

The Internet as a Public Accommodation and its Impact on Higher Education

*Constancio Carvajal Paranal III**

This article examines the Americans with Disabilities Act (“ADA”), specifically the classification of the internet as a Public Accommodation under Title III, in light of the technological advancements since its signing thirty years ago. The profound use of the internet in every sector and its relevance to our day-to-day life requires deeper examination into how the law can remain adaptive, relevant, and purposeful in serving the needs of individuals with disabilities. Furthermore, the COVID-19 pandemic has highlighted the indubitable impacts of remote learning on students with disabilities and the lack of legal clarity necessary to support adequate governance and compliance. Given these significant structural and environmental changes in higher education, the goal is to reinforce the need for constitutional protection for individuals with disabilities by amending the ADA.

I. INTRODUCTION	144
II. BACKGROUND	148
A. <i>Americans with Disabilities Act (1990): History and Evolution</i>	148
1. Civil Rights Movements and Reforms: The Harbinger of the ADA.....	149
2. The Americans with Disabilities Act (“ADA”): Mission, Goals, and Objectives.....	153
3. Title III: Public Accommodations	154
B. <i>ADA Amendments: 1990-2008</i>	155
C. <i>Future of ADA: 2008 and Beyond</i>	158
D. <i>The Convergence of Internet and Web 2.0 Technologies, Right to Equal Access to Education, and Disability Rights</i>	162
1. eLearning Web 2.0 Technologies and Education	162
2. Access to Digital Education and Information	164
3. Digital Learning for the Disabled.....	166
E. <i>Public Accommodations in Higher Education for the</i>	

* Constancio Paranal III, Juris Doctor Candidate (J.D.) William S. Richardson School of Law, University of Hawai‘i at Mānoa.

<i>Disabled</i>	170
1. ADA Title III: Public Accommodations.....	170
2. Higher Education and ADA Compliance	172
3. Hawai‘i: Education and ADA Compliance Amid COVID-19	174
F. <i>The Fourteenth Amendment and Disability Rights</i>	178
III. ANALYSIS	179
A. <i>Reclassifying the Internet as Public Accommodations</i>	179
1. Prevalent Use of Digital Technologies and the Internet in Facilitation Educational Services	182
2. Increasing Number of Cases Related to Lack of Compliance of Colleges and Universities to ADA Rules..	185
3. Increasing Number of Educational Technologies Leads to Lack of Legal Ownership Amongst Institutions of Higher Learning	189
B. <i>Reinforcing the Need for Constitutional Protection for Individuals with Disabilities in Higher Education</i>	192
IV. CONCLUSION	198

I. INTRODUCTION

The recent COVID-19¹ pandemic disrupted the global economy, including world trade and movement, and affected our day-to-day lives.² The impact is no more pervasive than in our U.S. schools and institutions of learning, where “[a]s many as 1.6 billion students worldwide have faced school closures.”³ In particular, the education sector has witnessed and continues to experience the impacts and challenges posed by the COVID-19 pandemic on students, most notably leading to inequalities of all kinds, including economic and gender disparities.⁴ The shift to a digital learning environment redefined and redesigned classrooms as communal places of learning where we see a blending of virtual and physical worlds.⁵ In conjunction with a new learning environment is a new way of accessing,

¹ The SARS-CoV-2 Coronavirus (“COVID-19”) is a viral disease spread from person to person through [droplets, air, etc.]. *What You Should Know About COVID-19 to Protect Yourself and Others*, CTR. FOR DISEASE CONTROL & PREVENTION (2020), <https://www.cdc.gov/coronavirus/2019-ncov/downloads/2019-ncov-factsheet.pdf>.

² Abid Haleem et al., *Effects of COVID-19 Pandemic in Daily Life*, ELSEVIER PUB. HEALTH EMERGENCY COLLECTION 78–79 (2020).

³ *Learning Interrupted: Education, COVID-19, and the Culture of Peace*, INT’L PEACE INST., <https://www.ipinst.org/2020/09/learning-interrupted-education-covid-19-and-the-culture-of-peace#5>.

⁴ *Id.*

⁵ Andrew Kim, *How Technology is Changing Education*, STEELCASE, <https://www.steelcase.com/research/articles/topics/technology/how-technology-is-changing-education/>.

delivering, distributing, and exchanging knowledge.⁶ With an increasing dependence on technology, access to technological resources becomes a critical concern, particularly for individuals with disabilities.⁷

Enacted in 1990, the Americans with Disabilities Act (“ADA”)⁸ “has often been described as the most sweeping nondiscrimination legislation since the Civil Rights Act of 1964.”⁹ The overall purpose of the ADA is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”¹⁰

The ADA is limited in its scope—it fails to cover nondiscriminatory policies for individuals with disabilities related to the services conducted on the internet and in the digital environment.¹¹ The ADA was enacted into law around the time the WorldWideWeb (commonly known as and referred to herein as the “Web” or “internet”)¹² was developed and formalized.¹³ While the ADA was amended in 2008, Congress’ amendments did not include any revisions specific to the internet as public accommodation; thus, issues of coverage for individuals with disabilities remain unresolved.¹⁴ “Public accommodations that receive federal financial assistance, [however,] are subject to the requirements of Section 504 of the Rehabilitation Act as well as the requirements of the ADA.”¹⁵ Thus, institutions of higher education

⁶ Betsy Foresman, *Pandemic Amplified Students’ Growing Reliance on Technology*, Says Educause, EDSCOOP (Oct. 23, 2021), <https://edscoop.com/educause-2020-student-technology-report/>.

⁷ *Id.*

⁸ Equal Opportunity for Individuals with Disabilities, 42 U.S.C. § 12101 et seq. (1990). For a more detailed discussion of the ADA, see CYNTHIA BROUGHER, CONG. RSCH. SERV., *THE AMERICANS WITH DISABILITIES ACT (ADA): STATUTORY LANGUAGE AND RECENT ISSUES* (2012).

⁹ See generally NANCY LEE JONES, CONG. RSCH. SERV., *THE AMERICANS WITH DISABILITIES ACT (ADA) PROPOSED REGULATIONS* (2009).

¹⁰ Equal Opportunity for Individuals with Disabilities, 42 U.S.C. § 12101(b)(1).

¹¹ See *id.* § 12182.

¹² WorldWideWeb (“W3”) is a wide-area hypermedia information retrieval initiative aiming to give universal access to a large universe of documents. *WorldWideWeb – Summary*, <http://info.cern.ch/hypertext/WWW/Summary.html> (last visited Feb. 28, 2021) [hereinafter WorldWideWeb].

¹³ *A Short History of the Web*, CERN, <https://home.cern/science/computing/birth-web/short-history-web#:~:text=Where%20the%20Web%20was%20born,and%20institutes%20around%20the%20world.>

¹⁴ CONG. RSCH. SERV., *THE AMERICANS WITH DISABILITIES ACT (ADA): APPLICATION TO THE INTERNET I* (2009).

¹⁵ *Title III Regulations 1991 Preamble and Section-by-Section Analysis*, AMS. WITH DISABILITIES ACT TITLE III REGULS. (2017), https://www.ada.gov/regs2010/titleIII_2010/titleIII_2010_regulations.htm#a1991preambl

receiving federal assistance must make “reasonable accommodations to ensure their web content is accessible to everyone, including, but not limited to, people who are blind, deaf or have limited mobility.”¹⁶ These required accommodations “ensur[e] that every aspect of a university’s sprawling web presence meets recommended web-accessibility standards, which [is] a huge challenge.”¹⁷ Despite these requirements, a number of universities and colleges fail to comply and are often subject to litigation over alleged violations of the ADA.¹⁸ With institutions of higher education adapting to the rapid development of technology, an increasing consumption of knowledge and learning via the internet reveals the increasing inequities in digital access and utilization for individuals with disabilities.¹⁹

The COVID-19 pandemic forced schools to shut down their campuses and move to remote and online learning.²⁰ The sudden move has impacted individuals with disabilities in seeking assistance necessary to fully adapt to online learning, thereby compromising their academic and professional success.²¹ For instance, the visually impaired have to be able to properly utilize and navigate Web 2.0²² technologies (i.e., Zoom, website, mobile applications) on their own while solely relying on their devices’ assistive technology, a product function that may or may not be available to the user. Furthermore, student services related to educational technology assistance and counseling, as well as administrative services such as course registration, have now been moved exclusively online in most instances.²³

e.

¹⁶ Lindsay McKenzie, *Feds Prod Universities to Address Website Accessibility Complaints*, INSIDE HIGHERED (Nov. 6, 2018), <https://www.insidehighered.com/news/2018/11/06/universities-still-struggle-make-websites-accessible-all> [hereinafter McKenzie, *Feds Prod Universities to Address Website Accessibility Complaints*].

¹⁷ *Id.*

¹⁸ Lindsay McKenzie, *Hit with ADA Lawsuit*, INSIDE HIGHERED (Dec. 22, 2018), <https://www.insidehighered.com/news/2018/12/10/fifty-colleges-sued-barrage-ada-lawsuits-over-web-accessibility> [hereinafter McKenzie, *Hit with ADA Lawsuit*].

¹⁹ See generally Robin Lake & Alvin Makori, *The Digital Divide Among Students During COVID-19: Who Has Access? Who Doesn’t?*, CRPE REINVENTING PUB. EDUC. (June 16, 2020), <https://www.crpe.org/thelens/digital-divide-among-students-during-covid-19-who-has-access-who-doesnt>.

²⁰ *Learning Interrupted: Education, COVID-19, and the Culture of Peace*, *supra* note 3.

²¹ Greta Anderson, *Accessibility Suffers During Pandemic*, INSIDE HIGHER ED (Apr. 6, 2020), <https://www.insidehighered.com/news/2020/04/06/remote-learning-shift-leaves-students-disabilities-behind>.

²² See Darcy DiNucci, *Fragmented Future*, DESIGN & NEW MEDIA 32 (1999), http://darcy.com/fragmented_future.pdf (explaining how “Web 2.0” was coined).

²³ See, e.g., David Ayersman et al., *Sustaining Advancements in the New Normal*,

This places the burden on individuals with disabilities to resolve these issues on their own, thereby further creating barriers that result in inequities.²⁴

For individuals with disabilities who are part of a scholarly community, equitable access is not enough; more adequate assistance must be provided to ensure that they are able to participate actively and productively.²⁵ But without specific regulatory standards on how the ADA should be applied to the digital environment and without proper administrative agency enforcement and guidance for effective compliance, individuals with disabilities will continue to face inequalities realizing educational opportunities.²⁶ The traditional view that the United States Supreme Court holds is that individuals with disabilities are not similarly situated and therefore require special treatment.²⁷ This is different from the case with women and racial minorities such that it engenders inequality as it limits the application of the Equal Protection clause under the Fourteenth Amendment.²⁸

In general, there is still much to do in the area of internet access and public accommodation within the realm of higher education.²⁹ While some educational institutions utilize International Organization for Standardization (“ISO”)³⁰ standards and the Web Content Accessibility

EDUCAUSE REV. (Oct. 26, 2020), <https://er.educause.edu/articles/2020/10/sustaining-advancements-in-the-new-normal> (discussing how the virtual campus led the effort to move academic advising entirely online); Roger G. Baldwin, *Technology in Education*, MICH. STATE UNIV., <https://education.stateuniversity.com/pages/2496/Technology-in-Education-HIGHER-EDUCATION.html> (discussing how technology has impacted college and university operations including housing and student services).

²⁴ See *Many Special Needs Students Left to Own Devices During Coronavirus Crisis, School Districts Scrambling to Fill Void*, 7 NEWS BOSTON (Apr. 14, 2020), <https://whdh.com/news/many-special-needs-students-left-to-own-devices-during-coronavirus-crisis/>.

²⁵ See *Section 504: A Plan for Equity, Access and Accommodations*, P’SHPIS FOR ACTION, VOICES, & EMPOWERMENT, <https://wapave.org/section-504-a-plan-for-equity-access-and-accommodations/>.

²⁶ See *The Civil Rights of Students with Hidden Disabilities Under Section 504 of the Rehabilitation Act of 1973*, OFF. FOR C.R., <https://www2.ed.gov/about/offices/list/ocr/docs/hq5269.html>.

²⁷ See Arlene B. Mayerson & Silvia Yee, *The ADA and Models of Equality*, DISABILITY RTS. EDUC. & DEF. FUND, <https://dredf.org/news/publications/disability-rights-law-and-policy/the-ada-and-models-of-equality/>.

²⁸ *Id.*

²⁹ See generally Victoria Rosenboom & Kristin Blagg, *Three Million Americans are Disconnected from Higher Education*, URBAN INST. (Feb. 1, 2018), <https://www.urban.org/urban-wire/three-million-americans-are-disconnected-higher-education>.

³⁰ “[International Organization for Standardization (“ISO”)] is an independent,

Guidelines (“WCAG”),³¹ non-adherence to these practices does not result in a violation of the ADA.³² As the future of education vis-a-vis the “new normal” points more to increased online learning and digital environments, it is critical and timely for the ADA to be amended and expanded to ensure that people with disabilities are not being deprived of their rights to public accommodations.³³

This Article examines the need for the reclassification of the internet as a public accommodation because of its impact on higher education as it relates to its accessibility to and use by individuals with disabilities.³⁴ The discussion highlights the limitations of the ADA in the preservation and promotion of constitutional rights of individuals with disabilities towards the enjoyment and fulfillment of equal access to education and educational opportunities.³⁵ Part II provides the background and discusses the evolution and historical transformation of the ADA in conjunction with the rapid technological developments and disruption. Apart from identifying the external drivers that led to its inception, this Part also focuses on the structure and substance of the ADA with particular emphasis on Title III, which talks about public accommodation. Part III provides an analysis and argues for the need to reclassify the internet as a public accommodation as it will positively impact higher education, including the rights of students with disabilities. It further establishes the unconstitutionality of discriminatory practices in education based on disability.

II. BACKGROUND

A. *Americans with Disabilities Act (1990): History and Evolution*

The importance of the ADA and its societal contributions can be

non-governmental international organization with a membership of 165 national standards bodies. . .[I]t brings together experts to share knowledge and develop voluntary, consensus-based, market relevant International Standards that support innovation and provide solutions to global challenges.” *About Us*, INT’L ORG. FOR STANDARDIZATION, <https://www.iso.org/about-us.html>.

³¹ Web Content Accessibility Guidelines (“WCAG”) is a technical document developed to explain “how to make web content more accessible to people with disabilities.” *Web RTC*, WEB CONTENT ACCESSIBILITY GUIDELINES (WCAG) OVERVIEW, <https://www.w3.org/WAI/standards-guidelines/wcag/> (“[W]hile the ADA doesn’t yet specify WCAG as a formal standard under the law, the courts are upholding that compliance with WCAG provides reasonable accessibility.”).

³² *Is There a Legal Requirement to Implement WCAG?*, BUREAU INTERNET ACCESSIBILITY (Aug. 22, 2019), <https://www.boia.org/blog/is-there-a-legal-requirement-to-implement-wcag>.

³³ *See The ADA at 25: Important Gains, But Gaps Remain*, KNOWLEDGE @ WHARTON (Aug. 7, 2015), <https://knowledge.wharton.upenn.edu/article/the-gaps-that-remain-as-the-ada-turns-25/>.

³⁴ *See* discussion *infra* Part II.D.

³⁵ *See* discussion *infra* Part II.E.

traced through its past.³⁶ “The [ADA] was signed into law on July 26, 1990, by President George H. W. Bush.”³⁷ It is considered:

[O]ne of America’s most comprehensive pieces of civil rights legislation that prohibits discrimination and guarantees that people with disabilities have the same opportunities as everyone else to participate in the mainstream of American life -- to enjoy employment opportunities, to purchase goods and services, and to participate in State and local government programs and services.³⁸

The ADA is modeled after the Civil Rights Act of 1964³⁹ and Section 504 of the Rehabilitation Act of 1973.⁴⁰

1. Civil Rights Movements and Reforms: The Harbinger of the ADA

The success of the ADA dates back to the civil rights movement.⁴¹ It prevailed under similar ideals and narratives of social activism.⁴² “The civil rights movement was a struggle for social justice that took place mainly during the 1950s and 1960s for Black Americans to gain equal rights under the law in the United States.”⁴³ There were three major civil rights statutes enacted from 1964 through 1968.⁴⁴ The Civil Rights Act of 1964 was broad in its scope, encompassing beneficiaries of federal funds, employers, and places of public accommodation, such as bus stations, restrooms, and lunch counters.⁴⁵ In 1965, the second major anti-discrimination statute of the Civil Rights Era, title 52, section 10101 of the

³⁶ See *Information and Technical Assistance on the Americans with Disabilities Act*, U.S. DEP’T JUST. C.R. DIV., https://www.ada.gov/ada_intro.htm.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Civil Rights Act of 1964*, NAT’L PARK SERV. (Mar. 22, 2016), <https://www.nps.gov/articles/civil-rights-act.htm>; Civil Rights Act of 1964, 42 U.S.C. Ch. 21.

⁴⁰ See *Information and Technical Assistance on the Americans with Disabilities Act*, *supra* note 36.

⁴¹ See Jones, *supra* note 9.

⁴² See *Civil Rights Act of 1964*, *supra* note 39.

⁴³ *Civil Rights Movement*, HIST. (Oct. 27, 2009), <https://www.history.com/topics/black-history/civil-rights-movement>.

⁴⁴ *The Civil Rights Act of 1964: A Long Struggle for Freedom*, LIBR. CONG., <https://www.loc.gov/exhibits/civil-rights-act/legal-events-timeline.html>.

⁴⁵ Howard Kager & Steven R. Rose, *Revisiting the Americans with Disabilities Act After Two Decades*, J. SOC. WORK DISABILITY & REHAB. 73, 74 (2010).

United States Code also known as the Voting Rights Act,⁴⁶ was enacted. Three years later, the last of the major civil rights acts of the era, the Fair Housing Act,⁴⁷ was passed.⁴⁸ These legislative acts, along with the African American and women's movements, served as the impetus for individuals with disabilities to push for the disability rights movement.⁴⁹

The ADA was born out of a grassroots civil rights movement.⁵⁰ It began with small congregations and turned into large movements across the nation fighting for civil rights and against exclusion, segregation, and institutionalization of individuals with disabilities.⁵¹ The disability rights movement has made the injustices faced by people with disabilities visible to the American public and to politicians.⁵² Like prior civil rights movements, the disability rights movement adopted specific strategic elements, seeking justice in the streets, courts, and legislative halls.⁵³

The disability rights movement led to the passage of Section 504 of

⁴⁶ Elective Franchise, 42 U.S.C. §§ 1973–1973(p).

⁴⁷ Fair Housing, 42 U.S.C. §§ 3601–3619.

⁴⁸ *Civil Rights Movement*, *supra* note 43.

⁴⁹ *See Information and Technical Assistance on the Americans with Disabilities Act*, *supra* note 36.

⁵⁰ Mayerson & Yee, *supra* note 28.

⁵¹ *A Brief History of the Disability Rights Movement*, ANTI-DEFAMATION LEAGUE 1, at 1-2 (2018), <https://www.adl.org/education/resources/backgrounders/disability-rights-movement>.

In the 1800s, people with disabilities were considered meager, tragic, pitiful individuals unfit and unable to contribute to society, except to serve as ridiculed objects of entertainment in circuses and exhibitions. They were assumed to be abnormal and feeble-minded, and numerous persons were forced to undergo sterilization. People with disabilities were also forced to enter institutions and asylums, where many spent their entire lives. The 'purification' and segregation of persons with disability were considered merciful actions, but ultimately served to keep people with disabilities invisible and hidden from a fearful and biased society . . . By the 1960s, the civil rights movement began to take shape, and disability advocates saw the opportunity to join forces alongside other minority groups to demand equal treatment, equal access and equal opportunity for people with disabilities. The struggle for disability rights has followed a similar pattern to many other civil rights movements—challenging negative attitudes and stereotypes, rallying for political and institutional change, and lobbying for the self-determination of a minority community.

Id.

⁵² *See* Arlene Mayerson, *The History of the Americans with Disabilities Act: A Movement Perspective*, DISABILITY RTS. EDUC. & DEFENSE FUND (1992), <https://dredf.org/about-us/publications/the-history-of-the-ada/>.

⁵³ *Id.*

the 1973 Rehabilitation Act, which addressed issues of discrimination on the basis of disability by the recipients of federal funds.⁵⁴ “For the first time, the exclusion and segregation of people with disabilities was viewed as discrimination.”⁵⁵ It brought to light the harsh realities of inequality that individuals with disabilities endure because of the lack of governmental support which exists to this day.⁵⁶ In addition, Section 504 recognized that while there are major physical and mental variations in disabilities, people with disabilities as a group faced similar discrimination in employment, education, and access to society.⁵⁷ Lastly, it allowed for rightful recognition of individuals with disabilities as a protected class or a minority group subject to discrimination and deserving of basic civil rights protections.⁵⁸

Despite tremendous progress, the path to the ADA was not easy.⁵⁹ Due to the economic hardship imposed on businesses in providing accommodations to individuals with disability, Section 504 was met with resistance and the attempt to de-regulate.⁶⁰ In 1979, the Supreme Court ruled against individuals with disabilities by allowing Southeastern Community College to deny admission in its nursing program to a hearing-impaired individual.⁶¹ The Court’s decision displayed its “lack of understanding, and at worst, a hostility toward applying the concept of discrimination based on disability.”⁶² In 1984, in *Grove City College v. Bell*, the Supreme Court concluded that prohibiting discrimination as a condition for federal assistance did not infringe upon the First Amendment rights of the College and the school was free to end its participation in the grant program.⁶³ The Civil Rights Restoration Act (“CRRA”),⁶⁴ which was passed in 1988, sought to overturn the decision of the Supreme Court in *Grove City College* and expanded the reach of statutes prohibiting

⁵⁴ See *Disability Discrimination: Overview of the Laws*, OFF. FOR C.R., <https://www2.ed.gov/about/offices/list/ocr/disabilityoverview.html#:~:text=Section%20504%20of%20the%20Rehabilitation,by%20recipients%20of%20federal%20funds>.

⁵⁵ Mayerson & Yee, *supra* note 28.

⁵⁶ Kathleen Romig, *President’s Budget Would Hurt People with Disabilities*, CTR. BUDGET & POL’Y PRIORITIES (Feb. 13, 2020), <https://www.cbpp.org/blog/presidents-budget-would-hurt-people-with-disabilities-1>.

⁵⁷ Mayerson & Yee, *supra* note 28.

⁵⁸ See *id.*

⁵⁹ See *ADA: A Historic Legacy*, PN ONLINE (July 20, 2016), <https://pnonline.com/archived/ada-a-historic-legacy/>.

⁶⁰ Mayerson & Yee, *supra* note 28.

⁶¹ *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 403 (1979).

⁶² Mayerson, *supra* note 52.

⁶³ *Grove City Coll. v. Bell*, 465 U.S. 555, 559 (1984).

⁶⁴ Mayerson, *supra* note 52.

discrimination.⁶⁵

In 1984, the Supreme Court granted review of *Consolidated Rail Corporation v. Darrone*,⁶⁶ which concerned whether employment discrimination against disabled employees was covered by the anti-discrimination provisions of Section 504.⁶⁷ “[T]he Disability Rights Education and Defense Fund [(“DREDF”)] filed an amicus brief on behalf of the 63 national, state, and local organizations dedicated to securing the civil rights of persons with disabilities.”⁶⁸ *Consolidated Rail* “marked a significant victory for the disability rights community” in that the court ruled that “employment discrimination was . . . prohibited by Section 504 [and,] equally important[], that the regulations issued in 1977 by the [Department of Health, Education, and Welfare (“HEW”)] were entitled to great deference by the courts.”⁶⁹

“In 1987, the Court was presented with the issue of whether people with contagious diseases are covered by Section 504.”⁷⁰ The Supreme Court’s 1987 decision in *School Board of Nassau County v. Arline*⁷¹ “became the foundation for coverage of people with AIDS under Section 504 and the ADA.”⁷² The following year, the civil and disability rights community helped amend the Fair Housing Act (“FHA”) “to improve enforcement mechanisms” and to include, for the first time, “disability anti-discrimination provisions . . . in a traditional civil rights statute banning race discrimination.”⁷³ These legislative acts further strengthened the disability rights community and led to passage of the ADA through the recommendations of the National Council on Disability.⁷⁴

⁶⁵ *Id.* (discussing how leaders from minority and woman’s groups coalesced with leaders of disability groups to fight the decision of the Supreme Court and in 1988 led to the establishment of the Fair Housing Act, 42 U.S.C Chapter 45).

⁶⁶ *Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 629 (1984).

⁶⁷ *Id.*

⁶⁸ Mayerson, *supra* note 52.

⁶⁹ *Id.* (“The Department of Health, Education and Welfare (“HEW”) had been given the task of promulgating regulations to implement Section 504, which would serve as guidelines for all other federal agencies. These regulations became the focus of attention for the disability rights movement for the next four years.”).

⁷⁰ *Id.*

⁷¹ *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273 (1987).

⁷² Mayerson, *supra* note 52.

⁷³ *Id.*

⁷⁴ *History of NCD*, NAT’L COUNCIL ON DISABILITY, <https://ncd.gov/about#:~:text=History%20of%20NCD&text=First%20established%20as%20a%20small,federal%20disability%20programs%20and%20policies> (The National Council on Disability (“NCD”) “is an independent federal agency charged with advising the President, Congress, and other federal agencies regarding policies, programs, practices,

The successful passage of the ADA bill into law was a hard-fought battle.⁷⁵ Community activists fought hard to have this type of legislation championed by the president.⁷⁶ In the 1980s, new legislations were “passed [and] reinstate[d] the coverage of anti-discrimination provisions to all airlines, the right to sue states for violations of Section 504, and the right of parents to recover attorney fees under the Education for All Handicapped Children’s Act [(“EAHCA”).”⁷⁷ Ultimately, the driving force of the ADA was the community of civil and disability rights activists who were dedicated to promoting awareness and advocacy for the disabled.⁷⁸

2. The Americans with Disabilities Act (“ADA”): Mission, Goals, and Objectives

The first version of the ADA was pioneered by the National Council on Disability⁷⁹ in 1988.⁸⁰ A second edition of the Act was introduced in May 1989 and, after further amendments, was passed by the Senate on September 7, 1989.⁸¹ President H. W. Bush depicted the ADA as “the world’s first comprehensive declaration of the equality of people with disabilities, and evidence of America’s leadership internationally in the cause of human

and procedures that affect people with disabilities. . . [It started] as a small advisory Council within the Department of Education in 1978 and was transformed into an independent agency in 1984 charged with reviewing all federal disability programs and policies. In 1986, NCD recommended enactment of an Americans with Disabilities Act, and then drafted the first version of the bill introduce in the House and Senate in 1988. Since enactment of the ADA in 1990, NCD has continued to play a leading role in analyzing the needs of people with disabilities, crafting policy solutions, and advising the President and Congress.”).

⁷⁵ See *ADA: A Historic Legacy*, supra note 59.

⁷⁶ *Id.*

⁷⁷ Mayerson, supra note 52; *S. 6 (94th): Education for All Handicapped Children Act*, GOVTRACK, <https://www.govtrack.us/congress/bills/94/s6> (explaining that The Education for All Handicapped Children Act (sometimes referred to using the acronyms “EAHCA” or “EHA”, or Public Law (PL) 94-142) “was enacted by the United States Congress in 1975. This act required all public schools accepting federal funds to provide equal access to education for children with physical and mental disabilities. Public schools were required to evaluate children with disabilities and create an educational plan with parent input that would emulate as closely as possible the educational experience of non-disabled students. The act was an amendment to Part B of the Education of the Handicapped Act enacted in 1966.”).

⁷⁸ See Mayerson, supra note 52; *S. 6 (94th): Education for All Handicapped Children Act*, supra note 77.

⁷⁹ *About Us*, NAT’L COUNCIL ON DISABILITY, <https://ncd.gov/about>. (last visited Mar. 27, 2021).

⁸⁰ *Timeline of Americans with Disabilities Act*, ADA NAT’L NETWORK, <https://adata.org/ada-timeline>.

⁸¹ *Id.*

rights.”⁸²

The ADA is essentially “a civil rights law that prohibits discrimination against individuals with disabilities in all areas of public life, including jobs, schools, transportation, and all public and private places that are open to the general public.”⁸³ The purpose of the law is to ensure that people with disabilities have the “same rights and opportunities as everyone else. The ADA gives civil rights protections to individuals with disabilities similar to those provided to individuals on the basis of race, color, sex, national origin, age, and religion.”⁸⁴

The ADA contains five separate titles.⁸⁵ Title I contains the findings of Congress; the definitions of terms and purposes of the ADA; the provisions for enforcement of the ADA; and a prohibition on discrimination in the employment context.⁸⁶ Title II enables plaintiffs to bring claims against state and local governments that have failed to provide equal access to government services and some forms of transportation.⁸⁷ Title III prohibits a place of public accommodation that is engaged in interstate commerce from discriminating in the provision of goods and services.⁸⁸ Title IV regulates telecommunications services that allows individuals with hearing and speech disabilities to communicate over the telephone as well as closed captioning of federally funded public service announcements.⁸⁹ Title V refers to miscellaneous provisions including its relationship to other laws, state immunity, its impact on insurance providers and benefits, prohibition against retaliation and coercion, illegal use of drugs, and attorney’s fees.⁹⁰ Title III addresses places of public accommodation and impacts of the use of technology in education for students with disabilities.⁹¹

3. Title III: Public Accommodations

Schools, such as institutions of higher education, are explicitly

⁸² *President's Day - Remembering the Signing of the ADA*, KESSLER FOUND., <https://kesslerfoundation.org/info/presidents-day-remembering-ada>.

⁸³ *What is the Americans with Disabilities Act?*, ADA NAT’L NETWORK, <https://adata.org/learn-about-ada#:~:text=The%20purpose%20of%20the%20law,origin%2C%20age%2C%20and%20religion> (last visited Mar. 2021).

⁸⁴ *Id.*

⁸⁵ Equal Opportunity for Individuals with Disabilities, 42 U.S.C. § 12101 et seq.

⁸⁶ *Id.* §§ 12101–12117.

⁸⁷ *Id.* §§ 12131–12165.

⁸⁸ *Id.* §§ 12181–12189.

⁸⁹ *Id.* § 12206.

⁹⁰ *What is the Americans with Disabilities Act?*, *supra* note 83.

⁹¹ See Equal Opportunity for Individuals with Disabilities, 42 U.S.C. § 12181(7)(J).

classified as places of public accommodation and, as such, must adhere to the provisions of the ADA that relate to providing services to individuals with disabilities.⁹² Title III of the ADA discusses “place[s] of public accommodation.”⁹³ In general, these places of public accommodation affect commerce as they facilitate the exchange of goods and services, and fall within specific types or categories.⁹⁴ Title III of the ADA states, “[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.”⁹⁵ In general, places of public accommodation have an affirmative duty to make reasonable modifications to their policies, practices, or procedures and to provide auxiliary aids and services, if necessary, to accommodate the needs of individuals with disabilities.⁹⁶

In addition, places of public accommodation must not impose requirements tending to exclude individuals with disabilities from the full enjoyment of their goods, services, facilities, privileges, advantages, or accommodations.⁹⁷ However, the affirmative responsibilities⁹⁸ and conditions of a place of public accommodation are limited by a reasonableness standard; such that, no action should be taken if it causes undue hardship to the entity offering a service.⁹⁹ Furthermore, accommodations should also be “readily achievable,” which is defined as “easily accomplishable and able to be carried out without much difficulty or expense.”¹⁰⁰

B. ADA Amendments: 1990-2008

Numerous discrimination lawsuits, predominantly by individuals against private businesses, were filed before the lower federal courts, with the U.S. Supreme Court granting certiorari and deciding on twenty cases

⁹² *Id.*

⁹³ *Id.* § 12182(a).

⁹⁴ *Id.* § 12181(7).

⁹⁵ *Id.* § 12182(a).

⁹⁶ *See id.* §§ 12182(b)(2)(A)(ii), (iii).

⁹⁷ *See id.* § 12182(b)(2)(A)(i).

⁹⁸ *See The ADA: Your Responsibilities as an Employer*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/publications/ada-your-responsibilities-employer>.

⁹⁹ *See Equal Opportunity for Individuals with Disabilities*, 42 U.S.C. §§ 12182(b)(2)(A)(ii), (iii).

¹⁰⁰ *Id.* §12181(9).

since the passage of the ADA.¹⁰¹ A majority of the cases dealt with discrimination issues while “balancing . . . states’ rights and the definition of disability.”¹⁰² In *Olmstead v. L.C.* (1999),¹⁰³ where two developmentally disabled women were barred from relocating outside of the psychiatric institution, the Court ruled that the prohibition classified as segregation and discrimination.¹⁰⁴ However, “in *Sutton v. United Airlines, Inc.* (1999), the Supreme Court ruled that two women who had sued the airline for not hiring them as pilots because they did not meet vision standards could not claim discrimination under the ADA because their correctable vision impairments did not constitute a disability.”¹⁰⁵ “The [C]ourt further limited the definition of who is disabled in *Vaughn L. Murphy v. United Parcel Service, Inc.* (1999),¹⁰⁶ [where] the majority argued that a medically treatable condition (in this instance hypertension) cannot be considered a disability.”¹⁰⁷ In *Toyota Motor Mfg. v. Williams* (2002), the Court unanimously ruled against an autoworker who claimed her carpal tunnel syndrome should have qualified her as disabled.¹⁰⁸ As author of the decision, Justice Sandra Day O’Connor “noted that ‘given large potential differences in the severity and duration of the effects of carpal tunnel syndrome, an individual’s carpal tunnel syndrome diagnosis, on its own, does not indicate whether the individual has a disability within the meaning of the ADA.’”¹⁰⁹

Prior to the ADA Amendments Act (“ADAAA”) of 2008,¹¹⁰ the

¹⁰¹ Chelsey Parrott-Sheffer, *Americans with Disabilities*, ENCYCLOPEDIA BRITANNICA (Apr. 30, 2020), <https://www.britannica.com/topic/Americans-with-Disabilities-Act>.

¹⁰² *Id.*

¹⁰³ *Olmstead v. L.C.*, 527 U.S. 581(1999).

¹⁰⁴ Parrott-Sheffer, *supra* note 101.

¹⁰⁵ *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999); Parrott-Sheffer, *supra* note 101.

¹⁰⁶ *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999).

¹⁰⁷ Parrott-Sheffer, *supra* note 101.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *The Americans with Disabilities Act Amendments Act of 2008*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/statutes/americans-disabilities-act-amendments-act-2008>. (“On September 25, 2008, the President signed the Americans with Disabilities Act Amendments Act of 2008 (“ADA Amendments Act” or “Act”). The Act emphasizes that the definition of disability should be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA and generally shall not require extensive analysis. The Act makes important changes to the definition of the term “disability” by rejecting the holdings in several Supreme Court decisions and portions of EEOC’s ADA regulations. The effect of these changes is to make it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the ADA.”).

Supreme Court repeatedly held that the ADA must be interpreted to create a demanding standard for qualifying as disabled, and that minor and nonchronic conditions of short duration that could be corrected with mitigating measures (e.g. bruises, broken limb, sprain, infection, et cetera) did not constitute disabilities.¹¹¹ The narrow interpretation shifted the Court's attention to deciding if people's claims of discrimination were protected by the law, as opposed to whether or not the individual was disabled and should be protected.¹¹²

In 2005, the Judiciary Data and Analysis Office of the Administrative Office ("AO")¹¹³ of the U.S. Courts "began publishing statistics on civil cases filed under the ADA in the U.S. district courts. ADA cases constitute a subcategory of civil rights cases on the civil docket."¹¹⁴ Most of the ADA claims involve public accommodation matters,¹¹⁵ which may be attributed to the country's aging baby boom population.¹¹⁶ From 2005 to 2008, the number of civil ADA related lawsuits rose by 32 percent from 2,177 to 2,883.¹¹⁷ Filings in the states of California, Florida, and New York accounted for a significant number of ADA cases.¹¹⁸

The increasing number of ADA-related cases pressured Congress to pass the ADAAA of 2008 and overturn two controversial Supreme Court decisions—*Sutton v. United Airlines, Inc.* and *Toyota Motor Mfg. v. Williams*.¹¹⁹ The ADAAA rejected the high standards imposed on claimants

¹¹¹ See Parrott-Sheffer, *supra* note 101.

¹¹² *Id.*

¹¹³ National Archives, *Federal Register*, <https://www.federalregister.gov/agencies/administrative-office-of-united-states-courts> ("Created in 1939, the Administrative Office of the United States Courts (AO) serves the federal Judiciary in carrying out its constitutional mission to provide equal justice under law. The AO is the central support entity for the Judicial Branch. It provides a wide range of administrative, legal, financial, management, program, and information technology services to the federal courts. The AO provides support and staff counsel to the Judicial Conference of the United States and its committees, and implements and executes Judicial Conference policies, as well as applicable federal statutes and regulations. The AO facilitates communications within the Judiciary and with Congress, the Executive Branch, and the public on behalf of the Judiciary.").

¹¹⁴ United States Courts, *Just the Facts: Americans with Disabilities Act*, (July 12, 2018), <https://www.uscourts.gov/news/2018/07/12/just-facts-americans-disabilities-act>.

¹¹⁵ *Id.*

¹¹⁶ Nathan Moon et al., *Baby Boomers Are Turning Grey*, ABA BUS. LAW (June 2010), <https://www-jstor-org.eres.library.manoa.hawaii.edu/stable/pdf/23297733.pdf?refreqid=excelsior%3Ae0da36116cfd063dd59e6cbf458cfdcc>.

¹¹⁷ United States Courts, *supra* note 114.

¹¹⁸ *Id.*

¹¹⁹ Ann S. Kimbol, *Congress Overturns USSC ADA Jurisprudence*, HOUS. J.

by the Court in these cases and reiterated the Congressional intent to broaden the scope of the ADA and make it more inclusive.¹²⁰ Furthermore, “the ADAAA went against the spirit of the [C]ourt’s earlier decision in [Vaughn L. Murphy] by declaring that mitigating measures such as medication could not be taken into account when considering whether someone should be classified as disabled.”¹²¹ Essentially, the ADAAA addressed the Supreme Court’s prior interpretations that limited the rights of individuals with disabilities and addressed the desire to strike a balance between employer and employee interests.¹²²

C. Future of ADA: 2008 and Beyond

Since the enactment of ADAAA in 2008, the number of ADA Civil Rights cases increased by 273.67 percent in 2017, from 2,883 to 10,773 cases.¹²³ “From 2005 to 2017, filings of ADA cases raising employment discrimination claims rose 196 percent to 2,494.”¹²⁴ “Filings of cases raising other ADA claims grew more rapidly, increasing 521 percent to 8,279 cases.”¹²⁵ These other cases included “claims of limited accessibility at businesses such as restaurants, movie theaters, schools, and office buildings.”¹²⁶

Revised regulations implementing the ADA in 2011 may have been the reason for the increase in cases filed across the country.¹²⁷ “Filings in the states of California, Florida, and New York account for a significant number of ADA cases.”¹²⁸ In California, state law (i.e., the Disabled Persons Act of 2009 and the Unruh Civil Rights Act of 1959) allows plaintiffs to add monetary claims for damages to requests for injunctive relief in lawsuits filed under the ADA, which undoubtedly contributes to the large number of

HEALTH L. & POL’Y (Oct. 2008),
[https://www.law.uh.edu/healthlaw/perspectives/2008/\(AK\)%20ADA.pdf](https://www.law.uh.edu/healthlaw/perspectives/2008/(AK)%20ADA.pdf).

¹²⁰ See U.S. Equal Employment Opportunity Protection, *ADA Amendments Act of 2008* (Sept. 25, 2008), <https://www.eeoc.gov/statutes/ada-amendments-act-2008>.

¹²¹ Parrott-Sheffer, *supra* note 101.

¹²² Georgetown Law, *ADA Amendments Act of 2008*, GEO. L. LIBR., <https://guides.ll.georgetown.edu/c.php?g=592919&p=4230126> (last visited Mar. 1, 2021).

¹²³ United States Courts, *supra* note 114.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ United States Department of Justice, *Justice Department’s New ADA Rules Go into Effect on March 15, 2011*, (Mar. 14, 2011), <https://www.justice.gov/opa/pr/justice-department-s-new-ada-rules-go-effect-march-15-2011>.

¹²⁸ United States Courts, *supra* note 114.

ADA cases filed in California.¹²⁹ In Florida, “testers”— “single plaintiff[s] who file[] separate claims against multiple businesses alleging failure to comply with ADA requirement[.]”—may contribute to the growth in ADA case filings.¹³⁰ In 2017, Florida passed a law aimed at curbing “frivolous”¹³¹ ADA-related lawsuits.¹³² Finally, “[t]he large number of ADA cases in New York may have been influenced by the age of many public buildings and infrastructure across New York City that plaintiffs claim are inaccessible to people with disabilities.”¹³³ More recently, a class action was approved against the Metropolitan Transportation Authority of New York City, in which disability organizations and disabled residents claim that the lack of elevators at many subway stops results in ADA violations.¹³⁴

Lawsuits under Title III of the ADA have steadily increased in both federal and state courts.¹³⁵ From 2013 to 2018, the number of these lawsuits filed in federal court increased by at least 306 percent.¹³⁶ However, “[those] numbers do not include the significant number of disability access lawsuits filed in state courts[.]”¹³⁷ A majority of the lawsuits in 2019 were filed in

¹²⁹ Denise Johnson, *Why Claims Under Americans with Disabilities Act are Rising*, INS. J. (Oct. 7, 2016), <https://www.insurancejournal.com/news/national/2016/10/07/428774.htm>; Anderson Cooper, *What’s a “Drive-By Lawsuit”?*, CBS NEWS 60 MINUTES, (Dec. 4, 2016), <https://www.cbsnews.com/news/60-minutes-americans-with-disabilities-act-lawsuits-anderson-cooper>.

¹³⁰ United States Courts, *supra* note 114.

¹³¹ John Catalano, *New Florida Law Helps Businesses Protect Against Frivolous ADA Lawsuits*, MIA. HERALD (Sept. 14, 2017), <https://www.miamiherald.com/news/business/biz-monday/article172378332.html> (stating that in 2017, Florida legislature created new laws aimed at restraining frivolous lawsuits) (“The new statute enables businesses and property owners to take substantive preventative measures to help insulate themselves from the most frivolous claims. Under the law, a business or property owner may retain a qualified expert to conduct an inspection of their property. If the property is found to be in compliance with the ADA, the expert may issue a certificate of conformity that includes the date of inspection, proof of the expert’s qualifications, and a statement confirming that the property is in conformity.”).

¹³² Fla. H.B. 727, 2017 Reg. Sess. (Fla. 2017), <https://www.flsenate.gov/Committees/billsummaries/2017/html/1674>.

¹³³ United States Courts, *supra* note 114.

¹³⁴ Ctr. for Indep. of the Disabled, N.Y., et al. v. Metro. Transp. Auth. et al., 184 A.D.3d 197, 200, 125 N.Y.S.3d 697, 702 (2020).

¹³⁵ Michael Franz, *The Verdict: Can Plaintiffs Make Money from ADA Lawsuits?*, ACCESSIBILITY.COM (July 14, 2020), <https://www.accessibility.com/blog/the-verdict-can-plaintiffs-make-money-from-ada-lawsuits>.

¹³⁶ Kristina Launey & Minh Vu, *2019 Was Another Record-Breaking Year for Federal ADA Title III Lawsuits*, JDSUPRA (Feb. 20, 2020), <https://www.jdsupra.com/legalnews/2019-was-another-record-breaking-year-75717/>.

¹³⁷ *Id.*

California, New York, and Florida courts with 43 percent, 24 percent, and 18 percent, respectively.¹³⁸ While the number includes Title III lawsuits filed on all grounds, such as physical facilities, websites and mobile applications, et cetera,¹³⁹ the “spike in Title III litigation (and litigation under state analogs to the ADA) seems to have arisen out of what has been dubbed ‘drive-by lawsuits’ or ‘Google lawsuits.’”¹⁴⁰

These lawsuits are generally filed by “testers” that “drive by” businesses and later bring lawsuits alleging ADA violations.¹⁴¹

[U]nder Title III, almost anyone who has a disability can sue a place of public accommodation (including hospitals, physician practices, clinics, and other health care entities open to the public) for a perceived failure to comply with the ADA’s requirement to accommodate disabled customers.¹⁴² According to some reports, plaintiffs (or attorneys) are able to spot perceived ADA violations simply by driving by an establishment and then claiming that he or she was unable to access the facility due to the violation—giving rise to the term “drive-by lawsuit.”¹⁴³

In addition to “drive-by lawsuits,” the rise in the so-called “Google lawsuits” have been supported by the emergence of imaging technology, such as Google Maps or Google Earth that could precisely and conveniently identify deficiencies and violations at a specific facility through a digital application.¹⁴⁴

With increasing digitization, one specific area that has proved challenging for individuals with disability, particularly those who are visually and hearing-impaired, is website accessibility.¹⁴⁵

¹³⁸ Minh Vu, *ADA TITLE III Litigation: A 2019 Review and Hot Trends For 2020*, JDSUPRA (Jan. 7, 2020), <https://www.jdsupra.com/legalnews/ada-title-iii-litigation-a-2019-review-66637/>.

¹³⁹ *Id.*

¹⁴⁰ Mintz, *The Rising Tide of ADA Litigation Against Health Care Entities*, AM. HEALTH LAWS. ASS’N (May 15, 2018), <https://www.mintz.com/insights-center/viewpoints/2226/2018-05-rising-tide-ada-litigation-against-health-care-entities>.

¹⁴¹ Rudy Gomez & Elizabeth M. Rodriguez, “Drive-by” Lawsuits Under the Americans with Disabilities Act Continue to Rise - Part I, FORD HARRISON (Aug. 7, 2018), <https://www.fordharrison.com/drive-by-lawsuits-under-the-americans-with-disabilities-act-continue-to-rise>.

¹⁴² See Mintz, *supra* note 140.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

[I]n *Gil v. Winn-Dixie Stores, Inc.*, a federal district judge in Florida concluded that the grocery store chain’s website was inaccessible to visually impaired individuals in violation of Title III of the ADA. The court ordered Winn-Dixie to conform its website to the Web Content Accessibility Guidelines 2.0 AA (“WCAG 2.0 AA”). In 2016, Tenet Healthcare, which operates several Florida hospitals, was named in a class action complaint on behalf of a putative class of blind individuals . . . The complaint alleged that the hospitals’ websites were not accessible to blind individuals using screen-reader technology in violation of Title III of the ADA as well as Section 504 of the Rehabilitation Act. [T]he case settled as a result of mediation within a few months of the filing of the complaint.¹⁴⁶

In addition to healthcare institutions, retail shops that deliver products and services via the internet are also subject to Title III ADA compliance.¹⁴⁷ In 2019, the Supreme Court declined certiorari in *Robles v. Domino*, a website accessibility case.¹⁴⁸ The Court declined to review the Ninth Circuit’s holding that Title III of the ADA covers websites with “a nexus to [a] physical place of public accommodation” and imposes liability on businesses with a physical place for not having an accessible website that impedes access to the physical location.¹⁴⁹ “The Ninth Circuit agreed with the district court that the ADA applies to Domino’s website and app and that the ADA ‘applies to the services of a place of public accommodation, not services in a place of public accommodation.’”¹⁵⁰ The Supreme Court’s denial of certiorari will send the case back to the district court for re-litigation.¹⁵¹ The Ninth Circuit Court’s decision sets a precedent for how Title III ADA cases could be handled in the future and the implications for

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ See Seyfarth Shaw, LLP, *Supreme Court Declines to Review Ninth Circuit Decision in Robles v. Domino’s, Exposing Businesses to More Website Accessibility Lawsuits*, SEYFARTH (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/>.

¹⁴⁹ *Id.*

¹⁵⁰ Kristina M. Launey & Minh N. Vu, *Ninth Circuit Allows the Robles v. Domino’s Website and Mobile App Accessibility Lawsuit to Move Forward*, SEYFARTH (Jan. 16, 2019), <https://www.adatitleiii.com/2019/01/ninth-circuit-allow-the-robles-v-dominos-website-and-mobile-app-accessibility-lawsuit-to-move-forward/>.

¹⁵¹ See Seyfarth Shaw, *supra* note 148.

individuals with disabilities.¹⁵² However, the changing social environment and the current pandemic could potentially change the Court's views on website accessibility regulation and influence Congress to enact legislative action.¹⁵³

D. *The Convergence of Internet and Web 2.0 Technologies, Right to Equal Access to Education, and Disability Rights*

1. eLearning Web 2.0 Technologies and Education

Advancement in technology has been a critical driver in the changing educational landscape.¹⁵⁴ Throughout history, “higher education has experimented with technological advances as diverse as the blackboard and the personal computer.”¹⁵⁵ “Some technologies have become permanent parts of the higher education enterprise.”¹⁵⁶ Since the dawn of the internet, college classrooms have seen an increase in the use of “technology-dependent resources such as e-mail, the internet, course web pages, and computer simulations.”¹⁵⁷ Apart from the “potential to revolutionize teaching and learning,” technology could “eliminate the barriers to education.”¹⁵⁸ The current COVID-19 pandemic has shown that technology has the potential to “eliminate the barriers imposed by space and time[,]”¹⁵⁹ allowing students to learn and meet virtually.¹⁶⁰ “Fundamentally, modern technologies have the ability to change the conception of a higher education institution. No longer is a higher education institution necessarily a physical place with classrooms and residence halls where students come to pursue an advanced education.”¹⁶¹

In recent years, the emergence of Web 2.0¹⁶² technologies has

¹⁵² *Id.*

¹⁵³ See Elena Silva & Kim Musheno, *People with Disabilities Are Getting Sidelined in Pandemic Aid Talks — Again*, NEW AM. (Sept. 25, 2020), <https://www.newamerica.org/weekly/people-with-disabilities-are-getting-sidelined-in-pandemic-aid-talks-again/>.

¹⁵⁴ See *The Evolution of Technology in the Classroom*, PURDUE UNIV. ONLINE, <https://online.purdue.edu/blog/education/evolution-technology-classroom>.

¹⁵⁵ Roger G. Baldwin, *Technology in Education*, MICH. STATE UNIV., <https://education.stateuniversity.com/pages/2496/Technology-in-Education-HIGHER-EDUCATION.html>.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *See id.*

¹⁶¹ *Id.*

¹⁶² *Web 2.0*, TECHTERMS, <https://techterms.com/definition/web20> (“Web 2.0 is a

provided new opportunities for creating and sharing content and interacting with others.¹⁶³ Web 2.0 encompasses tools that allow individual and collective publishing, sharing of media (e.g., images, audio, video), and the creation and maintenance of online social networks.¹⁶⁴ Students' apparent engagement with these tools in their everyday lives has sparked interest within education because of potential new ways of engaging students in individual and collaborative learning activities.¹⁶⁵ The administration of learning and instruction through collaboration and sharing ideas and content with other learners with the use of Web 2.0 technologies has been dubbed as "eLearning."¹⁶⁶ eLearning is facilitated in different modalities such as fully-online or hybrid, which blends online and face-to-face education.¹⁶⁷ In online instruction, differences in synchronous and asynchronous teaching and learning can impact the cognitive performance of students with disabilities using the theory of social presence.¹⁶⁸

These applications of Web 2.0 technologies in higher learning highlight the technology's instructional potential.¹⁶⁹ Studies show that successful use of technology in education depends on a multitude of factors, such as degree of alignment between educational and eLearning practices, including student and teacher familiarity with the tools; access to

term that was introduced in 2004 and refers to the second generation of the World Wide Web. The term "2.0" comes from the software industry, where new versions of software programs are labeled with an incremental version number. Like software, the new generation of the Web includes new features and functionality that was not available in the past. However, Web 2.0 does not refer to a specific version of the Web, but rather a series of technological improvements.").

¹⁶³ See Sue Bennett et al., *Implementing Web 2.0 Technologies in Higher Education: A Collective Case Study*, 59 *COMPUTS. & EDUC.* 524, 524–25 (2012).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *What is Web 2.0 eLearning?*, KNOWLEDGE DIRECT (Feb. 3, 2016), <https://www.kdplatform.com/what-is-web-2-0-elearning/>.

¹⁶⁷ Mike Kent, *Disability and eLearning: Opportunities and Barriers*, 35 *DISABILITY STUD. Q.* 3 (2015), <https://dsq-sds.org/article/view/3815/3830> ("Teaching can involve the use of formal online learning management systems such as Blackboard, WebCT and Moodle, web-based lecture technologies, such as Lectopia or the massive open online course ("MOOC") sites such as Coursera or edX. It can also take advantage of other less dedicated online platforms such as video hosting sites like YouTube and social networks like Twitter and Facebook. In 2012 more than one in three students in the United States (33.5%) were taking at least one online course and online enrollments were growing at a rate of 6.1% in an environment where overall enrolments were growing at a rate of only 1.2%.").

¹⁶⁸ Ibrahim Dahlstrom-Hakki, Zachary Alstad & Manju Banerjee, *Comparing Synchronous and Asynchronous Online Discussions for Students with Disabilities: The Impact of Social Presence*, *COMPUTS. & EDUC.* 8–9 (June 2020).

¹⁶⁹ See Bennett et al., *supra* note 163, at 524–25, 533.

institutional support; and access to physical infrastructure to support the virtual environment.¹⁷⁰ At present, it remains unclear whether these tensions can be overcome or whether they are intractable.¹⁷¹

Nevertheless, “[m]any educational reformers continue to hope that computers and other information and computer technologies (“ICTs”) will play crucial and integral roles in bringing about long-needed changes to education systems.”¹⁷² Institutions of higher learning recognize that investments in ICT could promote innovation within the halls of once traditional institutions.¹⁷³ The current COVID-19 pandemic has shown the transformational benefits of technology, and the importance of driving technological investments in educational institutions in order to remain operational during an unprecedented event.¹⁷⁴ However, “[w]hile not denying the potentially transformational impact of ICT use to help meet a wide variety of educational objectives, history has shown that bringing about positive disruptive change is not achieved by simply flooding schools with computers and related ICTs.”¹⁷⁵

2. Access to Digital Education and Information

The expansive use of technology in higher learning has impacted the lives of students both inside and outside of the classroom.¹⁷⁶ To ensure successful outcomes, designing successful practices for student use of technology is one key factor, in addition to integrating technology into teaching, learning, and assessment.¹⁷⁷ However, as institutions of higher learning migrate to digital learning environments, challenges related to access to technology become new levers in generating student success.¹⁷⁸ This highlights one of the barriers to eLearning: the lack of access to

¹⁷⁰ See Wahab Ali, *Online and Remote Learning in Higher Education Institutes: A Necessity in Light of COVID-19 Pandemic*, 10 HIGHER EDUC. STUD. 16, 18–21 (May 18, 2020).

¹⁷¹ Bennett et al., *supra* note 163, at 533.

¹⁷² Michael Trucano, *Education & Technology in an Age of Pandemics (Revisited)*, EDUTECH (Sept. 16, 2014), <https://blogs.worldbank.org/edutech/education-technology-age-pandemics-revisited>.

¹⁷³ See Emma Garcia & Elaine Weiss, *COVID-19 and Student Performance, Equity, and U.S. Education Policy*, ECON. POL’Y INST. 27-8, 30-1, 34 (Sept. 10, 2020), <https://www.epi.org/publication/the-consequences-of-the-covid-19-pandemic-for-education-performance-and-equity-in-the-united-states-what-can-we-learn-from-pre-pandemic-research-to-inform-relief-recovery-and-rebuilding/>.

¹⁷⁴ Trucano, *supra* note 172.

¹⁷⁵ *See id.*

¹⁷⁶ *See Student Access to Digital Learning Resources Outside of the Classroom*, NAT’L CTR. FOR EDUC. STAT. <https://nces.ed.gov/pubs2017/2017098/index.asp>.

¹⁷⁷ *See id.*

¹⁷⁸ *See Garcia & Weiss, supra* note 173, at 22.

technology or the internet.¹⁷⁹ Notably, particularly during this COVID-19 pandemic, students' access to education could largely depend on their access to technology.¹⁸⁰

A study conducted by the National Center for Education Statistics from international and national sources revealed the presence of digital divide across race, educational attainment, and income level.¹⁸¹ In addition to race, locality contributes to the growing disparity towards internet access and digital learning amongst students.¹⁸² However, the numbers reflected in the study do not account for additional gaps related to poverty, race, and ethnicity.¹⁸³

The inequality in access to digital learning and technology among students has been brought into sharper focus recently with the closing of schools due to the COVID-19 pandemic.¹⁸⁴ In a study conducted by Education Trust West,¹⁸⁵ a parent poll “revealed that 38 percent of low-

¹⁷⁹ See *id.* at 22–24.

¹⁸⁰ See *id.*

¹⁸¹ See *Student Access to Digital Learning Resources Outside of the Classroom*, supra note 176, at 2 (In the United States, “94 percent of children ages 3 to 18 had a computer at home and 61 percent of children ages 3 to 18 had internet access at home in 2015.¹⁸¹ The percentages of children with computer and internet access at home in 2015 were higher for children who were older, whose parents had higher levels of educational attainment, and whose families had higher incomes. Also, higher percentages of children who were White (66 percent), Asian (63 percent), and of two or more races (64 percent) had home internet access in 2015 than did Black (53 percent), Hispanic (52 percent), and American Indian/Alaska Native children (49 percent).”).

¹⁸² See Judy Block, *Distance Education and the Digital Divide: An Academic Perspective*, 13 ONLINE J. OF DISTANCE LEARNING ADMIN., at 1 (2010) (“[A] higher percentage of students in suburban areas had fixed broadband access at home than students in rural areas, with the largest difference noted for students in remote rural areas. For example, the percentage of students in remote rural (65 percent) and distant rural areas (66 percent) with fixed broadband access was lower than in other locales, with percentages ranging from 70 percent in distant towns to 85 percent in large suburbs. In contrast, the percentage of students with either no internet access or only dial-up access at home was higher for those living in remote rural areas (18 percent) than for those living in all other detailed locale types, with the percentages ranging from 7 percent in large suburbs to 16 percent in distant rural areas.”).

¹⁸³ See *id.*

¹⁸⁴ Education Trust-West, *Education Equity in Crisis: The Digital Divide*, (Apr. 7, 2020), <https://west.edtrust.org/resource/education-equity-in-crisis-the-digital-divide/>.

¹⁸⁵ *Who We Are*, EDUC. TRUST-WEST, <https://west.edtrust.org/who-we-are/> (“The Education Trust-West is the California based office of the nationally recognized Education Trust based in Washington D.C. The Education Trust-West was founded in 2001 by Russlynn Ali, who led the organization until 2009 when she left to join the Obama Administration as the Assistant Secretary for the Office of Civil Rights in the Education Department. The Education Trust-West works for the high academic achievement of all students at all levels, pre-k through college. [The organization] expose[s] opportunity and

income families and 29 percent of families of color are concerned about access to distance learning because they don't have reliable internet at home."¹⁸⁶ In addition, "[p]arents also cited concern about access to technology—50 percent of low-income and 42 percent of families of color lack sufficient devices at home to access distance learning."¹⁸⁷ It cannot be denied that:

[T]he impact of the World Wide Web on education and in every aspect of our community is profound. Access to the information available from cyberspace is crucial because information can be used in routine everyday life for education, business transactions, personal communication, information gathering, job searches and career development . . . The digital divide prevents people from getting an education because they don't have access to the right [or reliable] technology.¹⁸⁸

Addressing the issue of digital divide is key in making progress towards equity in education for individuals with disabilities.¹⁸⁹ Pertinent to individuals with disabilities, closing the digital divide would not only address the lack of accommodation but also support their quality of life.¹⁹⁰

3. Digital Learning for the Disabled

One of the greater benefits of eLearning is accessibility and greater flexibility for students and staff.¹⁹¹ The utilization of the internet allows for more effective and cheaper distribution of "learning materials, especially to a geographically dispersed cohort of students."¹⁹² However, while eLearning has the potential to promote inclusion for students who are unable to attend class in a physical classroom, it could potentially have a negative

achievement gaps that separate students of color and low-income students from other youth, and [help] identify and advocate for the strategies that will forever close those gaps.").

¹⁸⁶ Education Trust-West, *supra* note 184.

¹⁸⁷ *Id.*

¹⁸⁸ Block, *supra* note 182, at 2.

¹⁸⁹ *See id.*

¹⁹⁰ *See id.*

¹⁹¹ Tamar M. Heijstra & Gudbjörg Linda Rafnsdóttir, *The Internet and Academics' Workload and Work Family Balance*, 13 INTERNET & HIGHER EDUC. 158, 158–63 (2010).

¹⁹² Kent, *supra* note 167.

impact on students with disabilities.¹⁹³

For instance, building social capital, which includes relationships, behavior, and participation towards disability, are different in the physical and virtual environment.¹⁹⁴ “The social model of disability argues that disability is located in social practice rather than an individual body.”¹⁹⁵ In most instances, what makes one’s impairment to be a disability are the decisions made by society.¹⁹⁶ For instance, impairments related to vision, cognition, manual dexterity, and hearing could be a disability if the virtual environment does not provide assistive technology and services that enable individuals with disabilities to utilize the product or the service.¹⁹⁷ Thus, disabilities are less about physical impairments and have more to do with social acceptance.¹⁹⁸

Despite its ubiquity, the internet can prove to be a difficult environment to access for individuals with disabilities.¹⁹⁹ As the internet becomes more embedded in our everyday life, the debilitating effects of inaccessibility to individuals with disability increases.²⁰⁰ In 2006, a research study found that “people with a disability are less likely to have access to information technology.”²⁰¹ In 2011, another study found that people with disabilities in the United States “are significantly less likely to use the internet.”²⁰² According to a United States Census survey conducted in 2019,

¹⁹³ Doug Lederman, *The Shift to Remote Learning: The Human Element*, INSIDE HIGHER ED. (Mar. 25, 2020), <https://www.insidehighered.com/digital-learning/article/2020/03/25/how-shift-remote-learning-might-affect-students-instructors-and>.

¹⁹⁴ See Jin Huang, *Building Social Capital: A Study of the Online Disability Community*, 25 DISABILITY STUD. Q., at 8 (2005).

¹⁹⁵ Kent, *supra* note 167.

¹⁹⁶ Mike Oliver & Colin Barnes, *Disability Studies, Disabled People and the Struggle for Inclusion*, 31 BRITISH J. SOCIO. EDUC. 547, 547–60 (2010).

¹⁹⁷ See Dale Pennell, *The Role of Technology in the Education of Students With Disabilities in the Least Restrictive Environment*, WILLIAM & MARY SCH. EDUC., <https://education.wm.edu/centers/ttac/resources/articles/assistivetech/roleoftechnology/index.php>.

¹⁹⁸ Katharina Vornholt, Sjur Uitdewilligen, & Frans J. N. Nijhuis, *Factors Affecting the Acceptance of People with Disabilities at Work: A Literature Review*, J. OCCUPATIONAL REHAB. (2013), <https://link.springer.com/content/pdf/10.1007/s10926-013-9426-0.pdf>.

¹⁹⁹ See Kent, *supra* note 167.

²⁰⁰ See *id.*

²⁰¹ See *id.* (citing Keery Dobransky & Eszter Hargittai, *The Disability Divide in Internet Access and Use*, 9(3) INFO. COMM’N & SOC’Y 313, 315-16, 318-19, 330 (Aug. 16, 2006)).

²⁰² See *id.* (citing Susannah Fox, *Americans Living with Disability and Their Technology Profile*, PEW RSCH. CTR. (Jan. 21, 2011),

about ten percent of households in Hawai‘i did not have access to internet.²⁰³ Some Hawai‘i students reported feeling disconnected from friends or left out due to lack of access to technology.²⁰⁴ Even smaller independent private schools in Hawai‘i are facing challenges in providing digital connectivity for all of its students.²⁰⁵ And “[s]ince the Hawai‘i Department of Education closed schools in March [2020] and switched to distance learning to stem the spread of coronavirus, it has struggled to answer two critical questions: how many students are participating in online learning, and how many don’t have the tools or technology to access it?”²⁰⁶ Those questions remain unanswered.²⁰⁷

The pandemic highlighted the problem of digital divide when families across the country were left with inequitable access to devices and technology infrastructure.²⁰⁸ For students with disabilities, the digital divide is not only an issue of access to broadband and technological devices, but also about ensuring the technology is inclusive for their needs.²⁰⁹ One of the pervasive challenges is that digital accessibility, particularly for the disabled, begins with technology and defining the appropriate Learning Management System (“LMS”) to use.²¹⁰ According to Cyndi Wiley, digital accessibility coordinator for Iowa State University’s Information

<https://www.pewresearch.org/internet/2011/01/21/americans-living-with-disability-and-their-technology-profile/>).

²⁰³ *Type of Internet Subscription by Selected Characteristics*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/table?q=S2802&g=0400000US15&tid=ACSST1Y2018.S2802&hidePreview=false>.

²⁰⁴ Mark Carpenter, *State Looks to Bridge Digital Divide with Mobile Learning Hubs*, HAW. NEWS NOW (Oct. 31, 2020), <https://www.hawaiinewsnow.com/2020/10/30/state-looks-bridge-digital-divide-with-mobile-learning-hubs/>.

²⁰⁵ Christine Sakuda, *The Students’ Dilemma: No Internet, No Class*, HONOLULU CIV. BEAT (Apr. 2, 2020), <https://www.civilbeat.org/2020/04/the-students-dilemma-no-internet-no-class/>.

²⁰⁶ Suevon Lee, *Hawai‘i Schools Under Pressure to Provide More Data About Remote Learning*, HONOLULU CIV. BEAT (May 24, 2020), <https://www.civilbeat.org/2020/05/hawaii-schools-under-pressure-to-provide-more-data-about-its-remote-learning/>.

²⁰⁷ *Id.*

²⁰⁸ Tom Ridge, *Bridging the Digital Divide for Students with Disabilities*, HILL (Nov. 10, 2020), <https://thehill.com/opinion/education/525251-bridging-the-digital-divide-for-students-with-disabilities>.

²⁰⁹ *Id.*

²¹⁰ Mark Lieberman, *Technology Can Address Digital Accessibility – to an Extent*, INSIDE HIGHER ED. (May 2, 2018), <https://www.insidehighered.com/digital-learning/article/2018/05/02/technology-can-help-address-accessibility-challenges-many-say>.

Technology Services, students with disabilities were predominantly “put on the backburner ‘en masse’ as instructors scramble[d] to transfer two months’ worth of teaching content to a digital format.”²¹¹

Furthermore, addressing digital divide requires a fundamental understanding of the scope and definition of accessibility, which is broadly referred to as “allowing individuals with disabilities to use a product or system as easily as someone without those disabilities.”²¹² “Estimates put the number of students in higher education with disabilities at around 10 percent,” although that number is likely higher in that “many students with disabilities [do not] feel empowered to share those details with professors and administrators.”²¹³

The sudden move to online learning due to the pandemic highlighted the continuous challenges faced by students with disabilities.²¹⁴ The National Federation of the Blind reported that it “has been contacted by college students facing problems after complete shifts to remote learning by their respective institutions,” primarily due to incompatibility of learning materials with screen readers.²¹⁵ Similarly, the National Association of the Deaf has expressed concern that colleges and universities are not able to provide “American Sign Language interpreters or real-time captioning” that may have been provided in in-person classes.²¹⁶ Instead, a reliance on “[automated speech recognition] (“ASR”) software for live video formats, such as what is provided as a default for the Zoom, WebEx and Google Hangout conferencing platforms,” has been the preferred solution.²¹⁷

In this current environment where online learning is now the primary mode of learning and not merely a supplemental accommodation, students with disabilities face greater challenges.²¹⁸ Colleges and universities must now address the issue of digital accessibility, particularly concerning students with disabilities, and must pay close attention to the legalities of providing equitable and equal access to educational opportunities for students with disabilities.²¹⁹

²¹¹ See Anderson, *supra* note 21.

²¹² See *id.*

²¹³ *Id.*

²¹⁴ See *id.*

²¹⁵ See *id.*

²¹⁶ See *id.*

²¹⁷ See *id.*

²¹⁸ See *id.*

²¹⁹ See *id.*

E. *Public Accommodations in Higher Education for the Disabled*

1. ADA Title III: Public Accommodations

Title III provides 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.”²²⁰ Entities that are covered by the term “public accommodation” are listed, and include, among others: hotels, restaurants, theaters, auditoriums, laundromats, travel services, museums, parks, zoos, private schools, day care centers, professional offices of health care providers, and gymnasiums.²²¹

Title III applies only to places of public accommodation and requires only modifications that do not “fundamentally alter [the] nature of goods and services”²²² or that are reasonable in terms of their costs and benefits to the enterprise and handicapped person or group.²²³ The question of whether public accommodation is limited to physical structures has been a contested issue in Title III cases.²²⁴

The Third, Sixth, Ninth, and Eleventh Circuits have ruled that public accommodations are limited to physical places.²²⁵ In *Stoutenborough v. National Football League, Inc.* (1995),²²⁶ the Sixth Circuit decided against the impaired individual and association, and dismissed the discrimination complaint against the NFL’s blackout rule,²²⁷ “holding that Title III’s prohibitions are restricted to places of public accommodations, not broadcasts.”²²⁸ Similarly, in *Parker v. Metropolitan Life Insurance Co.* (1998), the Sixth Circuit held that the ADA’s nondiscrimination prohibition

²²⁰ Equal Opportunity for Individuals with Disabilities, 42 U.S.C. § 12182.

²²¹ *Id.* § 12181(7).

²²² *Id.* § 12182(b)(2)(A)(ii).

²²³ See *Information and Technical Assistance on the Americans with Disabilities Act*, *supra* note 36.

²²⁴ See Nathaniel Vargas Gallego & Jesse Sealey, *The Coming Ubiquity of ADA Compliance to the Internet and Its Extension to Online Education*, 20 J. TECH. L. & POL’Y, at 1 (2015).

²²⁵ See CONG. RSCH. SERV. AMERICANS WITH DISABILITIES ACT (ADA): APPLICATION TO THE INTERNET 7 (2012), https://www.everycrsreport.com/files/20120328_R40462_4cd1aa8279b147dd8eab287fbd16128d6086497a.pdf [hereinafter ADA: APPLICATION TO THE INTERNET].

²²⁶ See *Stoutenborough v. Nat’l Football League, Inc.*, 59 F.3d 580, 582 (6th Cir. 1995), cert. denied, 516 U.S. 1028 (1995).

²²⁷ SI WIRE, *NFL Continues Suspension of Local TV Blackout Policy for 2016*, SPORTS ILLUSTRATED (Mar. 28, 2016), <https://www.si.com/nfl/2016/03/28/nfl-continues-suspension-tv-blackout-rule>.

²²⁸ See ADA: APPLICATION TO THE INTERNET, *supra* note 225, at 8.

relating to public accommodations did not prohibit an employer from providing different plans based on the type of disability an employee had.²²⁹ “Because the plaintiffs did not receive their insurance policy from the offices of defendant MetLife but rather indirectly through their employer, the plaintiffs did not receive their policy in the requisite connection with a place of public accommodation.”²³⁰ Furthermore, in *Ford v. Schering-Plough Corp.* (1998),²³¹ the Third Circuit held that since the plaintiff received her disability benefits via her employment at Schering, no nexus to MetLife’s insurance office was established and thus was not discriminated against in connection with a public accommodation.²³² The Eleventh Circuit used similar reasoning in *Access Now, Inc. v. Southwest Airlines* (2002),²³³ a case that directly involved the ADA and the internet.²³⁴

To the contrary, in *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Assoc. of New England, Inc.* (1994),²³⁵ the First Circuit rejected the view of public accommodations being limited to physical structures.²³⁶ The court held that Title III covers more than mere physical structures that people enter to obtain services.²³⁷ Further, the court concluded that “to exclude this broad category of businesses from the reach of Title III and limit the application of Title III to physical structures which persons must enter to obtain goods and services would run afoul of the purposes of the ADA.”²³⁸ The Second Circuit reached the same conclusion in *Pallozzi v. Allstate Life Insurance Co.* (1999),²³⁹ stating that “[T]itle III’s mandate that the disabled be accorded ‘full and equal enjoyment of goods, [and] services...of any place of public accommodation,’ suggests to us that the statute was meant

²²⁹ See ADA: APPLICATION TO THE INTERNET, *supra* note 225 (citing Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1011 (6th Cir. 1997), cert. denied, 522 U.S. 1084 (1998)).

²³⁰ Adam M. Schloss, *Web-Sight for Visually-Disabled People: Does Title III of the Americans with Disabilities Act Apply to Internet Websites*, 35 COLUM. J.L. & SOC. PROBS. 35, 39 (2001).

²³¹ *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 613 (3rd Cir. 1998).

²³² *Id.* at 613.

²³³ *Access Now, Inc. v. Sw. Airlines*, 227 F. Supp. 2d 1312, 1328 (S.D. Fla. 2002) (holding that the plaintiffs had failed to state a claim upon which relief could be granted, and that “Southwest.com is Not a ‘Place of Public Accommodation’ as Defined by the Plain and Unambiguous Language of the ADA”).

²³⁴ *Id.*

²³⁵ *Carparts Distrib. Ctr., Inc. v. Auto. Wholesalers’ Ass’n of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994).

²³⁶ Schloss, *supra* note 230, at 40.

²³⁷ *Carparts*, 37 F.3d at 19.

²³⁸ *Id.* at 27.

²³⁹ *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 32 (2d Cir. 1999).

to guarantee them more than mere physical access.”²⁴⁰

These decisions suggest how divided the courts are in addressing the issue of public accommodation, which serves as a major challenge in promoting equal opportunity and protection for individuals with disabilities.²⁴¹ As the online world has created a new paradigm, it is critical for the courts to address this issue and develop a standard judicial analysis to fully achieve the goals of the ADA.²⁴²

2. Higher Education and ADA Compliance

Schools, as specified by Title III, are public accommodations and are required under federal law to comply with the ADA.²⁴³ However, given the prevalent use of technology in providing educational goods and services, particularly during the COVID-19 pandemic, the needs of students with disabilities are in danger of being overlooked.²⁴⁴ For colleges and universities, providing accommodations to students with disabilities may cause undue hardship, including significant difficulty or expense.²⁴⁵ For example:

In 2015, [Massachusetts Institute of Technology] and Harvard University were sued for discrimination by the National Association of the Deaf (“NAD”) and four... individuals [with hearing disabilities] for ‘failing to caption the vast and varied array of online content they make available to the general public, including massive open online courses (MOOCs).’²⁴⁶

The goal to dismiss the case by both universities was hampered by the Department of Justice’s (“DOJ”) issuance of governance regulations towards website accessibility.²⁴⁷ The universities attempted to dismiss the federal class action lawsuits by referring to the undue burden imposed by providing closed captioning to videos of free online courses accessible to

²⁴⁰ *Id.* (brackets in original) (citations omitted).

²⁴¹ *See* ADA: APPLICATION TO THE INTERNET, *supra* note 225.

²⁴² *See id.*

²⁴³ Equal Opportunity for Individuals with Disabilities, 42 U.S.C. § 12181.

²⁴⁴ Anderson, *supra* note 21.

²⁴⁵ *See* Nat’l Ass’n of the Deaf v. Harvard Univ., 377 F. Supp. 3d 49, 55–56 (D. Mass. 2019).

²⁴⁶ Nicole Flynn, *Higher Education Lawsuits: Disability Discrimination Spotlight*, CIELO24 (Feb. 7, 2017), <https://cielo24.com/2017/02/higher-education-lawsuits-disability-discrimination/>.

²⁴⁷ *Id.*

the public.²⁴⁸ On November 4, 2016, the magistrate's decision was upheld on appeal to the district court.²⁴⁹

As more and more university information and educational materials migrate to the Web, it becomes increasingly important to ensure that those materials are accessible to people with disabilities.²⁵⁰ If the content is not designed with Web accessibility in mind, then students with disabilities will be denied the benefits that should be available to them to the same extent that it should be available to all other students.²⁵¹ In addition to ensuring Web accessibility, adequate policies related to use of technical standard, compliance, proper implementation, evaluation, and monitoring must be in place.²⁵²

Under federal and state law, schools cannot discriminate against qualified students and applicants with disabilities.²⁵³ For instance, a student with a disability who “meet[s] academic or other standards for admission to or participation in school programs, cannot be treated differently—denied admission or enrollment, graded poorly, failed, suspended, expelled, or harassed—because of the individual’s disability.”²⁵⁴ Similarly, “[q]ualified students with disabilities may also obtain reasonable accommodations so that they can participate in school programs.”²⁵⁵ In general, “schools are required to ensure that all of their programs, services, activities, and facilities are accessible to persons with disabilities.”²⁵⁶ Furthermore, students with disabilities “may not be retaliated against for asking for an accommodation or otherwise asserting [their] rights.”²⁵⁷ When a student with a disability is not afforded the same access to education and educational opportunities as his or her peers due to lack of reasonable accommodation or compliance by universities, that corroborates to clear violation of the student’s civil rights.²⁵⁸

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ See Paul Bohman, *Cultivating and Maintaining Web Accessibility Expertise and Institutional Support in Higher Education*, ATHEN (ACCESS TECH. HIGHER EDUC. NETWORK) 1–2, 5–6 (2007), <https://athenpro.org/node/40>.

²⁵¹ *See id.*

²⁵² *See id.*

²⁵³ *Disabilities in Higher Education*, LEGAL AID AT WORK, <https://legalaidatwork.org/factsheet/disabilities-in-higher-education/>.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ See *The Civil Rights of Students with Hidden Disabilities Under Section 504 of the Rehabilitation Act of 1973*, *supra* note 26.

The changing educational landscape due to the advancement of technology and eLearning, has increased the challenges imposed on educational institutions in serving the needs of students with disabilities.²⁵⁹ The recent COVID-19 pandemic has shown the capabilities and capacities of universities to facilitate remote learning with the use of digital technologies.²⁶⁰ “The rapid migration to virtual classes has forced disabled students into using websites and apps that were never designed to accommodate them.”²⁶¹ Colleges and universities use a multitude of technologies and platforms like Blackboard, Moodle, Google Classroom, Zoom, Coursera, and WebX that have now become virtual extensions of physical classrooms that require public accommodations.²⁶² With online education and digital learning being the new normal, it should be mandatory for university courses to be accessible for a wider swath of people.²⁶³ The ADA’s lack of clear guidance on the classification of the internet as a public accommodation contributes to the problems faced by universities and colleges.²⁶⁴

3. Hawai‘i: Education and ADA Compliance Amid COVID-19

In 2018, the Office for Civil Rights (“OCR”) of the U.S. Department of Education initiated an investigation into an allegation that the University of Hawai‘i System (the “University”) violated Section 504 of the Rehabilitation Act of 1973 (“Section 504”) and its implementing regulations at Title 34 Code of Federal Regulations (“C.F.R.”) Section 104, and Title II of the Americans with Disabilities Act of 1990 (“Title II”) and its implementing regulations at Title 28 C.F.R. Section 35.²⁶⁵ Specifically, the complainant alleged that the University’s website contained barriers to access for people with disabilities, thereby denying them an equal opportunity to participate in the University’s programs, services, and activities, and denying them effective communication necessary for full

²⁵⁹ See Flynn, *supra* note 246.

²⁶⁰ See Garcia & Weiss, *supra* note 173.

²⁶¹ Mythili Sampathkumar & Maya Shwayder, *The Mass Migration to Online Learning is Leaving Disabled Students Behind*, DIGIT. TRENDS (Mar. 27, 2020), <https://www.digitaltrends.com/news/disabled-students-online-learning-coronavirus/>.

²⁶² See *id.*

²⁶³ See *id.*

²⁶⁴ See *Is Your Website a “Place of Public Accommodation” Under the Americans with Disabilities Act?*, SMITH, GAMBRELL, & RUSSELL, LLP, <https://www.sgrlaw.com/is-your-website-a-place-of-public-accommodation-under-the-americans-with-disabilities-act/>.

²⁶⁵ Letter from Kelli Medak, Supervisory Attorney of Office for Civil Rights to David Lassner, President of University of Hawai‘i (Feb. 20, 2018) (on file with author).

participation in the University's programs, services, and activities.²⁶⁶ If the

OCR determines that a recipient failed to comply with the civil rights law(s) that OCR enforces, [the] OCR will contact the recipient and will attempt to secure the recipient's willingness to negotiate a voluntary resolution agreement. If the recipient agrees to resolve the complaint, the recipient will negotiate and sign a written resolution agreement that describes the specific remedial actions that the recipient will undertake to address the area(s) of noncompliance identified by OCR.²⁶⁷

“To resolve the above-referenced complaint brought under Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990, the [OCR] and the University of Hawai‘i System enter[ed] into [a Voluntary Resolution Agreement (“VRA”)].”²⁶⁸ In the agreement, the University affirmed its commitment to nondiscrimination and ensured that people with disabilities have an opportunity equal to that of their nondisabled peers to participate in the University's programs, benefits, and services, including those delivered through electronic and information technology, except where doing so would impose an undue burden or create a fundamental alteration.²⁶⁹ The VRA includes the development, procurement, and utilization of new content and functionality to be fully accessible to individuals with disabilities.²⁷⁰ Furthermore, “by May 3, 2021, [the University] will take all actions necessary to ensure that individuals with disabilities have an equal opportunity to participate in the University's programs and activities offered through the University's website or equally effective alternate access.”²⁷¹

The University of Hawai‘i remains committed to ADA compliance

²⁶⁶ *Id.* at 2.

²⁶⁷ *Id.*; Office for Civil Rights, *How the Office for Civil Rights Handles Complaints*, U.S. DEP'T EDUC. 3 (Jan. 10, 2020) <https://www2.ed.gov/about/offices/list/ocr/complaints-how.html#:~:text=OCR%20will%20collect%20and%20analyze,allegations%20raised%20in%20the%20complaint.>

²⁶⁸ *Voluntary Resolution Agreement (VRA)*, UNIV. HAW., <https://www.hawaii.edu/access/resources/uhvra/> (“This agreement supersedes the agreement the University entered into on February 9, 2018. This agreement was entered into voluntarily and does not constitute an admission of liability, non-compliance, or wrongdoing by the University.”).

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Plan for New Online Content and Functionality*, UNIV. HAW. (Apr. 20, 2019), <https://www.Hawaii.edu/access/resources/uh-content-plan/>.

as evidenced by the Accessibility Updates posted on the University's website.²⁷² Since the University's ADA compliance reaffirmation on July 9, 2018, there have been eleven updates posted.²⁷³ However, none had a particular reference to an update in reference to COVID-19 and its impact and potential challenges posed in meeting the objectives of the VRA.²⁷⁴

Under the purview of the University of Hawai'i at Mānoa Office for Students with Disabilities, the KOKUA Program²⁷⁵ "serve[s] undergraduate, graduate and professional students with learning, physical, psychiatric and other documented disabilities."²⁷⁶ Per the COVID-19 update posted on August 20, 2020, the office will remain closed except for in-person exams.²⁷⁷ Furthermore, it also stated that one hundred percent of "prescreens, intake and regular appointments with KOKUA staff will continue to be via Zoom or by phone."²⁷⁸ These workarounds presume that individuals with disabilities do not have problems accessing or utilizing Zoom or a phone.²⁷⁹ The site also does not include any reference to the availability of assistive technologies that students with disabilities could access and utilize during the pandemic.²⁸⁰ Depending on the type and level of disability, the ability to use technology, and the access to technology, the aforementioned operational support may not be adequate.²⁸¹ The ubiquity of internet use does not imply that everyone has access to it and that everyone has the capacity and capability to use it.²⁸²

²⁷² See *Commitment to ADA Compliance*, UNIV. HAW. (Feb. 24, 2021), <https://www.Hawaii.edu/access/resources/vra/>.

²⁷³ See *id.*

²⁷⁴ See *id.*

²⁷⁵ *History and Origin of Name*, KOKUA PROGRAM (Mar. 18, 2020), <https://hawaii.edu/kokua/about/history-and-origin-of-name.php> ("Established in 1966 as one of the nation's first university offices for disabled students, KOKUA predates the implementation of the first civil rights law prohibiting discrimination on the basis of disability status. A blind freshman whom KOKUA began serving in 1966, Mary Ku'ulei Kaikainahaole coined the phrase 'Kahi O Ka Ulu 'Ana,' which translates into 'the Place of Growing.'").

²⁷⁶ University of Hawai'i at Mānoa, *Equal Opportunity for Students with Disabilities at the University of Hawai'i at Mānoa*, KOKUA PROGRAM, <https://Hawaii.edu/kokua/>.

²⁷⁷ *Covid-19 and Disability Access*, KOKUA PROGRAM, <https://hawaii.edu/kokua/covid-19/covid-19-and-disability-access.php>.

²⁷⁸ *Id.*

²⁷⁹ See *id.*

²⁸⁰ See *id.*

²⁸¹ See Jonathan Lazar & Paul Jaeger, *Reducing Barriers to Online Access for People with Disabilities*, 27 ISSUES SCI. & TECH. 69, 70 (2011).

²⁸² See *id.* at 73–74.

Finally, out of the \$14 trillion the United States Department of Education (“USDOE”) of Postsecondary Education allotted in the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act, the Higher Education Emergency Relief Fund (“HEERF”) received a total of \$2.2 trillion.²⁸³ Of the \$14 billion given to the Department of Education, the University received approximately \$44.9 million in three different allotments, or tranches,²⁸⁴ with different purposes for each tranche.²⁸⁵ Unlike the ESSER²⁸⁶ funding by the CARES Act, which aims to help K-12 schools “make learning more accessible to students with disabilities, at-risk populations, language needs, and other challenges,”²⁸⁷ the HEERF fund does not specify the need to support individuals with disabilities.²⁸⁸ According to the December 31, 2020 CARES Act HEERF quarterly report issued by the University of Hawai‘i, funds were mostly utilized to support reimbursement and subsidy of general costs (i.e. tuition and room and board, including off-campus lodging); purchasing, renting, or leasing of equipment (i.e. to support distance education); and other uses.²⁸⁹ It is unclear as to how students with special needs, specifically students with disabilities—those who are most severely impacted by the pandemic—were

²⁸³ Committee on Budget and Finance, *Status of CARES Act: Higher Education Relief Fund*, UNIV. HAW. (Nov. 4, 2020), <https://www.hawaii.edu/offices/government-relations/cares-act-grant-funds/>.

²⁸⁴ *Id.* (describing how the three tranches include: Tranche 1 (Student Grants), Tranche 2 (Institutional Portion), and Tranche 3 (Minority-Serving Institutions)).

²⁸⁵ *Id.*

²⁸⁶ *Elementary and Secondary School Emergency Relief Fund*, OFF. ELEMENTARY & SECONDARY EDUC. (Jan. 13, 2021), <https://oese.ed.gov/offices/education-stabilization-fund/elementary-secondary-school-emergency-relief-fund/> (“Congress set aside approximately \$13.2 billion of the \$30.75 billion allotted to the Education Stabilization Fund through the CARES Act for the Elementary and Secondary School Emergency Relief Fund (“ESSER Fund”). The Department will award these grants -to State educational agencies (“SEAs”) for the purpose of providing local educational agencies (“LEAs”), including charter schools that are LEAs, with emergency relief funds to address the impact that COVID-19 has had, and continues to have, on elementary and secondary schools across the Nation.”).

²⁸⁷ *New CARES Act Funding Released to Improve Access to Education*, DON JOHNSTON HUM. LEARNING TOOLS, <https://learningtools.donjohnston.com/2020/04/new-cares-act-funding-released-to-improve-access-to-education/#:~:text=CARES%20Act%20ESSER%20Funding%20aims,language%20need%20and%20other%20challenges.>

²⁸⁸ *Id.*

²⁸⁹ *Coronavirus Aid, Relief, and Economic Security (CARES) Act – Compliance*, UNIV. HAW. MĀNOA, (Quarterly budget and expenditure reporting by the University of Hawai‘i) <https://manoa.hawaii.edu/covid19/cares/cares-compliance/#CARES-2020-12-31> (on file with author).

duly supported.²⁹⁰ The KOKUA Program at the University of Hawai'i at Mānoa also does not have specific information on their webpage that helps address the challenges of students with disability given the pandemic, nor does it provide any information on how the CARES Act funding was utilized to support the program.²⁹¹

F. *The Fourteenth Amendment and Disability Rights*

The avenues for addressing discrimination cases surrounding disability rights have been largely myopic. At present,

The traditional legal options for pursuing disability discrimination cases have largely been limited to strategies that rely on legislation like the ADA, IDEA, The Fair Housing Act, and [other statutes]. While these pieces of legislation provide useful means for creating more accessible workplaces, schools and housing, this strategy does not adequately prevent state discrimination in all areas of American life . . . The solution in one view is to litigate these issues with state constitutions and federal laws like the ADA. However, this is not a holistic approach to the problems of discrimination. In fact, this strategy enables significant vulnerabilities to exist that allow the violation of the rights of people with disabilities.²⁹²

The drafters of the ADA never explicitly discussed theories of equality.²⁹³ Drawing from precedents such as Section 504 and the rhetoric founded in traditional civil rights movement, the ADA rallied for the need for accommodation (i.e. different treatment) in order to achieve equal opportunity.²⁹⁴ Proponents of the ADA conceptualized equal protection as equal opportunity such that to achieve absolute inclusion and participation amongst the disabled, the statute must go beyond equal treatment or affirmative action.²⁹⁵ Instead, it must eliminate all barriers to participation

²⁹⁰ *See id.*

²⁹¹ *See Equal Opportunity for Students with Disabilities at the University of Hawai'i at Mānoa, supra* note 276.

²⁹² Nathan Altman, *Disability and The Constitution*, *American Association of People with Disabilities*, AAPD (Sept. 10, 2018), <https://www.aapd.com/disability-and-the-constitution/>.

²⁹³ Mayerson & Yee, *supra* note 28.

²⁹⁴ Vocational Rehabilitation and Other Rehabilitation Services, 29 U.S.C. § 794 (1994); 28 C.F.R. § 42 (1978).

²⁹⁵ Mayerson & Yee, *supra* note 28.

and discrimination.²⁹⁶ However, the traditionalist view of the Supreme Court in the interpretation and application of the Equal Protection Clause serves as an encumbrance,²⁹⁷ such that

[R]ecent cases have held that suits against states can be brought only if the legislation is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment. Cases challenging the constitutionality of the ADA as applied to states have forced ADA lawyers to make the hybrid ADA model fit traditional doctrine.²⁹⁸

The Supreme Court displayed its interpretation and application of how disability fits into traditional equal protection doctrine in *Cleburne v. Cleburne Living Center, Inc.*, where it provided a discussion on the proper level of review to be accorded people with mental retardation under the Constitution.²⁹⁹ Central to its decision is the belief that people with disabilities are not similarly situated to individuals without disabilities and may require “special treatment.”³⁰⁰ In this particular case, the Court affirmed the difference between individuals with disabilities from racial minorities and women, and gave the states the power to make rational decisions on disability cases.³⁰¹ The ruling in the case highlighted the challenge in defending the ADA's constitutionality before the United States Supreme Court.³⁰²

III. ANALYSIS

A. *Reclassifying the Internet as Public Accommodations*

Federal courts are divided in their interpretation of public accommodations.³⁰³ “[C]ourts in the Third, Sixth, Ninth, and Eleventh Circuits have interpreted ‘place of public accommodation’ to reference an actual, physical place.”³⁰⁴ This further explains DOJ regulations concerning

²⁹⁶ *Id.*

²⁹⁷ *See id.*

²⁹⁸ *See* Mayerson & Yee, *supra* note 28; *City of Boerne v. Flores*, 521 U.S. 507 (1997).

²⁹⁹ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

³⁰⁰ Mayerson & Yee, *supra* note 28.

³⁰¹ *See Cleburne*, 473 U.S. at 439 (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).

³⁰² *Id.*

³⁰³ *See Gallego & Sealey, supra* note 224.

³⁰⁴ CONG. RSCH. SERV., COURTS WEIGH ACCESS TO THE INTERNET UNDER THE AMERICANS WITH DISABILITIES ACT 3 (2018), <https://crsreports.congress.gov/product/pdf/LSB/LSB10127>.

disability accommodation requirements being limited to physical entity locations.³⁰⁵ The regulation defines places of public accommodation as “facilities,” which include “complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.”³⁰⁶ The DOJ’s explanation of what constitutes a place of public accommodation as one that constitutes a physical public entity may have been true before the age of the internet, but lacks logical support now that the internet has become a part of our lives.³⁰⁷ The growth of the internet has raised the question of whether the ADA is applicable to the internet.³⁰⁸

Title III has caused courts confusion regarding the interpretation of “place of public accommodation.”³⁰⁹ To date, courts use the nexus requirement doctrine as the majority’s test when deciding whether the ADA applies.³¹⁰ In order for Title III of the ADA to apply to nonphysical applications, there must be a nexus between the disparity of benefits or services that the defendant provides, and a physical place of public accommodation.³¹¹ Thus, a physical location must be offering some kind of nonphysical service for the ADA to apply.³¹²

There are two cases that spawned the application of the ADA to the internet: 1) *National Federation of the Blind v. Target Corp.* (2007),³¹³ and

³⁰⁵ See Katherine Rengel, *The Americans with Disabilities Act and Internet Accessibility for the Blind*, 25 J. MARSHALL J. COMPUT. & INFO. L. 548, 553 (2008).

³⁰⁶ 28 C.F.R. § 36.104.

³⁰⁷ See *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1011–12 (6th Cir. 1997) (discussing prior ADA holdings).

³⁰⁸ Rengel, *supra* note 305, at 564.

³⁰⁹ See, e.g., *Stoutenborough v. Nat’l Football League, Inc.*, 59 F.3d 580, 583 (1995) (holding that the National Football League, its member clubs, and the media are not places of public accommodation because they are not physical places like those listed in section 301(7)); *Parker*, 121 F.3d at 1010–11 (holding that “places of public accommodation” are limited to physical places); *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994) (holding that “establishments of public accommodation” are not limited to physical structures); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 613–14 (3d Cir. 1998) (recognizing a circuit split concerning whether “place of public accommodation” is limited to physical structures).

³¹⁰ See *Parker*, 121 F.3d at 1011; see also *Pallozzi v. Allstate Life Ins. Co.*, 998 F. Supp. 204, 206 (N.D.N.Y. 1998) (“While the physical structure of an ‘insurance office’ would be covered under the Act, neither the insurance policy nor an insurance company is a ‘place of public accommodation’ under the ADA because neither is a physical structure.”).

³¹¹ See *Parker*, 121 F.3d at 1011.

³¹² See Gallego & Sealey, *supra* note 224, at 6.

³¹³ *Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946 (N.D. Cal. Oct.

2) *National Association of the Deaf v. Netflix, Inc.* (2012).³¹⁴ In *Target*, the Court denied Target's motion to dismiss and held the company in violation of the ADA for operating an inaccessible internet site to the blind.³¹⁵ This was the first time that a court determined that the ADA regulations applied to a private commercial website.³¹⁶ Similarly, in *Netflix*, the federal district court held that the internet was a place of public accommodation under Title III of the ADA and ruled that Netflix violated the ADA for failing to provide both equal access technologies with closed captioning for all of its streaming content and ease of access for content that does have captioning.³¹⁷

Arguably, the impact of these cases is not limited to commercial entities like Target and Netflix, but also applies to institutions of learning that provide services and goods to students and are considered public accommodations.³¹⁸ Universities are using the same media platforms and Web 2.0 technologies in delivering content and facilitating learning.³¹⁹ "The [National Association for the Deaf's] legal action against Harvard and MIT serves to underscore the incredible transition that has happened over the last decade in the field of technology-enabled learning."³²⁰

There are three reasons why it is appropriate to classify the internet as a public accommodation within the context of higher education.³²¹ First,

2, 2007).

³¹⁴ Nat'l Ass'n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196 (D. Mass. 2012).

³¹⁵ See *Target*, 452 F. Supp. 2d at 949.

³¹⁶ Samantha Sauld, *Americans with Disabilities Act (ADA) and Web Accessibility Requirements for Video*, 3PLAYMEDIA (Feb. 26, 2019), <https://www.3playmedia.com/blog/ada-video-requirements/>.

³¹⁷ See *Netflix*, 869 F. Supp. 2d at 203.

³¹⁸ See Equal Opportunity for Individuals with Disabilities, 42 U.S.C. § 12181(7)(J).

³¹⁹ Winner Dominic Chawinga, *Taking Social Media to a University Classroom: Teaching and Learning Using Twitter and Blogs*, 14 INT'L J. EDUC. TECH. HIGHER EDUC. 1, 5 (2017).

³²⁰ *Are Your Lecture Videos ADA Section 508 Compliant? What Everyone Recording Lectures Needs to Know*, PANOPTO, <https://www.panopto.com/blog/are-your-captions-compliant-what-everyone-recording-lectures-needs-to-know/> (last visited Mar. 29, 2021).

³²¹ See Karine Joly, *Web accessibility: Required, Not Optional*, UNIV. BUS. (Sept. 2011), https://onlinelearning.berkeley.edu/files/31412876/download?download_frd=1&verifier=NvehEIce6QoeH6YVHJ1XKwvyiXh2YBX8f3M8916Y); Anderson, *supra* note 21; Julee Peterson, *Inclusive Design: Why EdTech Companies Should Go Beyond Compliance*, OPENFIELD, <https://openfieldx.com/inclusive-ux-design-accessibility-compliance/#:~:text=This%20push%20toward%20inclusivity%20comes,in%20Q4%20of%202018%20alone> (last visited Mar. 28, 2021).

the use of digital technologies and the internet in facilitating educational services have been prevalent.³²² Second, the increasing number of cases related to lack of ADA compliance by colleges and universities highlights the ineffectiveness of the current law in addressing the changes in our educational systems.³²³ Finally, the increasing number of educational technologies coupled by a common practice of digital learning outsourcing by institutions of higher learning contribute to the lack of ownership and accountability in providing equal access to education to students with disabilities.³²⁴

1. Prevalent Use of Digital Technologies and the Internet in Facilitation Educational Services

Since the 1960s, use of digital technologies and the internet in teaching have grown exponentially.³²⁵ The proliferation of online learning in higher education has brought profound changes for students, instructors, and the institutions themselves.³²⁶ The pervasive use of technology changed how the education system facilitates learning, disseminates information, and shares and creates knowledge.³²⁷ During the COVID-19 pandemic in 2020, most colleges and universities abruptly moved their courses online and closed their campuses.³²⁸

A survey of college students taken after [the] Spring 2020 semester indicated that 43 [percent] of students enrolled in traditional face-to-face classroom courses had not taken an online class before, 21 [percent] had only taken one online class prior to the pandemic, and 35 [percent] had taken two or more classes.³²⁹

In addition, “[p]rior to the move online, 87 [percent] of students

³²² See Anderson, *supra* note 21.

³²³ See Joly, *supra* note 321.

³²⁴ See Peterson, *supra* note 321.

³²⁵ See Catherine W. Cook & Christian Sonnenberg, *Technology and Online Education: Models for Change*, 7 CONTEMP. ISSUES EDUC. RSCH. 171, 175–76 (2014).

³²⁶ See Andrew J. McMurray, *College Students, The GI Bill, and the Proliferation of Online Learning: A History of Learning and Contemporary Challenges*, 10 INTERNET & HIGHER EDUC. 143, 147–48 (2007).

³²⁷ See *How Has Technology Changed the Way We Teach and Learn in Schools?*, SEATTLE PI (May 4, 2020), <https://blog.seattlepi.com/lifestyle/2020/05/04/how-has-technology-changed-the-way-we-teach-and-learn-in-schools/>.

³²⁸ *Online Education Statistics*, EDUCATIONDATA.ORG, <https://educationdata.org/online-education-statistics> (last visited Mar. 28, 2021).

³²⁹ *Id.*

indicated they were somewhat or very satisfied with the course, and afterward, the number declined to 59 [percent].”³³⁰ Not surprisingly, “[t]he 3 percent of students who were very dissatisfied before going online grew to 13 percent.”³³¹ Thus, there is a need to reexamine the medium from the perspectives of those most affected by these rapid transformations in order to address quality assurance and provide performance metrics within distance learning programs.³³² “eLearning [possesses] great potential to both help existing students with disabilities in their studies and facilitate a more equitable representation of this group of people in higher education.”³³³ However, the relationship between students with disabilities and the use of technology in educational institutions is poorly understood.³³⁴ “In order for this potential to be realized, the eLearning platforms need to be as accessible as possible for students with a range of different impairments.”³³⁵

For students with disabilities, accessibility to eLearning refers to the ability to access content using virtual learning environments, digital repositories, multimedia, web portals, and discussion boards despite their disabilities.³³⁶ Across universities and colleges, the ascendance of web-based learning is considered a “novel approach to instructional delivery” and it has been met with slow adoption response.³³⁷ Website inaccessibility has been a challenge confronting institutions of higher learning.³³⁸ “Consequently, with insufficient budgets to manage, emerging technologies to implement, and other ‘more visible’ charges to confront, many

³³⁰ *Id.*

³³¹ *Id.*

³³² See John Moody, *Navigating Online College as a Disabled Student*, U.S. NEWS (Aug. 18, 2020), <https://www.usnews.com/education/best-colleges/articles/how-to-navigate-online-college-classes-as-a-student-with-disabilities>.

³³³ Kent, *supra* note 167.

³³⁴ Jane K. Seale, *When Digital Capital is Not Enough: Reconsidering the Digital Lives of Disabled University Students*, LEARNING MEDIA & TECH. 1 (2012), https://www.researchgate.net/publication/241727403_When_digital_capital_is_not_enough_Reconsidering_the_digital_lives_of_disabled_university_students/link/53fe4c0e0cf21edafd150d1f/download.

³³⁵ Kent, *supra* note 167.

³³⁶ Jane K. Seale & Martyn Cooper, *E-learning and Accessibility: An Exploration of the Potential Role of Generic Pedagogical Tools*, 54 COMPUTS. & EDUC. 1107, 1107 (2010), https://www.researchgate.net/publication/222517472_E-Learning_and_accessibility_An_exploration_of_the_potential_role_of_generic_pedagogical_tools.

³³⁷ John Huss & Shannon Eastep, *Okay, Our Courses Are Online, But Are They ADA Compliant? An Investigation of Faculty Awareness of Accessibility at a Midwestern University*, I.E.: INQUIRY EDUC. (2016), <https://files.eric.ed.gov/fulltext/EJ1171774.pdf>.

³³⁸ *Id.*

institutions simply allow web accessibility to slip off of their to-do lists.”³³⁹ “Since January 1, 2015, [sixty-one] lawsuits alleging that a defendant’s inaccessible website violates Title III of the ADA have been filed in or removed to federal court.”³⁴⁰ The lawsuits against Harvard and MIT are the harbinger of what is to come for website inaccessibility lawsuits in higher education.³⁴¹

In conjunction with website inaccessibility are the various student services that are carried out virtually with the use of the internet and web 2.0 technologies.³⁴² Functions such as course registration, tuition payment, and financial aid applications are central to any student’s experience at a university.³⁴³ These functions are now available on the Web, allow access any time, from anywhere, and are a benefit to the majority of the students.³⁴⁴ For students with disabilities, such online functions can be either liberating or limiting, depending on how the Web content is constructed.³⁴⁵ If the content is constructed with Web accessibility in mind, then students with disabilities are afforded a new level of freedom previously inexperienced.³⁴⁶ For example, blind students can use computer software that reads the Web content out loud to them, thus eliminating their previous reliance on other people to read the content to them.³⁴⁷ On the other hand, if the content is not designed with Web accessibility in mind, then students with disabilities are denied the benefits that should be available to them to the same extent that it should be available to all other students.³⁴⁸

“The crux of the problem is that when the ADA was enacted, Congress did not adequately anticipate the crucial role that the internet would have in peoples’ lives in the 21st Century, [focusing] instead on disability discrimination that occurred in person or through personal

³³⁹ *Id.* (citing Joly, *supra* note 321).

³⁴⁰ Kristina M. Launey et al., *Website Accessibility Lawsuits by the Numbers*, SEYFARTH (Mar. 14, 2016), <https://www.adatitleiii.com/2016/03/tracking-the-trends-website-accessibility-lawsuits-by-the-numbers/>.

³⁴¹ Minh N. Vu, *Lack of Website Accessibility Regulations is No Bar to Suit, Another Judge Affirms*, SEYFARTH (Feb. 26, 2016), <https://www.adatitleiii.com/2016/02/lack-of-website-accessibility-regulations-is-no-bar-to-suit-another-judge-affirms/>.

³⁴² *See* Ayersman et al, *supra* note 23.

³⁴³ *See* Bohman, *supra* note 250.

³⁴⁴ *See* Christopher Piehler, *Anytime, Anywhere Access to Learning*, LEARNING COUNS., <https://thelearningcounsel.com/article/anytime-anywhere-access-learning>.

³⁴⁵ *See* Bohman, *supra* note 250.

³⁴⁶ *See id.*

³⁴⁷ *See id.*

³⁴⁸ *See id.*

interactions.”³⁴⁹ The existing Title III mandate only “provides the standards required for businesses’ physical locations to properly accommodate disabled individuals, but does not provide guidance for the internet, or web-based and mobile applications. Nor does Title III expressly limit its coverage to brick and mortar locations or exclude online locations.”³⁵⁰ Amending Title III to include the internet or virtual places of business as a public accommodation would provide better guidance for businesses and educational institutions in ensuring that they are in compliance with the ADA.³⁵¹

2. Increasing Number of Cases Related to Lack of Compliance of Colleges and Universities to ADA Rules

“Hundreds of colleges and universities across the country are currently under investigation by the Department of Education’s Office for Civil Rights for failing to make their websites accessible to people with disabilities.”³⁵² In 2018, fifty lawsuits were filed against colleges that were in violation of the ADA because their websites were not accessible to people with disabilities.³⁵³ “Jason Camacho, a blind resident of Brooklyn, N.Y., [sued] fifty colleges over the accessibility of their websites. . . Camacho uses a screen reader and said he experienced barriers when trying to access the colleges’ websites.”³⁵⁴ In recent years, the number of lawsuits continued to rise partly because more and more student services, including teaching instructions, have moved online.³⁵⁵ For example, it has become normal and common for student records to be submitted, stored, delivered, and/or

³⁴⁹ Jason P. Brown & Robert T. Quackenboss, *The Muddy Waters of ADA Website Compliance May Become Less Murky in 2019*, HANTON ANDREWS KURTH (Jan. 3, 2019), <https://www.huntonlaborblog.com/2019/01/articles/public-accommodations/muddy-waters-ada-website-compliance-may-become-less-murky-2019/>.

³⁵⁰ *Id.*

³⁵¹ See Safia Samee Ali, *30 Years After Americans with Disabilities Act, College Students with Disabilities Say Law is Not Enough*, NBC NEWS (Mar. 1, 2020), <https://www.nbcnews.com/news/us-news/30-years-after-americans-disability-act-college-students-disabilities-say-n1138336>.

³⁵² McKenzie, *Feds Prod Universities to Address Website Accessibility Complaints*, *supra* note 16.

³⁵³ Lindsey McKenzie, *50 Colleges Hit with ADA Lawsuits*, INSIDE HIGHERED (Dec. 10, 2018), <https://www.insidehighered.com/news/2018/12/10/fifty-colleges-sued-barrage-ada-lawsuits-over-web-accessibility> [hereinafter McKenzie, *50 Colleges Hit with ADA Lawsuit*].

³⁵⁴ *Id.*

³⁵⁵ See Sarah Weissman, *Universities Face Digital Accessibility Lawsuits as Pandemic Continues*, DIVERSE (Sept. 8, 2020), <https://diverseeducation.com/article/189682/>.

accessed online via a digital platform.³⁵⁶ The digital touchpoints add another layer of barrier to students with disabilities; most especially, if the platform does not possess assistive technology thereby failing to adequately support accessibility.³⁵⁷

In conjunction, digital content owners, which include faculty members and staff, lack the required legal and technical training in providing content that meet website accessibility requirements.³⁵⁸ For instance, when the OCR audited Bowling Green State University's ("BGSU") website, among the problems highlighted were the lack of alt-tags on some images and videos that were not appropriately captioned and failure to use accessible fonts and colors that were not compatible with the required web-accessibility standards.³⁵⁹ Related to the number of webpages is the number of content owners moderating the site who may or may not be trained for universal web accessibility standard guidelines and best practices.³⁶⁰ BGSU has approximately 15,000 webpages that are controlled by 610 content moderators, all of whom must be trained as part of the University's resolution agreement with OCR.³⁶¹ With thousands of non-compliant webpages, resolving a web-accessibility complaint could be expensive and take a number of years.³⁶² The longer it takes for institutions of higher learning to comply, a greater number of students with disabilities are deprived of equal access to education.³⁶³

The need to transport content into the digital sphere has never been more important than today as the whole world grapples with the pandemic.³⁶⁴ COVID-19 has forced institutions of higher learning to

³⁵⁶ See Kipp Bentley, *How Can Schools Successfully Digitize Student Records?*, GOV'T TECH. (July 11, 2018), <https://www.govtech.com/education/k-12/How-Can-Schools-Successfully-Digitize-Student-Records.html>.

³⁵⁷ See Weissman, *supra* note 355.

³⁵⁸ See David A. Bradbard & Cara Peters, *Web Accessibility Theory and Practice: An Introduction for University Faculty*, 7 J. EDUCATORS ONLINE 1, 2, 6, 10 (2010), <https://files.eric.ed.gov/fulltext/EJ904073.pdf>.

³⁵⁹ See McKenzie, *Feds Prod Universities to Address Website Accessibility Complaints*, *supra* note 16.

³⁶⁰ See Bradbard & Peters, *supra* note 358, at 2–3.

³⁶¹ See McKenzie, *Feds Prod Universities to Address Website Accessibility Complaints*, *supra* note 16.

³⁶² See *id.*

³⁶³ See *id.*

³⁶⁴ See Leslie Janek, *Don't Forget the Documents: Minimizing ADA Accessibility Liability in Online PDFs*, MICROASSIST (Oct. 19, 2017), <https://www.microassist.com/digital-accessibility/pdf-document-accessibility-ada-litigation/> (citing the importance of web accessibility as it becomes the medium for storing information and how challenging it can be for people with disabilities. For instance, taking

conduct classes and services via an online platform.³⁶⁵ Part of the problem includes untrained faculty members who “may have discussed digital accessibility in the past, [but] might not be aware of the importance of ensuring it for all students and may not understand that digital accessibility goes beyond making special accommodations for individual students that specifically request it.”³⁶⁶ The sudden move has overwhelmed instructors and staff as they had to “rapidly convert classes and services online,” and “overlook[ed] accessibility” as an imperative requirement.³⁶⁷ As the coronavirus took hold in the U.S., colleges’ “disability services offices were busy helping with the rapid shift online. Often, they only had days to contact faculty members to confirm students with disabilities had what they needed to continue classes remotely.”³⁶⁸

Subject to Section 504 of the Rehabilitation Act of 1973 and the ADA, universities and colleges are required to provide proper accommodations to students with disability.³⁶⁹ However, since the COVID-19 pandemic, universities have shut down their physical offices and moved all services online.³⁷⁰ This presents a challenge for students with disabilities because depending on their disability and available resources, they may need proper accommodations to facilitate requests for student services such

classes online would require teaching and learning to be delivered digitally, and the content creator must ensure people with disabilities are able to enjoy the same benefits. The pandemic has highlighted this scenario).

³⁶⁵ Jeremy Bauer-Wolf, *What’s Next: Changes in Disability Services Could Add More Flexibility*, HIGHER ED DIVE (May 6, 2020), <https://www.highereddive.com/news/whats-next-changes-in-disability-services-could-add-more-flexibility/577502/>.

³⁶⁶ Anderson, *supra* note 21.

³⁶⁷ *Id.*

³⁶⁸ Bauer-Wolf, *supra* note 365.

³⁶⁹ *Students with Disabilities Preparing for Postsecondary Education: Know Your Rights and Responsibilities*, OFF. FOR C.R., <https://www2.ed.gov/about/offices/list/ocr/transition.html> (“Practically every postsecondary school must have a person—frequently called the Section 504 Coordinator, ADA Coordinator, or Disability Services Coordinator—who coordinates the school’s compliance with Section 504, Title II, or both laws. The school must also have grievance procedures. These grievance procedures must include steps to ensure that you may raise your concerns fully and fairly, and must provide for the prompt and equitable resolution of complaints. In addition, school publications, such as student handbooks and catalogs, usually describe the steps that you must take to start the grievance process. Often, schools have both formal and informal processes. If you decide to use a grievance process, you should be prepared to present all the reasons that support your request.”).

³⁷⁰ See Louis Freedberg, *Colleges in California and Nationally Move to Online Instruction in Response to Coronavirus*, EDSOURCE (Mar. 10, 2020), <https://edsources.org/2020/colleges-in-california-and-across-the-country-move-to-online-instruction-in-response-to-coronavirus/625099>.

as navigating online exams, registration, or other support services.³⁷¹

At the University of Hawai'i, the KOKUA Program within the Office of Students with Disabilities has remained closed since August 20, 2020, with all services now being done online.³⁷² If a student needs an accommodation for an exam or note taking, the student with disabilities has to set-up an appointment with the counselor and request for assistance in scheduling and setting-up accommodations.³⁷³ If the online platform being utilized does not support adequate and appropriate assistive technology, students with disabilities are left inadequately served and discriminated against due to a lack of equal access to educational opportunities.³⁷⁴

Other challenges of online education for students with disabilities include, but are not limited to, the following: (1) Not being able to “produce Braille or tactile materials for visually challenged students”; (2) not being able to “meet directly with students who don’t have virtual access (such as devices and internet access) to establish or discuss needed accommodations”; (3) not having the right technology, particularly for students “who have a text-to-speech accommodation for exams that would need to be allowed to use a screen-reading tool during exams . . . which [does not] always work if instructors require students to use a lockdown browser or monitoring system”; and (4) not being able to “provide phone-based services to students when working from home since the ADA prohibits staff from using personal phones to communicate directly with students.”³⁷⁵ If these challenges are not adequately addressed, ADA lawsuits will most likely continue to increase.³⁷⁶

Despite the advancement in technology, individuals with disability still face challenges using the internet.³⁷⁷ For one, the internet remains a “heavily visual and auditory medium, and not everyone can see or hear.”³⁷⁸ And since the migration to virtual classes due to the pandemic, disabled students had to turn to these technologies, some of which were not

³⁷¹ See John Moody, *supra* note 332.

³⁷² See *Equal Opportunity for Students with Disabilities at the University of Hawai'i at Mānoa*, *supra* note 276.

³⁷³ See *id.*

³⁷⁴ Aleksandra Dikumar, *The Use of Technology in Special Education*, ELEARNING INDUS. (Aug. 9, 2018), <https://elearningindustry.com/use-of-technology-in-special-education>.

³⁷⁵ Matthew Dembicki, *Staying ADA Compliant During the Pandemic*, AM. ASS'N COMTY. COLLS. (Mar. 23, 2020), <https://www.ccdaily.com/2020/03/staying-ada-compliant-during-the-pandemic/>.

³⁷⁶ See *id.*

³⁷⁷ See Sampathkumar & Shwayder, *supra* note 261.

³⁷⁸ *Id.*

appropriately designed with accommodations.³⁷⁹ As online classes become normalized, universities and colleges do not have a choice but to strictly comply with the ADA requirements.³⁸⁰ Individuals with disabilities still often struggle to use the computer.³⁸¹ According to a Pew Research Center survey conducted in the fall of 2016, “[d]isabled Americans are about three times as likely as those without a disability to say they never go online (23 [percent] vs. 8 [percent])[.]”³⁸² The increasing number of ADA non-compliance cases in higher education is indicative that the current law is not able to adequately support the changes in the current environment.³⁸³ While the DOJ continues to provide guidance based on its past ADA accessibility rulings, Congress remains in the best position to provide greater clarity to the law.³⁸⁴ Thus, it is timely and necessary for Congress to amend the ADA to address a greater systemic problem plaguing our universities and to help negate discriminatory practices against individuals with disabilities.³⁸⁵ As Peter Blanck, University Professor of Law at Syracuse University and chairman of the Burton Blatt Institute said, “It’s beside the point whether there are 50 or 1,000 lawsuits. . . These cases are reflective of a larger systemic problem—that there is a lack of a strong commitment by many institutions to try to be as inclusive as possible.”³⁸⁶

3. Increasing Number of Educational Technologies Leads to Lack of Legal Ownership Amongst Institutions of Higher Learning

“[M]ost universities make use of some form of formal learning management system to facilitate both blended and fully online learning and teaching.”³⁸⁷ A successful approach to accessibility requires a learning

³⁷⁹ *Id.*

³⁸⁰ *See id.*

³⁸¹ Elizabeth Rust, *How the Internet Still Fails Disabled People*, GUARDIAN, <https://www.theguardian.com/technology/2015/jun/29/disabled-people-internet-extra-costs-commission-scope> (last visited Mar. 27, 2021).

³⁸² Monica Anderson & Andrew Perrin, *Disabled Americans are Less Likely to Use Technology*, PEW RSCH. CTR. (Apr. 7, 2017), <https://www.pewresearch.org/fact-tank/2017/04/07/disabled-americans-are-less-likely-to-use-technology/>.

³⁸³ *See* Lieberman, *supra* note 210.

³⁸⁴ *See* Brown & Quackenboss, *supra* note 349 (The DOJ’s response to a letter sent on September 25, 2018 by Assistant Attorney General Stephen E. Boyd, to a bipartisan group of 103 members of the U.S. House of Representatives, “requesting clarity on ‘unresolved questions about the applicability of the ADA to websites’ which have ‘created a liability hazard that directly affects businesses in our states[.]’”).

³⁸⁵ *See id.*

³⁸⁶ McKenzie, *Hit with ADA Lawsuit*, *supra* note 18 (internal quotations omitted).

³⁸⁷ Kent, *supra* note 167.

management system that understands design and access.³⁸⁸ “However, . . . even with an accessible basis for the [Learning Management System], the course content that is hosted through these sites may have its own accessibility issues[.]”³⁸⁹ The unprecedented growth and complexity of digital media in recent years along with the lack of compliance and administrative enforcement have made accessibility quite challenging for students with disabilities.³⁹⁰ The rapid developments and changes in educational technology have created new modalities for educational teaching, learning, and experience.³⁹¹ Universities are using social networks including Facebook, Twitter, Skype, YouTube and other online networks and Web 2.0 technologies.³⁹² A study examined and assessed “[t]hese networks for a number of accessibility features including section headings, color contrasts, labels and form fields, keyboard navigation, text equivalents for images, multimedia, language, and validation, [and found that] [n]one of the networks met even thirty percent of the accessibility criteria set.”³⁹³

Due to the availability of Web 2.0 technologies and lack of transparency with administrative regulation and enforcement, the pervasive use of such technologies by universities and its affiliates without proper vetting procedures render students with disabilities at a disadvantage.³⁹⁴ Even if a university uses a vetted LMS or technology, the content created, uploaded, and displayed may not be accessible to students with disabilities.³⁹⁵ For instance, one common issue with Portable Document Format (“PDF”) is that it is not ADA-compliant.³⁹⁶

It is imperative that assistive technologies are provided and are designed to support documents that comply with the ADA.³⁹⁷ Identifying the appropriate assistive technologies, monitoring ADA compliance, and providing adequate ADA technology staff training are part of the university’s legal obligation to ensure equal access and protection for

³⁸⁸ *Id.*

³⁸⁹ *Id.*

³⁹⁰ See Lieberman, *supra* note 210.

³⁹¹ See Baldwin, *supra* note 155.

³⁹² Kent, *supra* note 167.

³⁹³ *Id.*

³⁹⁴ See Lindsay McKenzie, *The Sharing Solution* (Dec. 12, 2019), <https://www.insidehighered.com/digital-learning/article/2019/12/12/diminishing-duplication-evaluating-accessibility-education>.

³⁹⁵ See Janek, *supra* note 364.

³⁹⁶ *Id.*

³⁹⁷ See Grand Valley State University, *Making Documents Accessible Why Do We Need to Make our Content Accessible?*, <https://www.gvsu.edu/dsr/making-documents-accessible-90.htm> (last visited Mar. 27, 2021).

students with disabilities.³⁹⁸

Third-party technology and service providers have a legal obligation to ensure access for individuals with disabilities.³⁹⁹ Similarly, companies that employ third-party providers are held liable for the vendor's non-compliance.⁴⁰⁰ In *Gil v. Winn-Dixie Stores, Inc.* (2017), the judge ruled “that the grocery chain’s inaccessible website violated the ADA . . . [and] require[d] any third party vendors who participate on [the grocery’s] website to be fully accessible to the disabled.”⁴⁰¹ Similarly, in *Gil v. Sabre Technologies, Inc. et al.* (2018), the “plaintiff sued both the website owner and the vendor who ‘designed and hosted’ the website.”⁴⁰² Like private entities, universities that employ third-party technology providers must ensure vendor’s compliance to the ADA or risk getting sued.⁴⁰³ In 2007, four universities settled with the DOJ and “agreed not to purchase, recommend, or promote use of the Kindle DX, or any other dedicated electronic book reader, unless or until those devices are fully accessible to blind and visually handicapped students.”⁴⁰⁴ In a recent report, the education technology industry saw a 700 percent increase in ADA lawsuits filed in Quarter 4 of 2018.⁴⁰⁵ The increase in lawsuits against third party software and education technology providers place educational institutions at risk as more teachers rely on these technologies to address the new realities in the learning environment especially due to the pandemic.⁴⁰⁶

³⁹⁸ Rob Gould & Sarah Parker Harris, *Higher Education and the ADA: An ADA Knowledge Translation Center Research Brief*, ADA NAT’L NETWORK (2019), https://adata.org/research_brief/higher-education-and-ada.

³⁹⁹ See Lainey Feingold & Eve Hill, *Technology Vendor Contracts and Accessibility: What Every Business Lawyer Should Know*, AM, BAR ASS’N. (Apr. 19, 2018), <https://businesslawtoday.org/2018/04/technology-vendor-contracts-accessibility-every-business-lawyer-know/>.

⁴⁰⁰ See *id.*

⁴⁰¹ *Id.* (internal quotations omitted); *Gil v. Winn-Dixie Stores, Inc.*, 242 F. Supp. 3d 1315 (S.D. Fla. 2017).

⁴⁰² Feingold & Hill, *supra* note 399; *Gil v. Sabre Technologies, Inc. et al.*, 1:18-cv-20156 (S.D. Fla. 2018).

⁴⁰³ See Feingold & Hill, *supra* note 399.

⁴⁰⁴ Nancy K. Herther, *The DOJ and ADA Mandate Ebook Readers Be Accessible to All*, INFO. TODAY, INC. (Jan. 25, 2010), <http://newsbreaks.infotoday.com/NewsBreaks/The-DOJ-and-ADA-Mandate-Ebook-Readers-Be-Accessible-to-All-60756.asp>.

⁴⁰⁵ Julee Peterson, *Inclusive Design: Why EdTech Companies Should Go Beyond Compliance*, OPENFIELD, <https://openfieldx.com/inclusive-ux-design-accessibility-compliance/#:~:text=This%20push%20toward%20inclusivity%20comes,in%20Q4%20of%202018%20alone> (last visited Mar. 28, 2021).

⁴⁰⁶ Julee Peterson & Brian Keenan, *The Wave of Accessibility Lawsuits That Threatens Edtech and How to Stay Out of its Path*, OPENFIELD,

Settlement agreements between universities and colleges and the DOJ and OCR have required those institutions to avoid requiring students to utilize such inaccessible products.⁴⁰⁷

At present, an institution's legal responsibilities in relation to the extended digital campus are yet to be explored.⁴⁰⁸ As learning and teaching increasingly migrate beyond traditional learning management systems into third party applications, issues of equal access will become further interconnected and "the line between what is and is not discriminatory will remain blurred in an online setting."⁴⁰⁹ In amending the ADA by specifically categorizing the internet as public accommodations, universities and colleges would be more effective in crafting guidelines and procedures for the integration of technologies into the educational system.⁴¹⁰ In addition, this would clarify any blurred distinction between education services administered on-site versus online, where the source of application defines what is and is not discriminatory for any student with disabilities.⁴¹¹

B. Reinforcing the Need for Constitutional Protection for Individuals with Disabilities in Higher Education

"Access to higher education and equality of access for people with disabilities are important moral obligations for universities."⁴¹² Although federal laws such as the ADA and IDEA have been in place to protect persons with disabilities, many state laws continue to facially discriminate against people with disabilities.⁴¹³ In some states, it is legal to pay a worker with a disability below minimum wage to account for the cost of providing accommodations.⁴¹⁴ For instance, in Hawai'i it is legal to pay a worker with subminimum wage due to their physical or mental disability or injury.⁴¹⁵ Similarly, a disabled applicant "can be denied a job opportunity if an

<https://openfieldx.com/edtech-ada-compliance-inclusive-design/> (last visited Apr. 30, 2021).

⁴⁰⁷ Herther, *supra* note 404.

⁴⁰⁸ Kent, *supra* note 167.

⁴⁰⁹ Lauren Ingeno, *Online Accessibility a Faculty Duty*, INSIDE HIGHER ED (June 24, 2013), <http://www.insidehighered.com/news/2013/06/24/faculty-responsible-making-online-materials-accessible-disabled-students>.

⁴¹⁰ *See* Ali, *supra* note 351.

⁴¹¹ *Id.*

⁴¹² Kent, *supra* note 167.

⁴¹³ Altman, *supra* note 292.

⁴¹⁴ Linda Klein, *14th Amendment Should Be Used to Ensure Equal Protection for Those with Disabilities*, ABA J. (June 27, 2017), https://www.abajournal.com/news/article/14th_amendment_should_be_used_to_ensure_equal_protection_for_those_with_dis.

⁴¹⁵ Haw. Rev. Stat. § 387-9 (a)(2) (2014 & Supp. 2017).

employer has to make any accommodation that is deemed ‘unreasonable.’”⁴¹⁶ “When it comes to employment opportunities, educational equality and access to fair benefits, people with disabilities often lack essential constitutional protections.”⁴¹⁷

The effectiveness of the law in negating discriminatory practices in education is limited to a number of factors, including “conceptions of disability, . . . limited enforcement, and the ability of the law to keep pace with technological advancement.”⁴¹⁸ “People are not disabled by physical or cognitive impairments [alone.] Rather, architectural barriers, societal attitudes, and discriminatory policies contribute to the status of those with disabilities.”⁴¹⁹ Compared with other civil rights issues, “disability receives the weakest level of protection; dead last behind heightened protections for race and gender discrimination protections.”⁴²⁰

In *Brown v. Board of Education* (1954), the Supreme Court ruled that schools segregated by race were unconstitutional based on the Equal Protection Clause of the Fourteenth Amendment.⁴²¹ Similar to the unconstitutionality of racial discrimination, the Fourteenth Amendment has been used to uphold the rights of women and minorities.⁴²² However, it has not proven as effective in the disability rights movement, due mainly to a U.S. Supreme Court’s ruling in *City of Cleburne v. Cleburne Living Center, Inc.* more than thirty years ago.⁴²³

“In 1985, the Supreme Court ruled in [*Cleburne*] that a permit for a group home for mentally disabled people should be granted.”⁴²⁴ “But despite the ruling in favor of the home, the Court did not find that the mentally disabled were in a class that was historically subjected to discrimination.”⁴²⁵ It did not merit legitimate concern for the state, and therefore, did not merit constitutional protection per United States Constitutional Amendment 14.⁴²⁶ “[T]he [C]ourt ruled that, because disability-specific needs may be

⁴¹⁶ Klein, *supra* note 414.

⁴¹⁷ *Id.*

⁴¹⁸ Kent, *supra* note 167.

⁴¹⁹ Klein, *supra* note 414.

⁴²⁰ Altman, *supra* note 292.

⁴²¹ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

⁴²² Klein, *supra* note 414.

⁴²³ *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

⁴²⁴ Klein, *supra* note 414.

⁴²⁵ *See Cleburne*, 473 U.S. at 435 (stating that the Court of Appeals for the Fifth Circuit held that mental retardation is a “quasi-suspect” classification and that the ordinance violated the Equal Protection Clause because it did not substantially further an important governmental purpose).

⁴²⁶ *Id.*

addressed through varying government services, a more stringent level of protection [similar to what is provided for issues related to race, alienage, or national origin under the 14th Amendment] could threaten intervening government services and charity.”⁴²⁷ “This decision made it much easier for states to pass laws that discriminate against people with disabilities.”⁴²⁸ “States have a lower bar to clear when proving that they have a reasonable and rational excuse for not making accommodations for people with disabilities.”⁴²⁹ The “undue burden” clause is a common defense by employers to a reasonable accommodation claim.⁴³⁰

The COVID-19 pandemic added more complexity to the issue and made it more challenging for students with disabilities to gain fair and just treatment.⁴³¹

On April 13, 2020, a group of students in Hawai‘i filed a class action lawsuit against the Hawai‘i Department of Education, alleging that they, and thousands of other disabled children in Hawai‘i, have been denied a free and appropriate public education (“FAPE”) during school closures due to the COVID-19 pandemic.⁴³²

“[F]our students (three with [Individualized Education Program] (“IEPs”) and one with a Section 504 plan) alleged that Hawai‘i failed to implement the students’ IEPs and/or modification plans beginning about March 2020.”⁴³³ “Moreover, the students alleged that Hawai‘i discriminated against them by failing to provide mandated services to eligible disabled students, including Extended School Year (“ESY”) services, while continuing to provide educational services to non-disabled peers.”⁴³⁴ ESY

⁴²⁷ Altman, *supra* note 292.

⁴²⁸ Klein, *supra* note 414.

⁴²⁹ *Id.*

⁴³⁰ Lisa Guerin, *Undue Hardship: An Employer’s Defense to a Reasonable Accommodation Claim*, EMPLOYMENTLAWFIRMS, <https://www.employmentlawfirms.com/resources/ndue-hardship-an-employers-defense-a-reasonable-accommo> (last visited Mar. 1, 2021).

⁴³¹ *See* Anderson, *supra* note 21.

⁴³² Hodges, Loizzi, Eisenhammer, Rodick & Kohn, LLP, *Special Education Students Sue Hawaii DOE for Compensatory Ed Services for State’s Denial of FAPE during COVID-19*, (Apr. 29, 2020), <https://hlerk.com/special-education-students-file-class-action-suit-against-hawaii-department-of-education-requesting-compensatory-education-services-for-the-states-failure-to-provide-fape-during-covid-19-scho/#:~:text=On%20April%2013%2C%202020%2C%20a,to%20the%20COVID%2D19%20pandemic.>

⁴³³ *Id.*

⁴³⁴ *Id.*

services are specialized instruction or related services that are provided typically when schools are not in session.⁴³⁵ “The services are individualized to help each child maintain his skills and not lose the progress he has made toward his goals.”⁴³⁶ “For some kids, this may mean one-on-one tutoring. For others it may be a few sessions of occupational therapy or speech therapy each week.”⁴³⁷ “As relief, the students request that they receive certification as a class to move forward with their suit on behalf of all impacted students in the state.”⁴³⁸

These students face many procedural and substantive legal hurdles before reaching the stage in which a judge will issue a decision on the merits. Specifically, under the Individuals with Disabilities Act, plaintiffs must first exhaust their administrative remedies, *e.g.*, filing a due process complaint, prior to filing a complaint in federal court. Because the students here failed to exhaust their administrative remedies, this procedural failure may result in the court dismissing the complaint outright. Moreover, given the very individualized nature of determining the appropriateness of a student’s IEP services, as well as the student’s progress/regression in order to calculate the level of compensatory education services (if necessary), it is unlikely that the students will prevail on their attempt to be certified as a class.⁴³⁹

“The complaint seeks to represent a class of roughly 30,000 children in Hawai‘i with special needs between the ages of [three] and [twenty-two] who are eligible for services under the federal Individuals with Disabilities Education Act and Section 504 of the Rehabilitation Act of 1974.”⁴⁴⁰ “The lawsuit seeks to compel the DOE to come up with certain parameters now that it will apply down the road to determine what compensatory educational services a child with an IEP will need once schools resume.”⁴⁴¹

⁴³⁵ Amanda Morin, *Extended School Year Services: What You Need to Know*, UNDERSTOOD, <https://www.understood.org/en/friends-feelings/child-social-situations/summer-camp-summer-school/extended-school-year-services-what-you-need-to-know>.

⁴³⁶ *Id.*

⁴³⁷ *Id.*

⁴³⁸ Hodges, *supra* note 432.

⁴³⁹ *Id.*

⁴⁴⁰ Suevon Lee, *Lawsuit: Special Ed Students Need Extra Help When Schools Reopen*, CIV. BEAT HONOLULU (2020), <https://www.civilbeat.org/2020/04/lawsuit-special-ed-students-should-get-extra-help-when-schools-reopen/>.

⁴⁴¹ *Id.*

As Hawai'i schools move to remote or distance learning, access to technology or internet remains a challenge for roughly 12 percent of Hawai'i students who are disadvantaged due to their disability.⁴⁴²

The challenge in attaining equality towards access to education for disabled individuals is compounded by the lack of legislative support despite the presence of the Fourteenth Amendment's Equal Protection Clause.⁴⁴³ The Clause does not provide enough authority and guidance to help enforce education equality for disabled students.⁴⁴⁴ Further, the government promotes inequality by using a rational test, which includes a simple justification of legal distinction towards individuals with disabilities.⁴⁴⁵ In general, "courts employ different levels of scrutiny depending on whether the discrimination affects a suspect class."⁴⁴⁶

Some universities and colleges are using the reasonable and rational test, formulated in *Cleburne*, as a loophole towards compliance and providing necessary and required accommodations for students with disabilities.⁴⁴⁷ "The lack of proper constitutional protections for people with disabilities has kept the door open for states to continue to make laws that plainly and openly discriminate against people with disabilities, especially mental disabilities."⁴⁴⁸ Due to the lack of constitutional foundation, the Supreme Court has relied on statutes such as the ADA and IDEA to decide on cases related to discrimination against individuals with disabilities.⁴⁴⁹ As institutions of higher learning struggle to address the challenges presented by COVID-19 and to remain relevant in the face of rapidly changing educational landscape, the issue of accommodations and accessibility in eLearning for students with disabilities is in danger of being swept under the rug.⁴⁵⁰ The loopholes in existing statutes in navigating issues related to

⁴⁴² *Id.*

⁴⁴³ Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV., 135, 135 (2011).

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.* (stating that "[i]n most cases of unequal treatment under law, courts simply defer to the legislative judgment that the distinction is rational" and that it is rare for courts to "subject the government's classifications to more rigorous examination").

⁴⁴⁶ *Id.*

⁴⁴⁷ Sydney Missigman, *University Responds to Allegations of Denying Accommodation to a Disabled Student*, IRISH ROVER (Nov. 9, 2018), <https://irishrover.net/2018/11/university-responds-to-allegations-of-denying-accommodation-to-a-disabled-student/>.

⁴⁴⁸ Altman, *supra* note 292.

⁴⁴⁹ *Supreme Court Decisions Interpreting the Americans with Disabilities Act*, NAT'L COUNCIL ON DISABILITY (Sept. 17, 2002), <https://ncd.gov/publications/2002/sept172002>.

⁴⁵⁰ See Tanya Roscorla, *The Struggle to Make Online Courses Accessible in*

compliance could potentially leave our students with disabilities searching and looking for their own answers and solutions to upend this situation of discrimination and unfairness.⁴⁵¹

In order to promote constitutionality of the Fourteenth Amendment with respect to individuals with disability, better evaluation of the appropriate level of scrutiny or test should be in place.⁴⁵² To a degree, it presents an opportunity to rethink the Equal Protection Clause of the 14th Amendment.⁴⁵³ “The ambiguities and nuances of equal protection jurisprudence may ultimately require the Court to reconsider the validity of the three-tier analysis of rational basis, intermediate scrutiny, and strict scrutiny.”⁴⁵⁴ “Some argue that the ideals of equal protection are more likely protected by a balancing test^[455] or by a single standard^[456] or continuum approach that does not attempt to fit the factors within clearly circumscribed slots.”⁴⁵⁷ Perhaps, it is appropriate to reconsider evaluating *Cleburne* and apply new levels of scrutiny.⁴⁵⁸

Now more than ever, Congressional support is necessary to amend the ADA to “prohibit[] discrimination on the basis of disabilities akin to existing prohibitions on discrimination based on race, sex, national origin and religion.”⁴⁵⁹ With an amended and updated ADA, the DOJ will be able to provide better guidance to institutions of higher education on how to better serve individuals with disabilities within the realm of accessibility and universal design.⁴⁶⁰ The current pandemic highlights the timeliness and relevance of acknowledging the rights of individuals with disabilities.⁴⁶¹

Higher Ed, CTR. FOR DIGIT. EDUC. (Jan. 28, 2016), <https://www.govtech.com/education/higher-ed/The-Struggle-to-Make-Online-Courses-Accessible-in-Higher-Ed.html>.

⁴⁵¹ *See id.*

⁴⁵² *See* Strauss, *supra* note 443.

⁴⁵³ *Id.*

⁴⁵⁴ *Id.*

⁴⁵⁵ *See* *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 468–69 (1985) (Marshall, J., dissenting) (arguing for a balancing test).

⁴⁵⁶ *See* *Craig v. Boren*, 429 U.S. 190, 202 (1976).

⁴⁵⁷ Strauss, *supra* note 443.

⁴⁵⁸ *See* *Cleburne*, 473 U.S. at 460–61 (Marshall, J., dissenting) (indicating the level of scrutiny employed in an equal protection case should vary with “the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn”).

⁴⁵⁹ Klein, *supra* note 414.

⁴⁶⁰ Lillah Burke, *The ADA at 30*, INSIDE HIGHERED (Aug. 5, 2020), <https://www.insidehighered.com/news/2020/08/05/qa-ada-30>.

⁴⁶¹ *See id.*

IV. CONCLUSION

The significant advancement in the use of technology in education within the past fifty years has led to new challenges for students with disabilities that existing laws are not able to address.⁴⁶² While some technologies have assisted students with disabilities in keeping up with the pace of the rapidly changing modalities of learning and administration of student services, most remain rudimentary at best.⁴⁶³ Even if the Web 2.0 technologies and LMS platforms have employed universal access design, a lack of ADA compliance from content creators and distributors continues to be a challenge.⁴⁶⁴ Furthermore, as campuses transition into either hybrid or fully online learning due to the pandemic, the potential for students with disabilities and their needs to be ignored is heightened.⁴⁶⁵

The increasing number of ADA cases against universities and colleges suggests three insights.⁴⁶⁶ First, the rising trend in web accessibility ADA cases against universities and colleges points to a new set of challenges for students with disabilities as education moves into a digital environment.⁴⁶⁷ Second, the emergence of educational technologies utilized by universities and colleges formally and informally highlights the new normal for online learning and existing loopholes for shifting ADA compliance liabilities.⁴⁶⁸ And third, the mostly federal statutes designed to protect individuals with disabilities, while limited in scope and clarity, provide overwhelming authority to the government in defining what is or is not discriminatory.⁴⁶⁹ Our world has changed tremendously since the ADA was enacted and so have the challenges faced by individuals with disabilities.⁴⁷⁰ They deserve a fair and just place in our society, and they deserve true equality as much as every citizen in this country.⁴⁷¹ Individuals with disabilities should be surrounded, protected, and accommodated by the

⁴⁶² See Baldwin, *supra* note 155.

⁴⁶³ See *id.*

⁴⁶⁴ See Janek, *supra* note 364.

⁴⁶⁵ See *Are Your Lecture Videos ADA Section 508 Compliant*, *supra* note 320.

⁴⁶⁶ See Joly, *supra* note 321.; *The Civil Rights of Students with Hidden Disabilities Under Section 504 of the Rehabilitation Act of 1973*, *supra* note 26; Altman, *supra* note 292.

⁴⁶⁷ See Joly, *supra* note 321.

⁴⁶⁸ See *The Civil Rights of Students with Hidden Disabilities Under Section 504 of the Rehabilitation Act of 1973*, *supra* note 26.

⁴⁶⁹ See Altman, *supra* note 292.

⁴⁷⁰ See Anderson, *supra* note 21.

⁴⁷¹ See *id.*

same Constitution we uphold and respect, for they too are Americans.⁴⁷²

⁴⁷² *See id.*

Copyright of Asian-Pacific Law & Policy Journal is the property of Asian-Pacific Law & Policy Journal and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.