread non-compliance.\(^{194}\)

With regard to implementation, small-scale private enforcers are less capable of monitoring long compliance timelines required for many in the private sector.\(^{195}\) Additionally, these enforcers are not likely to shield entities from liability when they are either working to comply or simply cannot afford to do so.\(^{196}\) Accordingly, some ex-ante guidelines are needed to clarify business’ long-term web accessibility obligations, taking entity size and industry-specific feasibility

\(^{189}\) See Vu, supra note 139 (indicating that web accessibility litigation is spreading across a variety of industries).

\(^{190}\) See Molski v. Mandarin Touch Rest., 347 F. Supp. 2d 860, 861 n.2, 868 (indicating judicial backlash to Title III physical access suits); H.R. 3765, 114th Cong. (2015) (proposing legislation that would deter Title III actions by imposing pre-suit notice requirements and banning generalized demand letters); Frank, supra note 132, at 5 (discussing industry-wide impact of 2006 web accessibility action brought against Target).

\(^{191}\) 2010 Hearing, supra note 120, at 2 (statement of Rep. Nadler); 2016 ITI Comment, supra note 124, at 5–6 (detailing wide variability of web accessibility compliance costs and burdens for different types of entities); Omaha Steaks Complaint, supra note 141, at 1–2, 4–6; Randazzo, supra note 18.

\(^{192}\) Bagenstos, supra note 144, at 12; Raymond, supra note 148, at 254; see, e.g., Omaha Steaks Complaint, supra note 141, at 1–2 (detailing proposed confidential web accessibility settlement); Harbor Freight Complaint, supra note 142, at 1–3 (same).

\(^{193}\) Raymond, supra note 148, at 254; Waterstone, supra note 37, at 475.

\(^{194}\) Bagenstos, supra note 144, at 10; Waterstone, supra note 37, at 447–49.

\(^{195}\) Randazzo, supra note 18. Compare Omaha Steaks Complaint, supra note 141, at 3 (noting that a web accessibility demand letter contained insubstantial implementation provisions), with Scribd-NFB Agreement, supra note 15, at 2, 4–5 (detailing an extended implementation timeline in a settlement under which industry leader offering web-based publications agreed to institute accessibility policies, create an in-house accessibility position, and collaborate with a disability rights group in monitoring compliance).

\(^{196}\) Omaha Steaks Complaint, supra note 141, at 3; Randazzo, supra note 18.
factors into consideration.\textsuperscript{197} Cause lawyers, state-level enforcers, and state legislators should step in to promote adoption according to gradual implementation timelines that are realistic for the private sector.\textsuperscript{198}

2. Disability Cause Lawyering and State Attorney General Enforcement

Cause lawyering stands to increase adoption of commercial web accessibility among businesses by publicizing major settlements that create industry-specific standards and require long-term accountability.\textsuperscript{199} As cause lawyers and representative settlements demonstrate, private enforcement can allay the concerns over feasibility that major industry actors raised during the Title II and III website rulemaking processes.\textsuperscript{200} As the multimillion dollar Target litigation illustrated, cause lawyers can also incentivize web accessibility compliance by bringing lawsuits in jurisdictions where damages and attorney’s fees are available remedies.\textsuperscript{201} By bringing together disability rights groups and industry stakeholders, cause lawyers can hold defendants accountable under detailed, long-

\textsuperscript{197} See Americans with Disabilities Act of 1990, 42 U.S.C. § 12182(b)(2)(A) (2012) (covering Title III feasibility provisions that allow regulated entities to assert cost-related defenses); 2013 Air Carrier Web Accessibility Rule, supra note 108, at 67,887, 67,889–90 (setting forth web accessibility rules unique to the commercial airline industry); National Restaurant Association and Retail Industry Leaders Association, Comment Letter on 2010 Web Accessibility ANPRM for Titles II and III of the ADA at 2–3, 13 (Jan. 24, 2011) [hereinafter 2010 Restaurant and Retail Comment] (noting unique concerns of the restaurant industry during the Title III web accessibility rulemaking process and suggesting that small businesses be permitted to assert good faith compliance defenses in light of prior experience with lawsuits asserting de minimus Title III physical access violations).

\textsuperscript{198} See 2014 AODA REVIEW, supra note 159, at 8, 10 (discussing incremental enforcement mechanisms under Ontario web accessibility law); Friedman & Norman, supra note 163, at 79–80 (discussing proposed web accessibility law in Maryland that would have channeled enforcement through a disabilities commission); Kerr, supra note 133 (discussing a structured settlement agreement reached between web-based video provider and disability rights group); Hotel Settlement, supra note 138 (detailing agreement reached between an attorney general and a web-based travel service following an investigation).

\textsuperscript{199} Class Settlement Agreement and Release, supra note 127, §§ 6–8; Waterstone et al., supra note 132, at 131; ETrade Settlement, supra note 134.

\textsuperscript{200} 2016 Internet Association Comment, supra note 124, at 5 (proposing three-year implementation timeline under WCAG 2.0 AA standard); 2010 Chamber of Commerce Comment, supra note 169, at 5–6, 12–13 (noting industry concerns with web accessibility rule such as coverage of archived and third party content on pages that would be costly to remediate); Waterstone et al., supra note 132, at 1316 (discussing strategy of setting industry-wide standards); Scribd-NFB Agreement, supra note 15 (implementing industry-specific terms and extended implementation timeline in settlement agreement).

\textsuperscript{201} Waterstone et al., supra note 132, at 1301; see 2012 Netflix Consent Decree § 3, supra note 86, at 3 (requiring web-based video provider to pay $755,000 in attorney’s fees per the terms of a web accessibility settlement with a disability rights group); Class Settlement Agreement and Release, supra note 127, §§ 11, 14 (requiring retailer to pay $6 million in damages and $3 million in fees as part of web accessibility class action settlement).
term settlement agreements. Such collaborative implementation processes ensure that settlement agreements contain compliance timelines and practices that can serve as models for other businesses.

State attorney general actions highlight how state-level intervention can spur increased adoption and implementation of web accessibility guidelines that go even further than large-scale private enforcement. Unlike private enforcement actions—which are costly, zero-sum, and adversarial—state attorneys general are able to distribute costs to the public and work collaboratively with businesses to institute compliance measures for the benefit of the public benefit. Furthermore, because state investigations do not rely on attorney’s fees or require lengthy litigation, they can be instituted in greater numbers and on a more expedited basis. Finally, unlike private enforcement actions that focus on one individual or a representative group of individuals with a specific issue, states can investigate and remediate many aspects of Title III website non-compliance. State-level enforcement thus appears to be the best existing substitute in the absence of federal regulations.

---

202 See, e.g., ETrade Settlement, supra note 134 (providing for a multi-month web accessibility implementation timeline and industry-specific terms in settlement agreement with ETrade, a web-based financial services company).

203 Frank, supra note 132, at 5; Waterstone et al., supra note 132, at 1315.

204 See Waterstone, supra note 37, at 487, 491–92 (noting that the ADA requires “distributive justice” because it spreads remediation costs across society to entities that have not engaged in any form of invidious discrimination, and arguing that public enforcement is therefore well-suited to the ADA); Hotel Settlement, supra note 138 (discussing how a specialized bureau of a state attorney general’s office set web accessibility standards for the travel industry after conducting investigations into two major web-based industry leaders).

205 See Waterstone, supra note 37, at 476–77, 487 (noting that the ADA is conducive to collaborative enforcement because non-compliance is often not associated with culpability); Hotel Settlement, supra note 138 (discussing collaboration between travel industry leaders and attorney general’s office in reaching web accessibility settlement agreement).

206 Waterstone, supra note 37, at 476 (noting that “structural limitations” to private enforcement of Title III, such as its limited remedies, can be avoided where actions are pursued by governmental actors); Monster Settlement, supra note 137 (discussing year-long collaboration between a state attorney general, disability rights group, and web-based employment service in implementing web accessibility).

207 See Waterstone, supra note 37, at 476 (noting that, whereas individuals and classes with discrete disabilities are “tied to inefficient piecemeal litigation,” the government can remediate “all facets of inaccessibility” that are discovered during an ADA investigation of a covered entity). Compare HSBC Settlement, supra note 135 (explaining that the state attorney general and a banking industry leader reached a comprehensive web accessibility agreement ensuring access for individuals with hearing and vision disabilities after a blind individual notified the state that she could not access a service of the bank which required her to complete a written form), with 2012 Netflix Consent Decree, supra note 86, §§ 1–3 (setting forth terms of agreement between Netflix, a web-based video provider, and a group representing individuals with hearing disabilities, under which the provider agreed to increase the accessibility of its services to the class of individuals represented by the advocacy group).

208 Waterstone, supra note 37, at 476.
3. Web Accessibility Regulation Through State Legislation

State legislation to address Title III’s regulatory gap would help to consolidate a scattershot private enforcement regime by clarifying web accessibility standards.209 The proposed and enacted pieces of legislation in Maryland and Ontario addressed many of the current adoption and implementation challenges and they serve as a template for future state legislation that should address those challenges.210 For states that have already adopted consensus website accessibility standards in their government agencies, legislation would transition website accessibility policy from the public to the private sector.211

By backing a web accessibility requirement with the force of state law, the Maryland bill would have created a clear adoption incentive for regulated entities and gradual implementation that addressed small business concerns.212 Going even further towards structured enforcement, the 2005 AODA in Ontario provides a template for comprehensive state-level website accessibility regulation that addresses feasibility and accountability through a twenty-year implementation scheme.213 Rather than being regulated by firms that employ compliance testing tools to impose liability for minor violations, the AODA places

---

209 H.B. 183 §§ (E), (6), 2012 Leg. 429th Sess. (Md. 2012); Friedman & Norman, supra note 163, at 79–80 (discussing the possibility of consolidating claims in a central commission under proposed web accessibility bill in Maryland); Long, supra note 156, at 600–01, 633 (noting the tradition of federal civil rights expansion through state law and ability of state law to clarify reasonable accommodation requirements).

210 See Md. H.B. 183 §§ (E), (6) (exempting small businesses from proposed web accessibility bill); 2010 Restaurant and Retail Comment, supra note 197, at 1–2, 13 (discussing concerns over Title III web accessibility regulations burdening small businesses); see also 2016 ITI Comment, supra note 124, at Question 11 (proposing exemption from WCAG audio description requirement under forthcoming Title II web accessibility rule, and relying on similar exemption contained in the Ontario web accessibility regulations).

211 See MINN. STAT. § 16E.03 (2017) (setting forth public sector web accessibility law in Minnesota).

212 Md. H.B. 183 §§ (E), (6); Friedman & Norman, supra note 163, at 79–80. Notably, the ADA provides that the Attorney General may certify a state law as ADA compliant where the law prescribes accessibility requirements that are more specific than those set forth in the federal statute. 42 U.S.C. § 12188(b)(ii) (2012). The relevant provision of the ADA creates a procedure through which the Attorney General consults with the Access Board—the standard-setter for the ADA—in the certification process. Id. Although the provision contemplates “local building codes” as candidates for certification along with state laws, it is in not limited to physical accessibility standards. Id. Considering that the Access Board created web accessibility standards requiring federal government websites to comply with WCAG 2.0 AA under § 508 of the Rehabilitation Act, it appears that a state commercial web accessibility law could be certified as ADA compliant. Id.; 2017 Final Rule on Section 508, supra note 106, at 5791. Once a state accessibility law is certified, compliance with that law can serve to rebut an allegation of non-compliance in an enforcement action. 42 U.S.C. § 12188(b)(ii).

213 See Accessibility for Ontarians with Disabilities Act, S.O. 2005, c 11 (Can.) (laying out provisions of the AODA); O. Reg. 191/11 s 14 (detailing a multi-year web accessibility implementation timeline that proceeds from the public sector to the private sector, and exempts small businesses from coverage); see also S.O. 2005, c 11, ss 7–9 (providing for period updates of regulations by committees comprised of stakeholders from the government, diverse industries, and the disabled community).
these tools in the hands of regulated parties and tiers their obligations according to business size.\textsuperscript{214}

The proposed web accessibility legislation in Maryland and the AODA illustrate the possibility for states to fill the current Title III regulatory gap and provide a model for future federal regulations.\textsuperscript{215} State legislation should create adoption incentives by escalating enforcement and should aim for gradual implementation by creating safe harbors as well as long-term monitoring, training, and information-sharing requirements.\textsuperscript{216} States should create structured web accessibility enforcement regimes both to provide clarity, raise awareness regarding compliance and, crucially, to increase web accessibility for disabled individuals.\textsuperscript{217}

\textbf{CONCLUSION}

Title III of the ADA is poised to provide web accessibility to millions of disabled individuals through private enforcement actions. Title III guarantees the right to web accessibility because it demands equal access to the mainstream economy. Moreover, the law’s core promise belies any exclusion of web-based businesses based on anachronistic interpretations that limit it to physical places. Without website regulations under Title III, however, progress towards accessibility is at a crossroads. The prospects for widespread, sustainable compliance are diminished when placed in the hands of private law firms pursuing scattershot settlements and undertaking piecemeal litigation. Unlike traditional large-scale enforcement efforts, the second wave of web accessibility litigation does not fill the regulatory gap by targeting industry leaders or creating replicable implementation models. Cause lawyering, state action, and state law should therefore step in to create a structured enforcement regime that would achieve the ADA’s broad guarantee of web accessibility.

DANIEL SORGER

\textsuperscript{214} Harbor Freight Complaint, \textit{supra} note 142, at 1–3 (proposing a web accessibility settlement based on results of an automated test that showed non-compliance with WCAG standards); AODA BRIEF, \textit{supra} note 159, at 8 (discussing automated testing tools and other government-provided aids for private sector web accessibility implementation under the AODA).

\textsuperscript{215} Md. H.B. 183 §§ (E), (6); S.O. 2005, c 11; Friedman & Norman, \textit{supra} note 163, at 79–80; Long, \textit{supra} note 156, at 600–01.

\textsuperscript{216} \textit{See} 2014 AODA REVIEW, \textit{supra} note 159, at 8, 10 (discussing enforcement regime under AODA that relies on self-reporting before imposing fines for non-compliance); \textit{How to Make Websites Accessible}, \textit{supra} note 167.

\textsuperscript{217} \textit{2010 Hearing, supra} note 120, at 2 (statement of Rep. Nadler); Randazzo, \textit{supra} note 18; \textit{see} ADA Titles II and III 2010 ANPRM, \textit{supra} note 104, at 43,462 (noting that millions of Americans face barriers to web accessibility that can be feasibly removed across the private sector).