NOTE

ARE YOU THERE, EEOC? IT'S ME, TITLE I: USING TITLE I TO IMPROVE WEB ACCESSIBILITY UNDER THE ADA

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ABSTRACT

To address the exclusion of and discrimination against individuals with disabilities in employment, Congress dedicated the first title of the Americans with Disabilities Act of 1990 ("ADA") to equal opportunity in employment. Yet, today, more than thirty years after the ADA's enactment, the percentage of visually impaired individuals in the workforce has not improved. The transition to online recruitment and hiring ushered new challenges and opportunities for visually impaired job seekers. Online access and usability are critical to job seeking, and without accessible online hiring systems, visually impaired job seekers are disproportionately excluded from employment opportunities. Current efforts to litigate website accessibility under Title III of the ADA, which prohibits discrimination in places of public accommodation, can only provide incidental protection for web-based employment discrimination. As such, Title III is too limited to address web inaccessibility as employment discrimination. This Note argues that the U.S. Equal Employment Opportunity Commission ("EEOC") should use its rulemaking and enforcement authority to invigorate Title I of the ADA as a tool for advancing the goals of web accessibility and equality. Only a handful of web-inaccessibility claims have been filed under Title I. If the EEOC uses its enforcement authority to develop causes of action under Title I for website accessibility, private litigation will follow. Likewise, the EEOC should promulgate technical standards for employers regarding web accessibility. The EEOC must intervene and use Title I for its intended purpose: ensuring equal employment opportunities for individuals with disabilities.

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INTRODUCTION

The social model of disability teaches that people are not disabled, rather it is society's response to the "nontypical" that disables.[1] Taken to its logical end, this model implies that we, as a society, have constructed a disabling world. We built a world with stairs even though there are many who cannot ambulate by foot. We built a world with car horns and sirens even though many on the road cannot hear. Although this model is admittedly reductionist,[2] the social model of disability is useful for the purposes of this Note because it explains the civil rights problem at issue[3]: we created an online world that disables individuals who are blind or visually impaired.[4]

Individuals who are visually impaired[5] and unable to read text or view images on a webpage often rely on assistive technology ("AT") to navigate websites and access online content.[6] Screen readers, for example, are an AT that allow visually impaired persons to read a website's visual information "with a speech

[1] *See* THE DISABILITY STUDIES READER 215-20 (Lennard J. Davis ed., 4th ed. 2013) (explaining strengths and weaknesses of social model of disability).

[2] *Id.* at 217-19 (citing its "simplicity" and "concept of the barrier-free utopia" as among model of disability's weaknesses).

[3] *See* SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 138 (2009) ("A long-standing aim of disability rights activists has been to assert that people with disabilities are full citizens, for whom work opportunities should be a matter of civil rights rather than charity."); PETER BLANCK, EQUALITY: THE STRUGGLE FOR WEB ACCESSIBILITY BY PERSONS WITH COGNITIVE DISABILITIES 5 (2014) (acknowledging "web equality as a civil right").

[4] Keeping with the American Foundation for the Blind ("AFB") style guidelines, this Note will use person-first language (e.g., "individuals who are blind" instead of "visually impaired") as the first mention in each paragraph and will use "visually impaired individual" for subsequent references. *See Style Guidelines for AFB Authors*, AM. FOUND. FOR THE BLIND, https://www.afb.org/publications/jvib/jvib-authors/afb-style-guidelines [https://perma.cc/Y9AH-XPRB] (last visited Sept. 23, 2021). *See generally* Joan Blaska, *The Power of Language: Speak and Write Using "Person First," in* PERSPECTIVES ON DISABILITY 25 (Mark Nagler ed., 2d ed. 1993) (demonstrating how "person first" language demonstrates acceptance and respect for people with disabilities). Moreover, this Note embraces the disability community's "no about us without us" model. To that end, this Note frequently references the work and research of the AFB and the National Federation of the Blind ("NFB"). Both are nationally recognized organizations that represent individuals with visual impairments. *See* Julia Carmel, *15 Moments Within the Fight for Disability Rights*, N.Y. TIMES, July 26, 2020, at F4 (discussing the "nothing about us without us" model and its role in the disability rights movement).

[5] This Note uses the term "visual impairment," which "refers to conditions that encompass the entire continuum, from moderate to severe reductions of visual function to blindness." *Style Guidelines for AFB Authors*, *supra* note 4.

[6] *See* CYNTHIA N. SASS, WEBSITE ACCESSIBILITY FOR INDIVIDUALS WITH DISABILITIES 1 (2016), https://www.laborandemploymentcollege.org/images/pdfs/February2016newsletter/WebsiteAccessibilityforIndividualswithDisabilities01.11.16.pdf [https://perma.cc/GRK7-9WR3].

synthesizer or braille display."[7] However, AT is just half of the accessibility equation. Screen readers' software programs require websites to be coded in a manner that is "comprehensible" to the screen reader.[8] Without web-based platforms compatible with screen readers, individuals with visual impairments are essentially left with a key to a door that is welded shut.

As of 2020, the doors to 98.1% of the top million website home pages were welded shut because they did not comply with the Web Content Accessibility Guidelines ("WCAG"), which, among other things, set forth standards to ensure websites are compatible with screen-reader technology.[9] What happens if an online job application is behind the door? What should screen-reader users do then? The ubiquity of online hiring and job application systems in recent years[10] has made website inaccessibility an employment discrimination issue, and thus a ripe claim under Title I of the Americans with Disabilities Act of 1990 ("ADA").[11]

The ADA prohibits discrimination on the basis of disability in employment (Title I),[12] in public services (Title II),[13] and in public accommodations (Title III).[14] Congress intended Title I to serve as the sole provision by which to address disability discrimination related to employment or potential employment[15] and tasked the U.S. Equal Employment Opportunity Commission ("EEOC") with the title's administration.[16] Recognizing the staggering rates of unemployment for working-age Americans with disabilities, Congress drafted a separate employment provision to "unlock a splendid resource of untapped

[7] *Screen Readers*, AM. FOUND. FOR THE BLIND, https://www.afb.org/blindness-and-low-vision/using-technology/assistive-technology-products/screen-readers [https://perma.cc/NCG9-TXG6] (last visited Sept. 23, 2021).

[8] SASS, *supra* note 6, at 2.

[9] The World Wide Web Consortium, the web's "governing body," publishes international Web Content Accessibility Guidelines ("WCAG"). *See* Jared Smith, *WebAIM Million—One Year Update*, WEBAIM: BLOG (Apr. 1, 2020) [hereinafter WEBAIM BLOG], https://webaim.org/blog/webaim-million-one-year-update/ [https://perma.cc/Q49M-YRXC]. In 2017, the federal government codified the guidelines as the standard for Section 508 of the Rehabilitation Act, which applies to all federal administrative agencies. *See Accessibility Policy*, USA.GOV, https://www.usa.gov/accessibility [https://perma.cc/HP9H-F6ZD] (last updated Mar. 16, 2021).

[10] *See* AARON SMITH, PEW RSCH. CTR., SEARCHING FOR WORK IN THE DIGITAL ERA 2 (2015) https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2015/11/PI_2015-11-19-Internet-and-Job-Seeking_FINAL.pdf [https://perma.cc/L377-YD7S].

[11] Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213.

[12] *Id.* §§ 12101-12117.

[13] *Id.* §§ 12131-12165.

[14] *Id.* §§ 12181-12189.

[15] *See* Menkowitz v. Pottstown Mem'l Med. Ctr., 154 F.3d 113, 118 (3d Cir. 1998) (discussing 42 U.S.C. § 12182(a)); *infra* Part II.A.

[16] 42 U.S.C. §§ 12116, 12117 (providing for the EEOC's rulemaking and enforcement authority, respectively).

human potential that, when freed, will enrich us all."[17] Reflecting its broad mandate, Title I is broad reaching.[18] Accordingly, plaintiffs may not circumvent Title I by bringing an employment-related ADA claim under another title.[19]

Title I generally proscribes covered employers[20] from discriminating against job applicants "on the basis of disability in regard to job application procedures [and] hiring."[21] Title I's broad definition of unlawful discrimination allows the EEOC and private parties to challenge various conduct as a violation of the ADA, including the failure to make a reasonable accommodation;[22] participation in a contractual relationship that has a discriminatory effect on the employer's applicants or employees with disabilities;[23] the use of selection criteria that screen out a class of individuals with disabilities;[24] the use of "methods of administration" that have a disparate impact on the basis of disability;[25] and/or the "limit[ation], segregat[ion] or classif[ication] [of] a job applicant" in an adverse manner because of the applicant's disability.[26] Additionally, Title I imposes an affirmative obligation on covered employers to post required notices in an accessible format.[27] The statutory language of Title I thus provides multiple grounds for finding that an employer's website that is inaccessible by screen reader discriminates against visually impaired individuals by denying them equal opportunity for employment.[28]

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[17] President George H.W. Bush, Remarks of President George H. W. Bush at the Signing of the Americans with Disabilities Act (July 26, 1990) (available at https://www.ada.gov/ghw_bush_ada_remarks.html).

[18] *See infra* Section III.D (comparing Title I's exhaustion requirement with private right of action provided under Title III).

[19] *Menkowitz*, 154 F.3d at 119 (quoting S. REP. NO. 101-116, at 58 (1989)); *accord* DeWyer v. Temple Univ., No. 00-cv-01665, 2001 WL 115461, at *3 (E.D. Pa. Feb. 5, 2001) ("The court is unwilling to allow Plaintiff to circumvent statutory distinctions with convenient self-labeling.").

[20] 42 U.S.C. § 12111(5) (defining employer to include private and public employers, excluding the federal government).

[21] *Id.* § 12112(a), (b)(1). To establish a Title I violation, plaintiffs must demonstrate that they are disabled as defined by the ADA. *Id.* For the purposes of this Note, this requisite element is satisfied because individuals who are blind or visually impaired—to the degree that they have to use a screen reader to access web content—have an impairment that "substantially limit[s] . . . the major life activity of seeing" and thus are qualified as disabled under the ADA. *Id.* § 12102(4); U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-2014-2, BLINDNESS AND VISION IMPAIRMENTS IN THE WORKPLACE AND THE ADA (2014), https://www.eeoc.gov/laws/guidance/blindness-and-vision-impairments-workplace-and-ada [https://perma.cc/RR6P-SUZX].

[22] 42 U.S.C. § 12112 (b)(5).

[23] *Id.* § 12112(b)(2).

[24] *Id.* § 12112 (b)(6).

[25] *Id.* § 12112 (b)(3)(A).

[26] *Id.* § 12112 (b)(1).

[27] *Id.* § 12115.

[28] *See id.* § 12101(a)(7) ("[T]he Nation's proper goals regarding individuals with

Notwithstanding Title I's capacity to address web inaccessibility as disability discrimination under the ADA, the bulk of website accessibility litigation has occurred under Title III, not Title I. In fact, more than 2,258 Title III website accessibility suits were filed in 2018,[29] whereas only a handful of Title I website accessibility suits were filed around that time.[30]

Title III prohibits discrimination "by public accommodations"—privately run entities, such as movie theaters, retailers, and hotels.[31] The thrust of regulations and litigation under Title III involve removing architectural and communication barriers[32] and replacing them with an accessible design.[33] For example, a Domino's Pizza patron sued the franchise under Title III when he could not place an online order because the Domino's website and phone application were not screen reader compatible.[34] This "relation[ship] between customer enjoyment and a commercial entity's physical or online design"[35] has made Title III, not Title I, the most common vehicle for addressing website inaccessibility under the ADA.

disabilities are to assure *equality of opportunity*, full participation, independent living, and *economic self-sufficiency* for such individuals." (emphasis added)).

[29] *See* Minh N. Vu, Kristina M. Launey & Susan Ryan, *Number of Federal Website Accessibility Lawsuits Nearly Triple, Exceeding 2250 in 2018*, SEYFARTH: ADA TITLE III NEWS & INSIGHTS (Jan. 31, 2019), https://www.adatitleiii.com/2019/01/number-of-federal-website-accessibility-lawsuits-nearly-triple-exceeding-2250-in-2018/ [https://perma.cc/W3G9-N5XL].

[30] *See, e.g.*, Complaint, Mejico v. Hard Rock Café Int'l, Inc., No. 5:18-cv-01669 (C.D. Cal. filed Aug. 10, 2018) [hereinafter Mejico Complaint], ECF No. 1 (outlining Title I case in which job application was not accessible to individuals who are blind); Complaint, Dunlap v. Albertson's LLC, No. 5:18-cv-01482 (C.D. Cal. filed July 12, 2018) [hereinafter Dunlap Complaint], ECF No. 1 (regarding Title I case involving job application accessibility); Complaint, Martinez v. Dart Container Corp., No. 5:18-cv-01671 (C.D. Cal. filed Aug. 10, 2018) [hereinafter Martinez Complaint], ECF No. 1 (concerning a Title I case where employer's website presented a number of barriers for screen readers); Complaint & Demand for Jury Trial at 6, Murad v. Amazon.com, Inc., No. 2:19-cv-12578 (E.D. Mich. filed Sept. 3, 2019) [hereinafter Murad Complaint], ECF No. 1 (pertaining to Title I case where blind job candidate had to complete assessment test through virtual platform that was incompatible with screen-reading software); Complaint, EEOC v. ITT Educ. Servs., Inc., No. 2:11-cv-02504 (E.D. Cal. filed Sept. 21, 2011) [hereinafter EEOC Complaint], ECF No. 1 (relating to Title I case where prospective employer failed to accommodate blind job applicant who could not complete online hiring assessment in the allotted time because screen-reading software was not fast enough).

[31] 42 U.S.C. § 12181(7).

[32] *See id.* § 12182(b)(2)(A)(iv), (v) (naming failure to remove barriers as form of unlawful discrimination under Title III).

[33] *See generally* U.S. DOJ, 2010 ADA STANDARDS FOR ACCESSIBLE DESIGN (2010), https://www.ada.gov/regs2010/2010ADAStandards/2010ADAStandards.pdf [https://perma.cc/FM6G-G3D3] (including accessible parking spaces, toilet facilities, curb ramps, and platform lifts).

[34] *See* Robles v. Domino's Pizza, LLC, 913 F.3d 898, 905 (9th Cir.), *cert. denied*, 140 S. Ct. 122 (2019).

[35] BLANCK, *supra* note 3, at 102.

Although Title III may be more common, ignoring Title I forgoes an opportunity to advance goals similar to Title III litigation while providing additional benefits. Accordingly, this Note advocates for the EEOC to use its rulemaking and enforcement authority to invigorate Title I as a tool for advancing the goals of web accessibility and equality. The scope of this Note is limited to job seekers with visual impairments who rely on AT to access web content.[36] The impact, however, of addressing a website's accessibility as employment discrimination would encourage universal design, which would upgrade the website as a place or service of public accommodation as well as a source of employment.[37]

This Note proceeds as follows: Part I introduces the unequal pre-employment experiences of job seekers who are blind or visually impaired and explains what makes an inaccessible website amount to employment discrimination. Part II reviews the limitations of Title III in addressing website accessibility, generally, and website accessibility as employment discrimination, specifically. Part III explains how and why the EEOC should use Title I as a litigation and regulatory tool to address website accessibility. Part IV discusses how the websites of public accommodations will benefit from advances to web accessibility under Title I.

I. WHAT MAKES AN INACCESSIBLE WEBSITE EMPLOYMENT DISCRIMINATION?

To demonstrate how inaccessible websites constitute employment discrimination, this Part will begin with a hypothetical that illustrates the common obstacles encountered by job seekers with visual impairments who use

[36] Although the focus of this Note is limited to individuals with visual impairments who rely on screen-reader technology to access web content, I want to emphasize two points about AT and the disability community at-large. First, AT comes in many forms and is not used exclusively by individuals with visual impairments. For example, some deaf or hard of hearing individuals use AT in the form of video and audio captioning to access web content. Second, the experience of disability-based web inequality is not unique to the visual impairment community. What makes digital content inaccessible can vary both between and within disability communities. *See, e.g.*, BLANCK, *supra* note 3, at 157 ("Persons with cognitive disabilities have differences in sensory, linguistic and reading, and memory processing. They experience a range of attention skills and behavioral conditions in multiple channels of interaction, which change over time and context, and with age. They are affected by social factors and task-specific demands, and they have different tolerances for online tasks and interactions that have sequence-specific and time constraining elements."); WEBAIM BLOG, *supra* note 9 (explaining that accessibility for some visually impaired individuals means magnification and for others, such as those who are color-blind, it means heightened color contrasting).

[37] For example, the website Dominos.com can be used to order a pizza or apply for a job. *See Opportunities*, DOMINO'S, https://jobs.dominos.com/dominos-careers/opportunities [https://perma.cc/9D47-TG7H] (last visited Sept. 23, 2021); *see also* discussion *infra* Part IV (discussing interconnectedness of web accessibility efforts across ADA titles).

screen readers to apply for jobs online.[38] As the first step in the online application process, the job seeker navigates to the employer's website home page. The job seeker wants to use the home page as a springboard to connect to the employer's jobs page or career center. Because the employer home page is inaccessible to screen readers, the job seeker cannot determine which opportunities are available or begin the online application process.[39] Without sighted intervention, the online job search would end, but the job seeker, undeterred, tries again with another employer. This time, the home page has textual equivalents[40] for its graphics and search bar, and does not require a pointing device (e.g., a mouse), which means the job seeker can successfully navigate to the jobs page and begin the online application.[41] Before the job seeker can finish the application, however, a timeout restriction kicks her off.[42] Because the "save" button lacked a textual equivalent, the job seeker's work was lost.[43] Again, undeterred, the job seeker begins anew and now hastily fills out the application before the session times out. The job seeker has only two steps left before submitting the application: (1) sign the application and (2) "pass" a "CAPTCHA"—"a type of 'challenge-response' test used in computing to determine whether or not the user is human."[44] The job seeker, despite completing the application, cannot submit it because the application must be signed with a mouse and the "CAPTCHA" test has no audio option.[45] Worse still, the employer's jobs page does not say whom to contact with accommodation requests. Consequently, the job seeker cannot move forward in the process. In summary, the job seeker has invested significant time applying for jobs online but is no closer to securing employment than when she started.[46]

[38] I based this hypothetical on a study that tasked sixteen blind screen-reader users with submitting two online job applications each. Jonathan Lazar, Abiodun Olalere & Brian Wentz, *Investigating the Accessibility and Usability of Job Application Web Sites for Blind Users*, 7 J. USABILITY STUD. 68, 73 (2012). In the study, "[o]nly nine of the 32 [total] applications were submitted successfully and independently, without any type of [sighted] intervention." *Id.*

[39] *See id.* at 77.

[40] Commonly referred to as "alt-text." *See* Veronica Lewis, *How to Write Alt Text and Image Descriptions for the Visually Impaired*, PERKINS SCH. FOR THE BLIND: ELEARNING (Jan. 31, 2018), https://www.perkinselearning.org/technology/blog/how-write-alt-text-and-image-descriptions-visually-impaired [https://perma.cc/36WJ-EVJW].

[41] *See* Lazar et al., *supra* note 38, at 77 (finding that locating link to jobs page from company's home page was one of the most common obstacles study participants confronted while applying for jobs online).

[42] *See Is HR Tech Hurting Your Bottom Line?*, PEAT, https://www.peatworks.org/digital-accessibility-toolkits/talentworks/is-hr-tech-hurting-your-bottom-line/ [https://perma.cc/8367-4W97] (last visited Sept. 23, 2021) ("[E]veryone surveyed reported having trouble with applications that timed out before they were able to finish a task.").

[43] *See* Lazar et al., *supra* note 38, at 75 (noting that twenty-four of thirty-two applications were impacted by design and layout problems, such as poorly located "save" buttons).

[44] *Is HR Tech Hurting Your Bottom Line?*, *supra* note 42.

[45] *Id.*

[46] *See, e.g.*, Lazar et al., *supra* note 38, at 73 (recounting that "longest unsuccessful attempt

This illustration is not far-fetched. To the contrary, the accessibility barriers described above are common to job seekers with visual impairments who are denied employment opportunities because of their disability. For example, in 2017, Maryann Murad, who is "totally blind," applied for a position with Amazon via amazon.jobs.[47] Murad used a screen reader to complete the first portion of the application, but her screen reader was not compatible with the "inaccessible encrypted virtual platform" used for the assessment test portion of the hiring process.[48] Unable to complete the application, Murad contacted Amazon to request an accommodation.[49] Amazon failed to make the virtual platform accessible or provide Murad an accommodation of any kind.[50] In 2018, Hard Rock Cafe International's inaccessible online job application system similarly denied Brittney Mejico, an interested applicant who is "completely blind," the opportunity to "explore a career" with Hard Rock Cafe despite requesting an accommodation.[51] The same year, Lori Dunlap and Albert Martinez, Jr., both blind, could not apply for jobs at Albertsons[52] and Dart Container,[53] respectively, because of inaccessible online applications.

Inaccessible employer websites and online job applications like the ones illustrated above effectively screen out a class of people who use AT to access web-based services, and, in doing so, deny employment opportunities to visually impaired job seekers.[54] Moreover, these unequal "pre-employment experiences"[55] are why 46% of surveyed online job seekers with disabilities rated their last online job application experience as "difficult to impossible."[56] According to the American Foundation for the Blind ("AFB"), the

[applying to a single job online] lasted 229 minutes (nearly four hours), at which point the [study] participant gave up and indicated that they would not continue applying for the job").

[47] Murad Complaint, *supra* note 30, at 6.

[48] *Id.* at 2, 8.

[49] *See id.* at 9.

[50] *Id.*

[51] Mejico Complaint, *supra* note 30, at 2-3.

[52] Dunlap Complaint, *supra* note 30, at 1.

[53] Martinez Complaint, *supra* note 30, at 1.

[54] *See Reviewing the Disability Employment Research on People Who Are Blind or Visually Impaired: Key Takeaways*, AM. FOUND. FOR THE BLIND, https://www.afb.org/research-and-initiatives/employment/reviewing-disability-employment-research-people-blind-visually [https://perma.cc/XHV4-PX87] (last visited Sept. 23, 2021); Patrick Dorrian, *Blind Workers Test Limitations of Online Hiring Systems (1)*, BLOOMBERG L.: DAILY LAB. REP. (Aug. 21, 2018, 2:31 PM), https://news.bloomberglaw.com/daily-labor-report/blind-workers-test-limitations-of-online-hiring-systems?context=landing-heroes (quoting disability law expert Peter Blanck as estimating that one-quarter of employers lack a fully accessible online job application system).

[55] BLANCK, *supra* note 3, at 206.

[56] Jessica Miller-Merrell, *Is Your Job Application Process Accessible and Inclusive?,* FORBES (June 28, 2018, 8:00 AM), https://www.forbes.com/sites/forbescoachescouncil/2018/06/28/is-your-job-application-process-accessible-and-inclusive/?sh=384028f25788 [https://perma.cc/CZP6-3KVM].

inaccessibility of many online employment websites prevents visually impaired job seekers "from even applying for jobs online."[57] The critical roles of online access and usability for job seeking are also to blame.[58] A 2015 Pew Research Center survey revealed that 84% of recent job seekers had applied for a job online.[59] Yet, as of 2020, 98.1% of the top million website home pages did not comply with WCAG.[60]

Pervasive inequality in the pre-employment experience has translated into staggering unemployment rates for individuals with visual impairments.[61] Megan Dodd, AFB director, cited visually impaired individuals' inability to "make full use of employers' online hiring systems" as the leading factor[62] for the disparate unemployment rates.[63] Visually impaired persons have an unemployment rate two-and-a-half times higher than that of the general population.[64] In fact, the employment rates for individuals with visual impairments "are worse than for nearly any other group of adults for which the Bureau of Labor Statistics keeps track."[65] The National Federation of the Blind ("NFB") reported more than 70% of visually impaired working-age adults are not employed full-time.[66] Worse still, the percentage of visually impaired individuals in the workforce has not improved since the ADA's enactment over thirty years ago.[67]

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[57] *Reviewing the Disability Employment Research on People Who Are Blind or Visually Impaired: Key Takeaways*, *supra* note 54.

[58] *See* SMITH, *supra* note 10, at 14 (finding 22% of surveyed Americans who were not employed "had a hard time filling out an online job application"); *see also* BLANCK, *supra* note 3, at 197 (explaining how "the use of the web is crucial to hiring, retention, training and career advancement for people . . . with disabilities" (footnote omitted)).

[59] *See* SMITH, *supra* note 10, at 9.

[60] *See* WEBAIM BLOG, *supra* note 9.

[61] *See* Brief of Amicus Curiae American Council of the Blind in Support of Petitioner at 4, Winston-Salem Indus. for the Blind v. United States, 140 S. Ct. 909 (2019) (mem.) (No. 19-329), 2019 WL 5260505, at *4.

[62] Dorrian, *supra* note 54 (quoting Megan Dodd).

[63] *Accord* Brief of Amicus Curiae, *supra* note 61, at 6 (listing "inaccessible application processes" as one of the primary barriers to unemployment).

[64] *Id.* at 4.

[65] *Id.* at 5.

[66] *Blindness Statistics*, NAT'L FED'N OF THE BLIND, https://www.nfb.org/resources/blindness-statistics [https://perma.cc/2VA4-H7PA] (last visited Sept. 23, 2021). The AFB similarly found that "[n]early six out of 10" Americans with visual impairments are unemployed. Dorrian, *supra* note 54.

[67] *See* Erin Mulvaney, *Pandemic Exposes Ongoing Job Challenges for Disabled Workers*, BLOOMBERG L.: DAILY LAB. REP. (July 24, 2020, 5:51 AM), https://news.bloomberglaw.com/daily-labor-report/pandemic-exposes-ongoing-job-challenges-for-disabled-workers (finding that "that the outcome [of the ADA] has been positive over the last 30 years in helping people with disabilities have independent living and economic self-sufficiency, but workplace participation rates remain an issue").

II. THE LIMITATIONS OF TITLE III

Unlike a wheelchair user who reads a "jobs available, inquire within" sign on a storefront with no ramp access, a job seeker whose screen reader is incompatible with an employer's online hiring system cannot use Title III to remove the barrier. Title III may be the go-to title for removing barriers and replacing them with accessible design, but it is too limited to address the barriers that block the job seeker's path to employment in both situations.[68] Title III is both generally limited in its ability to redress web-based barriers, and specifically limited in its ability to redress employment-related web-based barriers.[69] When the two are mixed, Title III's fallibility becomes even more pronounced. As a consequence, visually impaired job seekers cannot effectively use Title III to dismantle the online barriers that deny them equal opportunity for employment.

Indeed, a job seeker with a visual impairment cannot establish a viable Title III claim unless (1) she sues about the website in her capacity as a *consumer* on a consumer-related website accessibility claim,[70] (2) the employer responds by improving the accessibility of its website, and (3) the improvements made to the website spill over to its job webpages and online hiring system.[71] In other words, Title III does not afford visually impaired job seekers any direct protections, only incidental protections. And incidental protections alone are insufficient to address these barriers as employment discrimination. What becomes of the visually impaired job seeker who wishes to apply online for a job but is not a consumer of the prospective employer's goods or services? For example, take a visually impaired job seeker who wishes to apply for a clerical job with a construction equipment manufacturing company. Because the job seeker cannot bring a consumer-related claim, she does not even have incidental protection from Title III. Thus, Title III is too limited to address online barriers as employment discrimination. The EEOC must intervene and invigorate Title I for this purpose.

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[68] *See supra* notes 33-35 and accompanying text.

[69] *But see* Access Now, Inc. v. Blue Apron, LLC, No. 17-cv-00116, 2017 WL 5186354, at *1, *11 (D.N.H. Nov. 8, 2017) (denying motion to dismiss visually impaired customer's claim that Blue Apron "violates Title III by not making its website sufficiently accessible to blind and visually-impaired customers"); Reed v. 1-800-Flowers.com, Inc., 327 F. Supp. 3d 539, 542 (E.D.N.Y. 2018) (denying motion to dismiss visually impaired customer's claim that defendant's commercial website was incompatible with screen-reader technology).

[70] As discussed in Section II.C *infra*, if the job seeker were to bring her Title III website accessibility claim in a circuit that requires a nexus to physical place, the job seeker would also have to demonstrate that the online consumer-related issue is "directly connected to [the prospective] employer's physical place." DeWyer v. Temple Univ., No. 00-cv-01665, 2001 WL 115461, at *3 (E.D. Pa. Feb. 5, 2001).

[71] *Cf. id.* (explaining that if a "qualified individual" under Title I wishes to bring a Title III web accessibility claim, the individual would have to show that "she seeks another benefit or privilege that is *unrelated* to her employment but directly connected to her employer's physical place" (emphasis added)).

This Part proceeds by discussing each of Title III's limitations in turn. First, Congress did not intend for Title III to reach employment-related barriers. Second, there is no regulatory scheme governing website accessibility, and even if such a scheme were devised under Title III, it would not make Title III better suited to address website accessibility as employment discrimination. Third, Title III does not reach all websites. Fourth, Title III's lack of an exhaustion requirement indicates that it does not reach everything that Title I reaches. And finally, damages are not available as a private enforcement remedy under Title III.

A. *Title III Does Not Cover Employment-Related Barriers*

As a general prohibition, Title III mandates that

> [n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.[72]

A plain reading of Title III's general prohibition suggests that Title III's coverage could extend to employment-related barriers. For instance, if an employer operates a "public accommodation," then the employer's online jobs page could constitute a "service" or "privilege" offered by the public accommodation.[73] Indeed, retail and entertainment, two of the most common sources of employment for the visually impaired,[74] are also places of "public accommodation" under Title III.[75] Title III also provides a cause of action to "individuals" generally, not consumers or patrons specifically, which suggests coverage could extend to prospective employees as well.[76]

Notwithstanding these textual indicia of coverage, the legislative history of the ADA makes clear that "Title III is not intended to govern any terms or conditions of employment by providers of public accommodations or *potential* places of employment; employment practices are governed by [T]itle I of this

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[72] 42 U.S.C. § 12182(a).

[73] *Id.*

[74] *Key Employment Statistics for People Who Are Blind or Visually Impaired*, AM. FOUND. FOR THE BLIND [hereinafter ACS Survey], https://www.afb.org/research-and-initiatives/statistics/archived-statistics/key-employment-statistics [https://perma.cc/F4TF-Z65F] (last visited Sept. 23, 2021).

[75] 42 U.S.C. § 12181(7).

[76] *See* Menkowitz v. Pottstown Mem'l Med. Ctr., 154 F.3d 113, 118 (3d Cir. 1998) (discussing 42 U.S.C. § 12182(a)). *But see* Bauer v. Muscular Dystrophy Ass'n, 268 F. Supp. 2d 1281, 1292 (D. Kan. 2003), *aff'd*, 427 F.3d 1326 (10th Cir. 2006) (interpreting Title III narrowly and "consistently with the historical understanding of public accommodation laws").

legislation."[77] The Sixth[78] and Ninth[79] Circuits have confirmed that a plaintiff cannot sue "about matters relating to her employment" under Title III, "because 'employment by a public entity' is not a 'service, program, or activity' of a public entity within the meaning of" Title III.[80] Accordingly, the first limitation of Title III is that a visually impaired job seeker cannot use it to remedy employment-related structural barriers on an employer's website, regardless of whether the employer is a public accommodation covered under Title III.[81]

B. *Title III Website Accessibility Regulations: Presently Nonexistent, and Prospectively Insufficient*

The second limitation of Title III is the lack of regulation. Regulation in this area is critical because (1) the ADA does not expressly name websites (or any nonphysical entity) as a type of "public accommodation" covered by the Act,[82] and (2) the circuits are split as to whether a website constitutes a "good[]" or "service[]"of a "place of public accommodation" under the ADA.[83] The Department of Justice ("DOJ"), the federal agency tasked with administering Title III, has long maintained that an inaccessible website violates the ADA by causing the unequal enjoyment of the "goods and services 'of' a place of public accommodation."[84] The Department also asserts that coverage does not require a nexus between the website and the physical "*place* of public accommodation."[85] In the same vein, the DOJ has argued that businesses

[77] *Menkowitz*, 154 F.3d at 119 (alteration in original) (emphasis added) (quoting S. REP. NO. 101-116, at 58 (1989)); *accord* DeWyer v. Temple Univ., No. 00-cv-01665, 2001 WL 115461, at *3 (E.D. Pa. Feb. 5, 2001) ("The Court is unwilling to allow Plaintiff to circumvent statutory distinctions with convenient self-labeling.").

[78] *See, e.g.*, Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1015 (6th Cir. 1997) (en banc) (applying Title III's legislative history and finding Title I alone covers lawsuits related to benefits available by virtue of employment).

[79] *See, e.g.*, Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114 (9th Cir. 2000).

[80] *Id.* (quoting Zimmerman v. Or. Dep't of Just., 170 F.3d 1169, 1174 (9th Cir. 1999)) (analogizing *Zimmerman* interpretation of Title II to Title III).

[81] *See DeWyer*, 2001 WL 115461, at *3 (dismissing Plaintiff's employment-related public accommodation claims because Title III is inapplicable to employment discrimination).

[82] 42 U.S.C. § 12181(7) (listing private entities considered public accommodations under Title III); *cf.* Samuel H. Ruddy, Note, *Websites, Apps, Accessibility, and Extraterritoriality Under Title III of the Americans with Disabilities Act*, 108 GEO. L.J. ONLINE 80, 84 (2019) (positing that "nonphysical entities like websites or apps" are not covered under Title III).

[83] 42 U.S.C. § 12182(a); *see infra* Section II.C (discussing circuit split).

[84] Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43,460, 43,463 (proposed July 26, 2010) (to be codified at 28 C.F.R. pt. 35-36), *withdrawn*, 82 Fed. Reg. 60,932, 60,933 (Dec. 26, 2017).

[85] 42 U.S.C. § 12182(a) (emphasis added); *see* Letter from Stephen E. Boyd, Assistant Att'y Gen., U.S. DOJ, to the Hon. Ted Budd, Congressman, U.S. House of Reps. (Sept. 25, 2018) [hereinafter Letter from DOJ], https://www.adatitleiii.com/wp-content/uploads

providing services exclusively over the internet without a brick-and-mortar location are subject to Title III liability.[86] Notwithstanding these attempts by the DOJ to clarify the title's coverage,[87] the Department, to date, has not issued regulations that codify its position.[88] Consequently, there is no clear-cut basis for establishing liability under the ADA for an inaccessible website.[89]

Even if the Biden Administration were to revive the Obama Administration's Title III regulatory efforts,[90] the regulations would not offer sufficient recourse to job seekers with visual impairments facing online barriers to employment. DOJ regulations would only provide indirect protection for job seekers because the EEOC has sole explicit authority to regulate barrier removal in the employment context.[91] More precisely, DOJ regulations would only offer indirect protection for those who apply for jobs with public accommodations

/sites/121/2018/10/DOJ-letter-to-congress.pdf [https://perma.cc/9JHB-WZ5H] ("This interpretation is consistent with the ADA's title III requirement that the goods, services, privileges, or activities provided by places of public accommodation be equally accessible to people with disabilities.").

[86] *See* Brief of the United States as Amicus Curiae in Support of Appellant at 4-6, Hooks v. OKBridge, Inc., 232 F.3d 208 (5th Cir. 2000) (unpublished table decision) (No. 99-50891), 1999 WL 33806215, at *4-6 (asserting that Title III applied to defendant business operating website that permitted users to play in online bridge tournaments and engage in online discussions). The Department reasoned that "the catchall phrases Congress used [in enumerating the types of public accommodations covered under the ADA], such as 'other service establishment,' [were] plainly broad enough to encompass establishments that provide services in their clients' homes, over the telephone, or through the internet." *Id.* at *12.

[87] The DOJ "first articulated its interpretation that the ADA applies to public accommodations' websites over 20 years ago." *See* Letter from DOJ, *supra* note 85.

[88] As two labor and employment attorneys stated, "[T]he Trump administration [DOJ] put the kibosh on every ADA Title III rulemaking that was pending." Minh N. Vu & Kristina M. Launey, *How Will DOJ Enforce Title III of the ADA in a Biden Administration?*, SEYFARTH: ADA TITLE III NEWS & INSIGHTS (Nov. 17, 2020), https://www.adatitleiii.com/2020/11/how-will-doj-enforce-title-iii-of-the-ada-in-a-biden-administration/ [https://perma.cc/QM6N-B7V9]. One of the rulemakings withdrawn in 2017 specifically covered web accessibility standards for Title III. *See* Nondiscrimination on the Basis of Disability, 75 Fed. Reg. at 43,463.

[89] *Cf.* Robles v. Domino's Pizza LLC, No. 16-cv-06599, 2017 WL 1330216, at *8-9 (C.D. Cal. Mar. 20, 2017), *rev'd & remanded*, 913 F.3d 898 (9th Cir.), *cert. denied*, 140 S. Ct. 122 (2019) (mem.) (determining that liability premised on website inaccessibility could not be established until the DOJ clarified "what obligations a regulated individual or institution must abide by in order to comply with Title III" because in absence of those technical standards, finding of liability would offend due process). The Department has stated that

> [a]lthough the Department has been clear that the ADA applies to Web sites of private entities that meet the definition of "public accommodations," inconsistent court decisions, differing standards for determining Web accessibility, and repeated calls for Department action indicate remaining uncertainty regarding the applicability of the ADA to Web sites of entities covered by title III.

Nondiscrimination on the Basis of Disability, 75 Fed. Reg. at 43,463.

[90] *See generally* Nondiscrimination on the Basis of Disability, 75 Fed. Reg. at 43,463.

[91] *See* 42 U.S.C §§ 12116, 12117.

that provide goods and services to the public over the internet.[92] An appendix to the existing DOJ regulations on removing (physical) barriers clearly states that

> the purpose of title III of the ADA is to ensure that public accommodations are accessible to their customers, clients, or patrons (*as opposed to their employees, who are the focus of title I*), [and consequently] the obligation to remove barriers under § 36.304 does not extend to areas of a facility that are used exclusively as employee work areas.[93]

By extension, future Title III regulations that focus on barrier removal in the online environment are unlikely to directly improve the pre-employment experience.[94]

Finally, the DOJ regulations would be limited by the lower and less demanding "readily achievable" standard for barrier removal provided in Title III, which requires the removal measure to be "easily accomplishable and able to be carried out without much difficulty or expense."[95] Although making websites screen-reader compatible is neither difficult nor costly,[96] the more demanding Title I standard, which requires a showing of "undue hardship,"[97] would make it harder for employers, as website proprietors, to escape liability for their inaccessible websites.[98] Accordingly, website accessibility regulations issued pursuant to Title III would necessarily be more limited in their reach and implementation than parallel regulations issued pursuant to Title I.

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[92] *See* Nondiscrimination on the Basis of Disability, 75 Fed. Reg. at 43,465.

[93] 28 C.F.R. pt. 36 app. C (2021) (emphasis added) (citing 28 C.F.R. § 36.304 (2021)).

[94] H.R. REP. NO. 101-485, pt. 2, at 117 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 400 ("To the extent that new facilities are built in a manner that make[s] them accessible to all individuals, including potential employees, there will be less of a need for individual employers to engage in reasonable accommodations for particular employees.").

[95] 28 C.F.R. § 36.304(a) (2021).

[96] The Department described the process of making websites compatible:

> In most instances, removing these and other Web site barriers is neither difficult nor especially costly, and in most cases providing accessibility will not result in changes to the format or appearance of a site. The addition of invisible attributes known as alt (alternate) text or tags to an image will help keep an individual using a screen reader oriented and allow him or her to gain access to the information on the Web site. Associating form labels to form input fields and locating form labels adjacent to form input fields will allow an individual using a screen reader to access the information and form elements necessary to complete and submit a form on the Web site. Moreover, Web designers can easily add headings, which facilitate page navigation using a screen reader, to their Web pages. They can also add cues to ensure the proper functioning of keyboard commands and set up their programs to respond to assistive technology, such as voice recognition technology.

Nondiscrimination on the Basis of Disability, 75 Fed. Reg. at 43,463.

[97] 42 U.S.C. § 12112(b)(5).

[98] *See* 28 C.F.R. § 36.304 (explaining that barrier removal measure could fail readily achievable standard and still not impose undue hardship).

C. *Title III Does Not Cover All Websites*

The third limitation of Title III is that it does not reach all websites. In the absence of regulatory guidance from the DOJ, Title III's unclear statutory language has split the circuits as to whether websites of privately operated businesses are covered by the ADA.[99] The Third,[100] Fifth,[101] Sixth,[102] Ninth,[103] and Eleventh[104] Circuits have decided that only physical places constitute places of public accommodation but that the ADA may cover the websites of public accommodations if (1) the website is a good or service provided by the public accommodation, and (2) the website has a sufficient nexus to a physical place. By extension, these circuits hold as a matter of law that the websites of web-only businesses cannot be held liable under Title III.[105] By contrast, the First,[106]

[99] *See generally* Amanda Robert, *A Tangled Web: ADA Questions Remain over Web Accessibility Cases and the Lack of DOJ Regulations*, 105 A.B.A. J. 16 (2019) (discussing circuit split).

[100] *See, e.g.*, Ford v. Schering-Plough Corp., 145 F.3d 601, 612 (3d Cir. 1998) ("The plain meaning of Title III is that a public accommodation is a place . . . ."); Peoples v. Discover Fin. Servs., Inc. 387 F. App'x 179, 183-84 (3d Cir. 2010) (following precedent set in *Ford*).

[101] *See, e.g.*, Magee v. Coca-Cola Refreshments USA, Inc., 833 F.3d 530, 534 (5th Cir. 2016) (deciding vending machines are not places of public accommodation because vending machines are not "physical place[s] open to public access").

[102] *See, e.g.*, Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1010 (6th Cir. 1997) (en banc) (holding benefit plan provided by covered employer but administered by insurance office is not good offered by insurance office, i.e., a public accommodation).

[103] *See, e.g.*, Robles v. Domino's Pizza, LLC, 913 F.3d 898, 905 (9th Cir.), *cert denied*, 140 S. Ct. 122 (2019) (mem.) (finding sufficient nexus between Domino's website and app and its physical pizza franchises); Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114 (9th Cir. 2000) (concluding that employer-issued insurance policy of insurance company with physical storefront lacked sufficient nexus for ADA coverage because there was no "connection between the good or service complained of and an actual physical place").

[104] *See, e.g.*, Haynes v. Dunkin' Donuts LLC, 741 F. App'x 752, 754 (11th Cir. 2018) (denying dismissal for blind customer's claim that Dunkin' Donuts' inaccessible website is "service that facilitates the use of Dunkin Donuts' shops" and thus is covered under Title III); Gil v. Winn-Dixie Stores, Inc., 257 F. Supp. 3d 1340, 1348-49 (S.D. Fla. 2017), *vacated and remanded*, 993 F.3d 1266 (11th Cir. 2021) (holding grocery store liable for its inaccessible website where grocery store website "operates as a gateway to" and is "heavily integrated with Winn-Dixie's physical store locations"). Notably, *Gil* involved the first and only trial involving a Title III website inaccessibility claim. *See* Jason P. Brown & Robert T. Quackenboss, *Looking Ahead to Potential Developments in Online Accessibility Law*, NAT'L L. REV. (Feb. 24, 2021), https://www.natlawreview.com/article/looking-ahead-to-potential-developments-online-accessibility-law [https://perma.cc/A2TR-PYLF].

[105] *See, e.g.*, Earll v. eBay, Inc., 599 F. App'x 695, 696 (9th Cir. 2015) (finding eBay not subject to ADA because website lacked connection to physical space).

[106] *See, e.g.*, Nat'l Ass'n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 201-02 (D. Mass. 2012) (holding Netflix streaming service, despite being service enjoyed at customer's home, is place of public accommodation in and of itself); Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc., 37 F.3d 12, 19 (1st Cir. 1994) (reasoning that Congress's inclusion of "travel service" as "among the list of services considered 'public accommodations'" established that places of public accommodation include "providers of

Second,[107] and Seventh[108] Circuits have decided that no nexus to a physical place is required and that websites in and of themselves may constitute a place of public accommodation under the ADA. In 2019, the Supreme Court declined to review the Ninth Circuit's Title III website accessibility decision in *Robles v. Domino's Pizza, LLC*,[109] leaving the issue unresolved among the circuits.[110] The circuit split is a significant limitation of Title III because it demonstrates the doctrinal uncertainty over Title III's applicability to websites.[111] And the Supreme Court could still rule that Title III does not cover websites. The shaky ground on which the bulk of website accessibility litigation rests is alarming and suggests Title III is an inadequate cause of action for plaintiffs.[112]

services which do not require a person to physically enter an actual physical structure"). *See* BLANCK, *supra* note 3, at 121-22 (noting *National Ass'n of the Deaf* was first federal court decision finding Title III could cover web-based services irrespective of nexus to physical place of public accommodation).

[107] *See, e.g.*, Andrews v. Blick Art Materials, LLC, 268 F. Supp. 3d 381, 393 (E.D.N.Y. 2017) (holding dickblick.com is a place of public accommodation under Title III of ADA); Nat'l Fed'n of the Blind v. Scribd Inc., 97 F. Supp. 3d 565, 575-76 (D. Vt. 2015) (denying dismissal of Plaintiff's Title III claim that digital library, which operates no physical locations open to public, nonetheless "owns, leases or operates a place of public accommodation").

[108] *See, e.g.*, Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999) ("The core meaning of [Title III], plainly enough, is that the owner or operator of a store, hotel, restaurant, dentist's office, travel agency, theater, Web site, or other facility (*whether in physical space or in electronic space*) that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do." (emphasis added) (citation omitted)).

[109] 913 F.3d at 898 (9th Cir), *cert. denied*, 140 S. Ct. 122 (2019) (mem.).

[110] Minh N. Vu, *Supreme Court Declines to Review Ninth Circuit Decision in* Robles v. Domino's*, Exposing Businesses to More Website Accessibility Lawsuits*, SEYFARTH: ADA TITLE III NEWS & INSIGHTS (Oct. 7, 2019), https://www.adatitleiii.com/2019/10/supreme-court-declines-to-review-ninth-circuit-decision-in-robles-v-dominos-exposing-businesses-to-more-website-accessibility-lawsuits/ [https://perma.cc/WDF4-8SDJ].

[111] *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. 43,460, 43,464 (proposed July 26, 2010) (to be codified at 28 C.F.R. pt. 35-36), *withdrawn*, 82 Fed. Reg. 60,932, 60,933 (Dec. 26, 2017).

[112] As an added consequence of the circuit split, a visually impaired job seeker who wishes to pursue opportunities with an online-only company could only use Title III for its indirect benefits if she sues in a circuit without a nexus requirement. *Cf.* Young v. Facebook, Inc., 790 F. Supp. 2d 1110, 1115-16 (N.D. Cal. 2011) (dismissing Title III claim against Facebook because the social media platform is online only). *See generally* Ashley Cheff, *The Website Accommodations Test: Applying the Americans with Disabilities Act to Websites*, 26 WM. & MARY J. RACE GENDER & SOC. JUST. 261 (2020) (using Etsy as example of online-only retailer).

D. *Title III Has No Exhaustion Requirement*

Unlike Title I,[113] Title III has no exhaustion requirement.[114] Lower courts have concluded the omission was intentional.[115] Plaintiff's attorneys prefer Title III, in part, for this reason.[116] At first glance, allowing victims of discrimination to enforce their rights in court sooner appears to be a strength of Title III. But in practice, the rights that attorneys can seek to enforce and the relief available under Title III are much narrower than those under Title I,[117] which is likely why Congress created two different systems of enforcement. Moreover, attorneys cannot bring employment discrimination claims under Title III to circumvent exhaustion.[118] Therefore, this "strength" is an impediment insofar as it limits the reach of Title III.

E. *Title III Grants Limited Remedies*

The final limitation of Title III is that damages are not available in private actions. Rather, the only available remedies are reasonable attorney's fees and injunctive relief where structural barriers are readily removable.[119] The threat of Title III litigation carries little deterrent power without damages as an available

[113] 42 U.S.C. § 12117(b) (incorporating Title VII's administrative exhaustion requirement into Title I of the ADA); *id.* § 2000e-5(b).

[114] *See, e.g.*, McInerney v. Rensselaer Polytechnic Inst., 505 F.3d 135, 138 (2d Cir. 2007) (per curiam) (comparing pre-suit requirements of Titles I and III).

[115] *Id.* at 138-39 ("[I]t is a general principle of statutory construction that when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is . . . presumed that Congress acts intentionally and purposely . . . ." (alterations in original) (quoting Barnhart v. Sigmon Coal Co., 534 U.S. 438, 452 (2002)).

[116] Title III has enabled a flood of so-called "surf by" suits by plaintiffs' attorneys filing on behalf of clients who are blind or visually impaired. Harry Nelson, *"Surf By" ADA Lawsuits: An Emerging Compliance Priority for Digital Businesses*, LINKEDIN (Feb. 9, 2019), https://www.linkedin.com/pulse/surf-ada-lawsuits-emerging-compliance-priority-harry-nelson-/ [https://perma.cc/ED4H-LB9P]; *see also* Stephen Rex Brown, *Brooklyn Lawyer Files Avalanche of Lawsuits Over Website Accessibility for the Blind*, N.Y. DAILY NEWS (Sept. 23, 2018, 4:00 AM), https://www.nydailynews.com/new-york/ny-metro-ada-blind-website-accessibility-20180913-story.html; Kristina M. Launey & Minh N. Vu, *Criticisms of "Quick-Fix" Website Accessibility Products Highlighted in New Lawsuit*, SEYFARTH: ADA TITLE III NEWS & INSIGHTS (Jan. 29, 2021), https://www.adatitleiii.com/2021/01/criticisms-of-quick-fix-website-accessibility-products-highlighted-in-new-lawsuit/ [https://perma.cc/F4Q2-GG33].

[117] *See infra* Section II.E (comparing remedies available under each title).

[118] *See McInerney*, 505 F.3d at 138 ("Whether an ADA claim must first be presented to an administrative agency depends on which precise title of the ADA the claim invokes."); *cf.* Cook v. City of Philadelphia, 94 F. Supp. 3d 640, 649 (E.D. Pa. 2015) (dismissing employment discrimination claim brought under Title II of ADA for failure to exhaust administrative remedies).

[119] 42 U.S.C. §§ 12182(b)(2)(A)(iv), 12188(a)(2), 12205, 2000a-3(b).

remedy.[120] Moreover, without damages available, the only economic incentive for plaintiff's attorneys to bring Title III suits is the award of attorney's fees.[121] By contrast, the Civil Rights Act of 1991 created a damages remedy under Title I for private actions for intentional discrimination, in addition to attorney's fees and injunctive relief, which were already available under the Act.[122]

III. THE EEOC MUST INVIGORATE TITLE I TO ADDRESS WEB ACCESSIBILITY

Incidental protection from Title III is insufficient to address web accessibility as employment discrimination. Job seekers with visual impairments cannot effectively use Title III to remove barriers in their pre-employment experience. As such, Title I should be used to supplement Title III's limitations. The EEOC must intervene and facilitate litigation under Title I. The EEOC already has the tools to do this: rulemaking authority[123] and a broad definition of discrimination that provides several avenues for redressing inaccessible employer websites.[124] In brief, Title I must be used. This Section explains why and how the EEOC should use Title I as a regulatory and litigation tool to remove barriers in the online employment environment.

A. *Title I as a Regulatory Tool*

The EEOC[125] and the DOJ[126] have exclusive statutory authority to promulgate regulations on web accessibility under Titles I and III, respectively. Yet only the

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[120] *But see* Letter from the Hon. Charles E. Grassley, M. Michael Rounds, Thom Tillis, Mike Crapo, John Cornyn & Joni K. Ernst, Sens., U.S. Congress, to the Hon. Jeff Sessions, Att'y Gen., U.S. DOJ (Sept. 4, 2018), https://www.judiciary.senate.gov/imo/media/doc/2018-10-04%20Grassley,%20Rounds,%20Tillis,%20Crapo,%20Cornyn,%20Ernst%20to%20Justice%20Dept.%20-%20ADA%20Website%20Accessibility.pdf [https://perma.cc/8YQJ-KABE] (referring to Title III lawsuits as "shakedown[s] by trial lawyers").

[121] *See* Gil v. Winn-Dixie Stores, Inc., 257 F. Supp. 3d 1340, 1350-52 (S.D. Fla. 2017) *vacated and remanded*, 993 F.3d 1266 (11th Cir. 2021) (permitting Plaintiff's counsel to file motion for attorneys' fees and costs and ordering injunctive relief on public accommodation website accessibility claim).

[122] 42 U.S.C. §§ 1981A(a)(2)-(3), 12117(a). Although damages are not available for reasonable accommodation claims where covered entities have made a "good faith" effort to accommodate, damages are available for situations where covered entities demonstrate bad faith by refusing or failing to engage in the interactive process. *Id.* § 1981A(a)(3). Damages are also not recoverable for disparate impact claims. *Id.* § 1981A(a)(2).

[123] *Id.* § 12116.

[124] *See infra* Section III.B.1 (discussing broad definition of discrimination under Title I and its applicability for web accessibility litigation).

[125] Congress granted the EEOC rulemaking authority pursuant to Title I of the ADA. 42 U.S.C. § 12116; U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-0000-25, WHAT YOU SHOULD KNOW: EEOC REGULATIONS, SUBREGULATORY GUIDANCE AND OTHER RESOURCE DOCUMENTS (2016), https://www.eeoc.gov/laws/guidance/what-you-should-know-eeoc-regulations-subregulatory-guidance-and-other-resource [https://perma.cc/C7B3-H9BC].

[126] *See* 42 U.S.C. § 12186(b) (granting DOJ rulemaking authority pursuant to Title III).

DOJ has attempted to regulate website accessibility under the ADA.[127] Since 1996, the DOJ has "repeatedly affirmed the application of [T]itle III to Web sites of public accommodations."[128] Because of the DOJ's clear position, the Ninth Circuit held that a public accommodation cannot escape liability under Title III for an inaccessible website by claiming that the DOJ's failure to regulate constitutes unfair notice and thus offends due process.[129] The EEOC, however, has taken no such position, nor has the EEOC attempted to regulate the online barriers that constitute employment discrimination under Title I.[130] The EEOC's continued passivity could jeopardize Title I's ability to address website accessibility. An employer could dismiss Title I challenges to its inaccessible online employment application on due process[131] or primary jurisdiction[132] grounds. Moreover, by issuing regulations, the EEOC would facilitate litigation pursuant to Section 12117 of Title I, which permits private parties or the EEOC to challenge any violation of a regulation promulgated by the EEOC under Title I.[133] For the reasons discussed, the EEOC must step in and use its regulatory authority to clarify employers' web accessibility obligations under Title I.

Specifically, the EEOC should adopt WCAG 2.0[134] as the accessibility standard for Title I. WCAG 2.0 is the natural choice for Title I given that the federal government already codified the guidelines as the standard for Section 508 of the Rehabilitation Act, which applies to the EEOC and its fellow federal

[127] *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. 43,460, 43,463 (proposed July 26, 2010) (to be codified at 28 C.F.R. pt. 35-36), *withdrawn*, 82 Fed. Reg. 60,932, 60,933 (Dec. 26, 2017).

[128] Robles v. Domino's Pizza, LLC, 913 F.3d 898, 906-07 (9th Cir.), *cert. denied*, 140 S. Ct. 122 (2019) (mem.) (alteration in original) (quoting Nondiscrimination on the Basis of Disability, 75 Fed. Reg. at 43,463).

[129] *Id.* at 906-09.

[130] *See* Dorrian, *supra* note 54.

[131] *Cf.* Robles v. Domino's Pizza LLC, No. 16-cv-06599, 2017 WL 1330216, at *8 (C.D. Cal. Mar. 20, 2017), *rev'd & remanded*, 913 F.3d 898 (9th Cir.), *cert. denied*, 140 S. Ct. 122 (2019) (mem.) (holding Domino's could not be held liable for ADA violation until DOJ issued rules clarifying "what obligations a regulated individual or institution must abide by in order to comply with Title III").

[132] *Id.* (quoting Clark v. Time Warner Cable, 523 F.3d 1110, 1114 (9th Cir. 2008)) (dismissing the Title III claim on primary jurisdiction grounds and explaining that the primary jurisdiction doctrine "allows courts to stay proceedings or dismiss a complaint without prejudice pending the resolution of an issue within the special competence of an administrative agency").

[133] 42 U.S.C. §§ 12116-12117.

[134] If the federal government adopts a newer version of WCAG by the time of this Note's publication, then this Note advocates for the EEOC to adopt the newer version in lockstep with the federal government.

agencies.[135] In 2017, the U.S. Access Board promulgated a final rule establishing WCAG 2.0 as the governing standard because it is a "globally-recognized and technologically-neutral set of accessibility guidelines for Web content."[136]

The EEOC could begin by issuing regulations pursuant to Section 12115 of Title I, the title's notice-posting requirement.[137] Imported from federal employment antidiscrimination law, specifically Title VII of the Civil Rights Act of 1964,[138] the notice-posting requirement does not appear in the ADA's other titles. Section 12115 requires covered employers to post and keep notices "in an accessible format."[139] However, in situations where employees do not visit the workplace on a regular basis, "electronic posting . . . may be required."[140] The COVID-19 pandemic has prompted such a situation, and consequently, notice posting needs to be accessible in both physical and electronic formats. The pandemic-induced transition to telework for millions of Americans has thus provided the EEOC with an immediate reason to promulgate website accessibility regulations. Currently, the EEOC provides an electronic format of its "EEO is the Law" poster that is compatible with screen readers[141] but fails to provide further guidance on how to make electronic notices in other formats compatible with screen readers as well.[142] This is a technical subject requiring technical expertise, and, without mandatory design standards, employers are at a disadvantage when faced with potential liability.[143] Accordingly, the EEOC should adopt WCAG 2.0 as the standard for Title I's

[135] *See Accessibility Policy*, *supra* note 9 (requiring federal government to follow WCAG 2.0).

[136] Information and Communication Technology (ICT) Standards and Guidelines, 82 Fed. Reg. 5,790, 5,791 (Jan. 18, 2017) (codified at 36 C.F.R. pt. 1193-1194 (2021)). The revised Section 508 standards "contain scoping and technical requirements for information and communication technology (ICT) to ensure accessibility and usability by individuals with disabilities", and "[c]ompliance with these standards is mandatory for Federal agencies." *Id.* at 5,832. The EEOC is required to comply with WCAG 2.0 via its statutory obligations under Section 508 but has no enforcement authority regarding the Section 508 accessibility rule. *Workplace Laws Not Enforced by the EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/workplace-laws-not-enforced-eeoc [https://perma.cc/H2QD-2FB4] (last visited Sept. 23, 2021).

[137] 42 U.S.C. § 12115.

[138] *Id.* § 2000e-10.

[139] *Id.* § 12115.

[140] *"EEO is the Law" Poster*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/employers/eeo-law-poster [https://perma.cc/5MK8-BK3K] (last visited Sept. 23, 2021).

[141] *See id.*

[142] The "EEO is the Law" poster is just one way to satisfy Title I's notice-posting requirement. *See id.*

[143] *See* Dorrian, *supra* note 54 (explaining why EEOC and DOJ "should adopt clear-cut regulations requiring platform providers to meet WCAG 2.0 or similar standards").

notice-posting requirement so that covered entities can have fair notice of what is expected of them and cannot escape liability on due process grounds.[144]

B. *Title I as a Litigation Tool*

Despite the limitations of Title III,[145] only a handful of web-inaccessibility claims have been filed under Title I and, of the few filed, all have settled.[146] As a consequence, the courts have not yet weighed in on this important issue, making Title I ripe for development. This Note specifically advocates for the EEOC to use its enforcement authority under the ADA to bring website accessibility claims under Title I and invigorate Title I for this purpose.[147] The last time the EEOC litigated a Title I web-based employment discrimination claim was in 2011.[148] In that case, the EEOC sued ITT Educational Services for wrongfully denying a blind screen-reader user's accommodation request for extra time to complete an online job assessment.[149] The lawsuit resulted in a

[144] *See* 42 U.S.C. § 12115; *cf.* Robles v. Domino's Pizza, LLC, No. 16-cv-06599, 2017 WL 1330216, at *8 (C.D. Cal. Mar. 20, 2017) *rev'd & remanded*, 913 F.3d 898 (9th Cir.), *cert. denied*, 140 S. Ct. 122 (2019) (mem.) (dismissing each of plaintiff's asserted causes of actions against defendant Domino's Pizza, LLC).

[145] *See supra* Part II.

[146] *See, e.g.*, Settlement Agreement and General Release, Murad v. Amazon.com, Inc., No. 2:19-cv-12578 (E.D. Mich. signed July 6, 2020), https://www.nfb.org/sites/www.nfb.org/files/files-pdf/settlement-agreement-and-general-release-signed-ace.pdf [https://perma.cc/H8MS-Z5DW].

[147] *See* 42 U.S.C. § 12117(a) ("The powers, remedies, and procedures set forth in . . . this title shall be the powers, remedies, and procedures this subchapter provides to the *Commission*, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter . . . " (emphasis added)); *id.* § 2000e-5(a) ("The Commission is empowered . . . to prevent any person from engaging in any unlawful employment practice . . . .").

[148] *See* Press Release, U.S. Equal Empl. Opportunity Comm'n, EEOC Sues ITT Tech for Disability Discrimination (Sept. 21, 2011), https://www.eeoc.gov/es/node/21763 [https://perma.cc/M46J-HETW] [hereinafter EEOC Press Release]. On a handful of occasions, nonlitigation methods have produced desired change. For example, the Massachusetts Attorney General's Office and the NFB collaborated to make Apple iTunes services, Cardtronics ATMs, and Monster.com fully accessible to blind and visually impaired individuals. *See* Press Release, Nat'l Fed'n of the Blind, Monster.com First in Industry to Make Website Accessible for Blind Users (Jan. 30, 2013), https://www.nfb.org/about-us/press-room/monstercom-first-industry-make-website-accessible-blind-users [https://perma.cc/3ZFL-9HWL]. In the case of Monster.com, an online job search and recruiting service, the parties negotiated a five-year agreement "to address organizational and technological barriers . . . such as operability with screen readers." BLANCK, *supra* note 3, at 198. In 2019, the EEOC similarly used conciliation to settle a discrimination charge against DISH Network regarding its inaccessible online application. Press Release, U.S. Equal Emp. Opportunity Comm'n, EEOC and Dish Network Conciliate Disability Charge over Application Practices for $1.25 Million (Oct. 9, 2019), https://www.eeoc.gov/newsroom/eeoc-and-dish-network-conciliate-disability-charge-over-application-practices-125-million [https://perma.cc/CA8J-4JZS].

[149] BLANCK, *supra* note 3, at 201.

consent decree granting the job seeker injunctive and monetary relief.[150] The consent decree also reached ITT's third-party vendors, who had created ITT's online "applicant testing materials," and required ITT's vendors to modify their programs to accommodate individuals with sensory disabilities.[151] The relief obtained through the consent decree is a concrete example of how Title I litigation brought by the EEOC can remove barriers in the online environment and initiate an accessibility ripple effect.[152]

If the EEOC uses its enforcement authority to address web accessibility as a form of employment discrimination and show that these Title I cases are viable, then private litigation will follow.[153] As discussed in Section II.D above, attorneys prefer Title III because it does not have an exhaustion requirement, which could, in part, explain why web accessibility litigation under Title I has been infrequent for both the EEOC and private parties alike.[154] That said, the infrequency of these lawsuits is one of the very reasons why the EEOC should bring these suits.[155] Unlike the private bar, "the EEOC does not rely on contingent fees or statutory attorneys' fees to fund its litigation practice," so "it can bring . . . small-recovery hiring cases that are not [as] profitable."[156] Accordingly, EEOC litigators pursue cases that "have the most impact,"[157] and Title I web accessibility cases would certainly have an impact.

Unlike Title III's limited coverage, Title I applies to inaccessible employer websites regardless of whether they constitute a place or service of a public accommodation. As a general prohibition, Title I mandates that "[n]o covered

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[150] *See* Consent Decree, Equal Empl. Opportunity Comm'n v. ITT Educ. Servs., Inc., No. 2:11-cv-02504 (E.D. Cal. filed June 17, 2013) [hereinafter EEOC Consent Decree], ECF No. 36.

[151] *See id.* at 5-6.

[152] *See* BLANCK, *supra* note 3, at 199 (advocating for the EEOC to bring suit against the larger web companies to "inspire changes by smaller online service providers"); *infra* Part IV **(**discussing the importance of using Title I as regulatory and litigation tool to increase demand-side pressure on third-party vendors who act as de facto gatekeepers of website accessibility).

[153] For example, when the EEOC issued decisions in the 2010s holding that sexual orientation discrimination was a form of sex discrimination under existing federal law (i.e., Title VII), "[t]he agency's position . . . rejuvenated efforts by advocates to bring cases in court for LGBT people using Title VII and some courts [began] to agree with those arguments." SAMUEL ESTREICHER, MICHAEL HARPER & ELIZABETH TIPPETT, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION AND EMPLOYMENT LAW: THE FIELD AS PRACTICED 417 (5th ed. 2016) (quoting Chai R. Feldblum, former EEOC Commissioner).

[154] *See* Title I cases cited *supra* note 30.

[155] BAGENSTOS, *supra* note 3, at 133 (stressing that "EEOC's enforcement generally ought to focus on the kinds of cases that private lawyers are *not* bringing"). The other reason being the egregious denial of employment opportunities for individuals with visual impairments. *See supra* Part I.

[156] BAGENSTOS, *supra* note 3, at 133.

[157] ESTREICHER ET AL., *supra* note 153, at 148.

entity shall discriminate against a qualified[158] individual on the basis of disability in regard to *job application procedures, the hiring*, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[159] The statute proceeds by defining nonexclusive forms of discrimination. This Note likewise proceeds by translating Title I's forms of unlawful discrimination into five distinct causes of action that the EEOC (and private parties) can use to bring web accessibility claims,[160] in addition to one procedural cause of action.[161] The variety of Title I causes of action demonstrates how Title I's definition of discrimination is broad enough to cover web accessibility claims and address web accessibility as employment discrimination.

1. Discrimination Claims

a. *Failure to Make a Reasonable Accommodation*

Section 12112(b)(5)(A) defines the failure to make a reasonable accommodation as per se discrimination under Title I.[162] Interpreting Section 12112(b)(5)(A), the EEOC lists "ensuring . . . components of the application process are held in accessible locations" as an example of a reasonable accommodation during the hiring process.[163]

To succeed with a failure-to-accommodate hiring claim, a job seeker with a visual impairment must show: (1) she is qualified for the position, (2) the employer was given "adequate notice" of her request for some accommodation, and (3) the employer failed to provide a reasonable accommodation.[164] To illustrate these elements, recall the story of Maryann Murad: a (1) qualified blind applicant, (2) who requested an accommodation from Amazon to complete an online job application, but (3) whose request to make the virtual platform accessible was rebuffed by Amazon.[165] Shortly after Murad made this prima facie showing in her complaint, Amazon settled.[166]

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[158] Given the size of the class affected, this Note assumes, without addressing, that within said class there are "qualified individual[s]" as defined under the Act. *See* 42 U.S.C. § 12111(8) (defining "qualified individual").

[159] *Id.* § 12112(a) (emphasis added). According to the accompanying regulations, "job application procedures" include recruitment and advertising. 29 C.F.R. § 1630.4(a) (2021).

[160] *See infra* Section III.B.1 (discussing discrimination claims).

[161] *See infra* Section III.B.2 (outlining procedural claim).

[162] 42 U.S.C. § 12112(b)(5)(A).

[163] U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-2003-4, JOB APPLICANTS AND THE ADA (2003), https://www.eeoc.gov/laws/guidance/job-applicants-and-ada [https://perma.cc/SX9U-MRNS].

[164] Exby-Stolley v. Bd. of Cnty. Comm'rs, 979 F.3d 784, 795 (10th Cir. 2020).

[165] Murad Complaint, *supra* note 30, at 6, 9; *see also* discussion *supra* Section I.A. *But see* Settlement Agreement and General Release, *supra* note 146.

[166] Settlement Agreement and General Release, *supra* note 146.

For failure-to-accommodate claims, the adverse employment action *is* the failure to accommodate, unless the accommodation "would impose an undue hardship."[167] Fortunately, in the context of website accessibility, the "undue hardship" defense is less viable because removing web-based barriers "is neither difficult nor especially costly."[168] Indeed, cost estimations vary between a few hundred dollars[169] and $1,000,[170] which is inconsequential for businesses with more than fifteen employees.[171] Accordingly, the "undue hardship" defense in this context should not deter the EEOC from bringing suit. The EEOC, having already successfully litigated at least one Title I website accessibility claim premised on a failure to accommodate, knows this firsthand.[172]

Of the few Title I website accessibility claims filed to date, all have used a failure-to-accommodate theory of liability.[173] This trend is likely because damages[174] are available for these claims in addition to equitable relief.[175] However, there is a caveat: damages are not available for failure-to-accommodate claims where the job seeker informs the employer that an accommodation is needed and the employer "demonstrates good faith efforts, in consultation with the [job seeker] . . . to identify and make a reasonable accommodation that would provide such individual with an equally effective

[167] 42 U.S.C. §§ 12112 (b)(5)(A), 12111(10)(A) (defining "undue hardship" as "an action requiring significant difficulty or expense"). See Section 12111(10)(B) of Title I for a non-exhaustive list of the factors to be considered in making an undue hardship determination, including in relevant part: "the nature and the cost of the accommodation; the effect of the accommodation relative to employer's overall expenses, resources, and operation; and "the type of operation . . . including the composition, structure, and functions of the workforce." *Id.* § 12111(10)(B)(i)-(iv).

[168] Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43,460, 43,462 (proposed July 26, 2010) (to be codified at 28 C.F.R. pt. 35-36), *withdrawn*, 82 Fed. Reg. 60,932, 60,933 (Dec. 26, 2017)

[169] Dorrian, *supra* note 54 ("[F]ixing website accessibility issues 'is quick and easy' and typically takes only an investment of a few hours and a few hundred dollars.").

[170] Belo Cipriani, *Hiring Blind: The Misconceptions Facing America's Visually Impaired Workforce,* BRAILLE MONITOR (July 2013), https://www.nfb.org/images /nfb/publications/bm/bm13/bm1307/bm130711.htm [https://perma.cc/7SQA-H2KK] (noting that most accommodations for visually impaired employees cost less than $1,000).

[171] 42 U.S.C. § 12111(5)(A) (defining "employer" to only include those with at least fifteen employees).

[172] *See* EEOC Consent Decree, *supra* note 150, at 2 (enjoining defendants from "unlawfully discriminating against any employee due to his or her disability"); *see also* EEOC Press Release, *supra* note 148.

[173] For example, the failure-to-accommodate theory of liability has been used in public litigation (as seen in the EEOC Complaint) and private litigation (as seen in the Murad Complaint). *See, e.g.*, EEOC Complaint, *supra* note 30, at 3; Murad Complaint, *supra* note 30, at 10.

[174] Specifically, compensatory and punitive damages. 42 U.S.C. § 1981A(a)(2).

[175] *Id.* § 12117(a) (authorizing 2000e-5); *id.* § 2000e-5(g)(1).

opportunity and would not cause an undue hardship on the operation of the business."[176]

There are also several drawbacks to premising a website accessibility claim on the employer's failure to accommodate. First, a visually impaired job seeker must request an accommodation and wait for that request to be denied before she has a viable claim.[177] This process forces the job seeker to disclose her disability before she has the opportunity to be neutrally evaluated on the merits of her application, which may disincentivize the job seeker from even applying.[178] Second, these claims do not address the online barriers that can prevent screen-reader users from learning whom to contact with their accommodation requests in the first place. What good is a statement on a company's job portal that reads: "applicants with disabilities can contact our Human Resources Department at hr@company.com to request an accommodation," if a visually impaired job seeker cannot navigate to the webpage that contains that contact information or if the webpage containing the contact information is itself incompatible with screen-reader technology?[179] These concerns prompt exploring alternate causes of actions for website accessibility. The tried and true failure-to-accommodate claim must be supplemented by causes of action that can address the technological source of the employment problem, not just its symptoms.

b. *Disparate Impact*

Unlike failure-to-accommodate claims which require the job seeker to first ask for an accommodation, Title I disparate impact claims reallocate the burden of accessibility from the job seeker to the employer. For this reason, the EEOC should spur private litigation and employer compliance efforts by bringing disparate impact challenges against inaccessible employer websites. The EEOC is in the best position to litigate these claims because the EEOC chooses which cases to bring based on potential impact, not potential profit, and thus the fact that only equitable relief[180] is available for disparate impact claims would not disincentivize the EEOC from bringing these claims (as it might for a private party).[181]

This Note will demonstrate the viability of Title I disparate impact theories for web accessibility actions by using facts from a prior-discussed failure-to-

[176] *Id.* § 1981A(a)(3); *cf.* Mejico Complaint, *supra* note 30, at 3 (claiming employer made no good faith effort and refused to consult with job seeker about her accommodation request).

[177] *See id.* § 12112(b)(5)(a).

[178] A survey conducted by AFB found that the individuals responsible for hiring often do not know how an individual with a visual impairment might accomplish tasks like using the internet. *See* ACS Survey, *supra* note 74.

[179] *See* Dorrian, *supra* note 54.

[180] 42 U.S.C. § 12117(a) (authorizing 2000e-5); *id.* § 2000e-5(g)(1).

[181] *See* ESTREICHER ET AL., *supra* note 153, at 148 ("The amount of money at stake for the victims . . . does not determine whether [the EEOC] file[s] suit.").

accommodate case: *Mejico v. Hard Rock Café International, Inc*.[182] This exercise is necessary because no web accessibility actions to date have been filed using a Title I disparate impact theory of liability.[183] This exercise serves another purpose as well: illustrating how the same pre-employment discrimination experience can support a variety of claims under Title I—claims that the EEOC can and should bring to address web accessibility as employment discrimination.

The first disparate impact claim that the EEOC could bring is under Section 12112(b)(3)(A), which defines unlawful discrimination as "utilizing standards, criteria, or methods of administration . . . that have the effect of discrimination on the basis of disability."[184] The EEOC has acknowledged that this provision may cover the "effect of discrimination against blind applicants" by employers who use "inaccessible technology [as] a method of administering the recruitment and application process."[185] Besides this kernel from the EEOC, the regulatory guidance and case law interpreting this provision are scant.[186] This Note, guided by the EEOC's suggested application, applies a plain language interpretation of the statute to the facts from the Mejico Complaint to demonstrate why this legal theory is a viable cause of action under Title I. Mejico, as a blind job seeker, was unable to learn what positions were available, let alone apply for a position with Hard Rock Cafe, because its website was incompatible with Mejico's screen reader.[187] Mejico could have made a "method of administration" claim on the grounds that Hard Rock Cafe used its company website as the method for administering its recruiting and hiring process, and that the inaccessible format of its website had the effect of discriminating against her, a visually impaired applicant who uses screen-reader technology to access web content.[188]

The second disparate impact claim that the EEOC could bring is under Section 12112(b)(6), which prohibits using "selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities."[189] The EEOC regulations vaguely define "selection criteria" as the

[182] Mejico Complaint, *supra* note 30.

[183] All of the complaints cited *supra* in note 30 use a failure-to-accommodate theory of liability. Those complaints are the product of an exhaustive query to find *any* web-related accessibility cases under Title I. *See supra* note 30.

[184] 42 U.S.C. § 12112(b)(3)(A).

[185] Letter from Peggy R. Mastroianni, Assoc. Legal Couns., U.S. Equal Emp. Opportunity Comm'n, to member of the public (Dec. 17, 2003), https://www.eeoc.gov/foia/eeoc-informal-discussion-letter-83 [https://perma.cc/SYB6-29VZ].

[186] The legislative history contains only one illustration of this provision: an employer cannot refuse to hire a person with a disability on the grounds that the employer's liability insurance policy does not cover persons with disabilities. H.R. REP. NO. 101-485, *supra* note 94, pt. 3, at 15.

[187] Mejico Complaint, *supra* note 30, at 5-7.

[188] 42 U.S.C. § 12112(b)(3); *see* Mejico Complaint, *supra* note 30, at 6, n.7.

[189] 42 U.S.C. § 12112(b)(6). This Note assumes, without addressing, that an inaccessible online hiring and recruitment system is not job related and thus not defensible as a "business necessity." *Id.*

criteria used to determine whether an applicant is "'otherwise' qualified for the position."[190] As an example, the EEOC notes that a law firm that requires its incoming associates to have graduated from law school and passed the bar examination uses graduation and bar passage as a form of selection criteria.[191] "Selection criteria" claims require a facially neutral employment practice or policy that adversely affects job seekers with disabilities more than nondisabled job seekers and is not justified by business necessity.[192] Specifically, a plaintiff must:

> (1) [I]solate and identify specific practices that are allegedly responsible for any observed statistical disparities; and (2) establish causation by "offer[ing] statistical evidence of a kind and degree sufficient to show that the practice in question has caused the [alleged harm] because of their membership in a protected group."[193]

Applying the facts from the Mejico Complaint to demonstrate the viability of a "selection criteria" claim, here, the facially neutral employment practice would be Hard Rock Cafe's practice of using its website, which is incompatible with screen-reader technology, for recruitment and hiring.[194] Because Hard Rock Cafe's website is incompatible with screen readers, individuals who use screen readers would be disparately affected. Moreover, because the majority of screen-reader users are also individuals with disabilities, the inaccessible website would necessarily have a disparate impact on the basis of disability. Mejico could also establish the requisite causation and harm by demonstrating that the inaccessible website (i.e., the facially neutral employment practice) denied her the opportunity to apply for employment (i.e., the harm) because her blindness requires her to use a screen reader to access web content.[195] Accordingly, Mejico would have a viable "selection criteria" claim under Title I.

The third disparate impact claim that the EEOC could bring is under Section 12112(b)(1),[196] which forbids "limiting, segregating, or classifying a job

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[190] 29 C.F.R. pt. 1630 app. (2021).

[191] *Id.*

[192] *See* Raytheon Co. v. Hernandez, 540 U.S. 44, 45 (2003). *Compare* Patton v. Shulkin, No. 7:16-cv-00250, 2018 WL 1321589, at *14 (W.D. Va. Mar. 14, 2018) (discussing elements of disparate impact claim in hiring case: plaintiff must show "that an employment practice had a 'significant discriminatory effect on disabled individuals *as a group*'" (emphasis added) (quoting Smith v. Miami Dade Cnty., 621 F. Appx 955, 961 (11th Cir. 2015)), *with* Bryan v. Wal-Mart Stores, Inc., 669 F. App'x 908, 909 (9th Cir. 2016) (allowing Plaintiff to demonstrate how "selection criterion screens out or tends to screen out" Plaintiff as an *individual* on the basis of his disability).

[193] Leskovisek v. Ill. Dep't of Transp., No. 17-cv-03251, 2020 WL 7323840, at *11 (C.D. Ill. Dec. 11, 2020) (second and third alterations in original) (quoting Swan v. Bd. of Educ. of City of Chicago, No. 13-cv-03623, 2013 WL 4401439, at *12 (N.D. Ill. Aug. 15, 2013)).

[194] Mejico Complaint, *supra* note 30, at 5, 7.

[195] *See Leskovisek*, 2020 WL 7323840, at *11.

[196] *But see* 29 C.F.R. § 1630.5 app. (2021) (suggesting the EEOC views (b)(1) as only covering intentional discrimination).

applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee."[197] The language of Section 12112(b)(1) tracks the disparate impact language of Title VII.[198] The EEOC has questioned, without answering, whether (1) "an employer who uses an inaccessible website format," and (2) "limit[s] blind job applicants in a way that adversely affects their opportunity to learn of or apply for jobs."[199] Again, applying the facts from the Mejico Complaint to demonstrate the viability of the "limiting, classifying, segregating" claim: (1) Hard Rock Cafe used an inaccessible website format, and (2) the inaccessible format limited Mejico in a way that prevented her from learning about and applying for a job.[200] As such, the EEOC should further develop the legal theory it posited (through either litigation or regulation) so that employers—the party in the best position to implement accessible design—have legal incentive to do so.

c. *Disparate Treatment*

Alternatively, the EEOC could bring a disparate treatment claim under Section 12112(b)(2) and seek damages as well as equitable relief.[201] Section 12112(b)(2) prohibits employers from "participating in a contractual . . . relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter."[202] Congress added this provision to proscribe employers from doing "through a contractual provision what it may not do directly,"[203] and the proscription applies regardless of whether the employer "intended . . . the contractual relationship to have the discriminatory effect."[204] Although vendors

[197] 42 U.S.C. § 12112(b)(1).

[198] *Id.* § 2000e-2(a)(2); Griggs v. Duke Power Co., 401 U.S. 424, 426 n.1 (applying § 2000e-2(a)(2) as statutory basis for plaintiff's disparate impact claim). *But see* EEOC v. C.R. Eng., Inc., 644 F.3d 1028, 1039-40 (10th Cir. 2011) (holding that Plaintiff failed to meet his prima facie burden because the adverse employment action did not affect Plaintiff's "responsibilities, duties, and compensation" and "there [was] no evidence that he was ever segregated from other employees"); Duda v. Bd. of Educ. of Franklin Park Pub. Sch. Dist. No. 84, 133 F.3d 1054, 1059-60 (7th Cir. 1998) (holding that Plaintiff met his burden because forced transfer that segregated Plaintiff on the basis of his disability is viable Title I claim).

[199] Letter from Peggy R. Mastroianni, *supra* note 185.

[200] Mejico Complaint, *supra* note 30, at 5, 7.

[201] 42 U.S.C. § 12112(b)(2); *see id.* § 1981A(a)(2) (providing for compensatory or punitive damages), §§ 12117(a), 2000e-5(g)(1) (providing for equitable relief).

[202] *Id.* § 12112(b)(2).

[203] H.R. REP. NO. 101-485, *supra* note 94, pt. 3, at 13 ("This provision is intended to apply to a situation in which a covered entity 'A' enters into a contractual relationship with another entity 'B,' which has the effect of subjecting the covered entity 'A's' own employees or applicants to discrimination.").

[204] 29 C.F.R. pt. 1630 app. (2021); *see also* Fromm v. MVM, Inc., 371 F. App'x 263, 271 (3d Cir. 2010) (remanding to determine whether defendant, through its contract with third party, subjected Plaintiff to discrimination prohibited under the ADA).

are not expressly listed in the statutory language as a covered contractual relationship,[205] Congress intended the provision to cover vendors as well:[206]

> [A]ssume that an employer contracts with a hotel for a conference held for the employer's employees. Under the Act, the employer has an affirmative duty to investigate the accessibility of a location that it plans to use for its own employees. Suggested approaches for determining accessibility would be for the employer to check out the hotel first-hand, if possible, or to ask a local disability group to check out the hotel. In any event, the employer can always protect itself in such situations by simply ensuring that the contract with the hotel specifies that all rooms to be used for the conference, including the exhibit and meeting rooms, be accessible in accordance with applicable standards. If the hotel breaches this accessibility provision, the hotel will be liable to the employer for the cost of any accommodation needed to provide access to the disabled individual during the conference, as well as for any other costs accrued by the employer. Placing a duty on the employer to investigate the accessibility of places that it contracts for will, in all likelihood, by the impetus for ensuring that these types of contractual provisions become commonplace in our society.[207]

Because Section 12112(b)(2) applies to vendors, the EEOC could sue employers who enter into contracts with "web architects"[208] that do not comply with applicable web accessibility standards.[209] Although "lack of knowledge" is not a defense to a Section 12112(b)(2) claim,[210] the EEOC could proceed by suing the employers of public accommodations, who have been on notice from the DOJ "at least since 1996" that their "website[s] . . . must comply with the ADA."[211]

Section 12112(b)(2) claims also have the benefit of incentivizing both employers and vendors to ensure web accessibility is addressed in their

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[205] 42 U.S.C. § 12112(b)(2) ("[S]uch relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs.").

[206] 29 C.F.R. § 1630.6(b) (clarifying that Section 12112(b)(2) provides a nonexhaustive list of covered relationships).

[207] H.R. REP. NO. 101-485, *supra* note 94, pt. 2, at 60; *see Fromm*, 371 F. App'x at 271 (noting that if employer via agreement with its contractor subjected employee to unlawful discrimination then employer is liable under the ADA).

[208] BLANCK, *supra* note 3, at 63 (defining "web architects" as "teams of content designers, developers, testers, operating for or independently of online service providers").

[209] *See Fromm*, 371 F. App'x at 271 ("[Defendant-employer] cannot rest on blind contractual compliance to escape liability for discrimination.").

[210] EEOC v. M.G.H. Fam. Health Ctr., 230 F. Supp. 3d 796, 809 (W.D. Mich. 2017); *see* 29 C.F.R. § 1630.6.

[211] Robles v. Domino's Pizza, LLC, 913 F.3d 898, 907 (9th Cir.), *cert. denied*, 140 S. Ct. 122 (2019) (mem.).

contracts. For example, if an employer-vendor contract specifies that the employer's website must be WCAG compliant, then the vendor could be held responsible under Section 12112(b)(2) for the costs incurred by the employer for reasonable accommodations the employer has to make to compensate for the website's noncompliance.[212] The EEOC has at least once before used Title I to reach third-party vendors whose web-based programs did not accommodate individuals with disabilities,[213] but has never addressed this particular legal theory. If the EEOC establishes that non-WCAG-compliant employer-vendor contracts subject both parties to liability under Section 12112(b)(2), damages will be easier to obtain,[214] thereby making Title I more attractive to private litigants.

2. Notice-Posting Violation Claims

As discussed in Part III.A, Section 12115 of Title I requires employers to post and keep notices "in an accessible format."[215] However, in situations where employees do not visit the workplace on a regular basis "electronic posting . . . may be required."[216] The COVID-19 pandemic has prompted such a situation, and, by extension, notice-posting needs to be accessible in both physical and electronic formats. The EEOC could use the COVID-19 pandemic as a reason to bring notice-posting violation claims against large companies to enforce the accessibility of electronic notices ("e-notices").[217] Another reason is the fact that 84% of recent job seekers have applied for a job online.[218] The ubiquity of the online applicant status also necessitates posting notices on employer websites. Otherwise, how would employers satisfy their notice-posting obligation as it pertains to applicants?

Notice-posting is an affirmative requirement of covered entities under Title I,[219] and a requirement that the EEOC already enforces.[220] The typical remedy

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[212] *See* H.R. REP. NO. 101-485, pt. 2, at 60 (1990).

[213] EEOC Consent Decree, *supra* note 150, at 5-6.

[214] 42 U.S.C. §§ 12112(b)(2), 1981A(a)(2) (providing for compensatory and punitive damages).

[215] *Id.* § 12115; *see also* U.S. EQUAL EMPL. OPPORTUNITY COMM'N, EEOC-NVTA-1991-1 THE ADA: YOUR RESPONSIBILITIES AS AN EMPLOYER (1991), https://www.eeoc.gov/laws/guidance/ada-your-responsibilities-employer [https://perma.cc/SNA2-ZNCJ] ("The ADA requires that you post a notice in an *accessible format* to applicants . . . ." (emphasis added)).

[216] *"EEO is the Law" Poster*, *supra* note 140.

[217] BLANCK, *supra* note 3, at 199-200 ("From a business point of view, larger organizations procuring and using web applications developed by smaller companies have leverage to mandate that [they] develop[] tools, products and services [that] are capable of integration for purposes of web equality, as they would do for other areas of product functionality in security and operability.").

[218] SMITH, *supra* note 10, at 9.

[219] 42 U.S.C. § 12115.

[220] *See* 29 C.F.R. pt. 1601 (2021).

for these violations is a small $569 fine.[221] However, the minor fine is not the only relief available. Injunctive relief is available to the EEOC (or any person) "alleging discrimination on the basis of disability in violation of *any* provision" of Title I.[222] Injunctive relief is a remedy preserved through the EEOC's Section 12117 enforcement authority, which grants the EEOC "[t]he powers, remedies, and procedures set forth in section[] . . . 2000e-5" of the Civil Rights Act of 1964.[223] Thus, the EEOC can sue to enjoin an employer from posting e-notices in an inaccessible format and order the employer to take "affirmative action"[224] to make its e-notices accessible as mandated by Section 12115.[225]

Although only injunctive relief would be sought, there are several benefits to the EEOC pursuing this cause of action. First, as a general matter, the threat of litigation would incentivize employers to ensure their e-notices are accessible.[226] Second, unlike the discrimination-based causes of action discussed above,[227] Title I's notice-posting requirement is an affirmative obligation and the failure to comply has consequences.[228] Third, because notice-posting is an affirmative requirement, the conversation shifts to universal design practices by making it incumbent on the employer—not the visually impaired job seeker—to maintain accessible web platforms. Fourth and finally, there are practical implications. The notice-posting provision requires employers to have an accessible notice of law that is compatible with screen readers. As a matter of economies of scale, an employer who has to modify its web-based platforms for notice-posting purposes is incentivized make the same changes to their website that they make for their online job application system. As such, private litigants who claim failure to accommodate could point to the employer's accessible notice-posting obligation to counter an "undue hardship" defense.[229] Because covered employers already have an affirmative obligation to make sure their e-notices are accessible, an employer who argues that accommodating a visually impaired job seeker who cannot access its online job application would "requir[e] significant difficulty or expense" will probably not meet its burden.[230]

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[221] *Id.*

[222] 42 U.S.C. § 12117(a) (emphasis added).

[223] *Id.*; *see id.* § 2000e-5(g)(1).

[224] *Id.* § 2000e-5(g)(1) ("[T]he court may . . . order such *affirmative action* as may be appropriate, which may include, *but is not limited to*, reinstatement or hiring of employees, with or without back pay . . . ." (emphasis added)).

[225] *Id.* § 12115.

[226] *See* BAGENSTOS, *supra* note 3, at 133.

[227] *See supra* Part II.B.1.

[228] *See* 42 U.S.C. § 12115.

[229] *Id.* § 12112(b)(5)(A) (qualifying that failure to accommodate is not discrimination if "covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business").

[230] *Id.* § 12111(10)(b) (listing factors that must be considered when making undue hardship determination). The employer bears the burden of proving "undue hardship." *See* 29 CFR § 1630.9(a) (2021).

IV. EEOC ACTION UNDER TITLE I WILL PRODUCE ANCILLARY BENEFITS FOR THE WEBSITES OF PUBLIC ACCOMMODATIONS

Progress toward web accessibility under Title I is also progress toward web accessibility for public accommodations and the ultimate goal of web-based equality irrespective of disability. "Web content equality cases in the employment context raise issues similar to those brought by plaintiffs seeking the full and equal enjoyment of online services provided by public accommodations,"[231] and thus addressing website inaccessibility as a Title I violation will also move the needle for web equality under Title III. If the home pages of these public accommodations' websites are inaccessible via screen reader, then the same fix to the home page that would enable a visually impaired job seeker to navigate from the home page to the website's online application portal would likely have the ancillary effect of enabling a visually impaired customer to navigate from the home page to the webpage used to access the company's goods and services.[232] The "home page barrier" underscores (1) why discussions of inaccessible online job applications cannot be had in isolation from concerns about the accessibility of an employer's website in its entirety, and (2) how accessibility improvements can have a ripple effect across employer websites.[233]

The Domino's Pizza website, which was at issue in the recent Ninth Circuit Title III website accessibility decision, illustrates these points.[234] Domino's website home page provides navigation links both to order a pizza (i.e., to "enjoy[]" the "goods. . . [and] services" of the "public accommodation")[235] and to apply for a job.[236] Consequently, regulating or suing Domino's as an employer would have clear, practical effects for Domino's website as a place of public accommodation. By making the Domino's website accessible to prospective employees, visually impaired patrons will also benefit from accessibility improvements made to its home page. Put differently, the interrelatedness of website inaccessibility is what allows accessibility efforts under Title I to move the needle for accessibility under Title III as well.

The ancillary effect across titles is further buttressed by the fact that "most employers use third-party vendors to build their sites,"[237] which means Title I litigation and regulation would empower employers to incorporate accessibility

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[231] BLANCK, *supra* note 3, at 200.

[232] *See* Lazar et al., *supra* note 38, at 75.

[233] *Id.*

[234] Robles v. Domino's Pizza, LLC, 913 F.3d 898, 898 (9th Cir.), *cert. denied*, 140 S. Ct. 122 (2019) (mem.).

[235] 42 U.S.C. § 12182(a).

[236] DOMINO'S, https://www.dominos.com/ [https://perma.cc/RVW7-4BGD] (last visited Sept. 23, 2021).

[237] Dorrian, supra note 54.

compliance into their vendor contracts.[238] This demand-side pressure on vendors is paramount,[239] especially for smaller businesses, where employers oftentimes "lack any leverage to force a vendor to redesign a jobs page."[240] Moreover, demand-side pressure on third-party vendors to comply with accessibility standards would have the supply-side effect of redesigning off-the-shelf products to ensure full accessibility.[241] As accessibility becomes a core feature of software developer's product lines, small businesses will be able to ensure their websites are accessible at a lower price. As such, the "solutions themselves are easy," while the issue stems from the lack of demand-side pressure on the vendors who act as the gatekeepers of website accessibility for Titles I and III.[242]

This is also what makes Title I's proscription of vendor contracts that have a discriminatory effect on the basis of disability so critical in advancing website accessibility.[243] This proscription applies regardless of employer intent[244] and can be used to hold vendors responsible for the costs incurred by the employer to compensate for the vendor's failure to build an accessible website as stated in the contract.[245] The EEOC, too, has recognized the importance of using the ADA to reach these vendor relationships—as evidenced by a 2011 consent decree requiring an employer's third-party vendors who had created the employer's "applicant test[ing] materials" to modify their programs to accommodate individuals with "sensory disabilities."[246] The relief the EEOC obtained in the consent decree is a concrete example of the far-reaching effect that litigating website accessibility under Title I can have for all titles of the ADA.[247]

CONCLUSION

While employers' increasingly rely on web-based recruiting and hiring, the unemployment rates of job seekers with visual impairments remains stagnant.[248] Indeed, the percentage of visually impaired individuals in the workforce is the

[238] For example, employers who purchase online employment application software could "request documentation that the software complies" with governing standards or ask for a "Voluntary Product Accessibility Template®" that documents the program's accessibility features. Lazar et al., *supra* note 38, at 83.

[239] Whether Title III liability extends to "web architects" has yet to be addressed by the courts. BLANCK, *supra* note 3, at 63.

[240] Dorrian, *supra* note 54.

[241] *Id.*

[242] Lazar et al., *supra* note 38, at 83; *see also* Dorrian, *supra* note 54.

[243] 42 U.S.C. § 12112(b)(2). See Section III.B.1.c for a more detailed discussion of Title I's disparate treatment provision that extends to vendors.

[244] 29 C.F.R. § 1630.6(a) (2021).

[245] H.R. REP. NO. 101-485, pt. 2, at 60 (1990).

[246] EEOC Consent Decree, *supra* note 150, at 5-6.

[247] *Id.*

[248] *See* BLANCK, *supra* note 3, at 197 (explaining how "the use of the web is crucial to hiring, retention, training and career advancement for people . . . with disabilities" (footnote omitted)).

same as it was thirty years ago when the ADA first passed.[249] The inability of visually impaired job seekers to "make full use of employers' hiring systems" is a "leading" factor for the disparate unemployment rates of visually impaired individuals,[250] yet the go-to title for web accessibility claims under the ADA is too limited to remove these online employment barriers.[251] If the next thirty years of the ADA are to differ from the first thirty, the EEOC must act. The EEOC must use its enforcement and regulatory authority under the ADA to develop causes of action under Title I for website accessibility claims so that private litigation can follow. If the EEOC fails to act, then visually impaired job seekers may have no direct legal recourse under the ADA, only incidental protections from Title III. If the EEOC acts, then visually impaired job seekers will have legal recourse to remedy the employment discrimination they face in the online environment and the effects of such actions will reverberate across the ADA's titles.

[249] Mulvaney, *supra* note 67.

[250] Dorrian, *supra* note 54.

[251] *See supra* Part II.